



ISSUE BRIEF

#11

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Cluster 6: The future governance of work

New directions for the governance of work

The establishment of the Global Commission on the Future of Work in August 2017 marked the start of the second phase of ILO's Future of Work Centenary initiative. The six thematic clusters provide a basis for further deliberations of the Global Commission. They focus on the main issues that need to be considered if the future of work is to be one that provides security, equality and prosperity. A series of Issue Briefs are prepared under each of the proposed clusters. These are intended to stimulate discussion on a select number of issues under the different themes. The thematic clusters are not necessarily related to the structure of the final report.

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Introduction

The transformation of the world of work poses unprecedented challenges for established institutions and modes of the governance of work. Many of the challenges are associated with globalization (ILO, 2017a). Global market integration promotes competition between States, including on labour conditions. It also constrains national policy space. Both effects put pressure on established modes of governance of work. At the national level, effective legal regulation of the individual employment relationship is challenged by informality, by labour migration, and by the proliferation of non-standard forms of employment. The collective regulation of work is challenged by stagnant or falling membership of trade unions and, in some cases, weakening policy support for collective bargaining. Effective state regulation, particularly labour inspection and dispute resolution.

Despite the challenges, the nation State remains a central actor in the governance of work: much remains within national jurisdiction. Thus it is the nation State that has the authority – and the responsibility – to mediate the effects of globalization on workers and enterprises. Yet the capacity of the nation State to discharge this responsibility is under heavy strain. In particular, existing institutions and modes of governance may not be able to cover all those who work.

This Issue Brief explores what the new directions in the governance of work suggest about how governance might be different in the future, so as to address the transformations that are under way. It considers national governance, transnational labour governance, private governance and new governance.

Key findings

National governance

National governance of work is achieved through the interaction of labour market institutions, within an overarching system (Berg, 2015). These include the application of international labour standards in national law, labour administration in all its facets, collective industrial relations, minimum wage setting, and the individual employment relationship.

The employment relationship lies at the intersection of the economic organization and the legal regulation of work. As a means of organization of work, the employment relationship promotes firm productivity through employment stability, and so contributes positively to overall economic performance (ILO, 2016a). Over time, the contract of employment emerged as the primary legal institution to regulate the economic structure of work in an employment relationship. Central to the legal regulation of the employment relationship is the presumption of subordinate work under the control of a single employer.

In a system of national governance, the contract of employment is at the heart of interconnected layers (ILO, 2016b). Public law supplements the contract of employment with legislated minimum conditions and, often, access to social protection systems. Public law usually facilitates collective bargaining as a further layer of governance. Private governance and different forms of transnational governance – that refer to and seek to reinforce the national application of international labour standards – are further layers again that shape the employment relationship. At the same time, each layer depends upon the employment relationship for delivery of its intended benefits.

Even with the proliferation of new working arrangements, and the advent of further layers of governance, the contract of employment remains the *conceptual* touchstone for state action to design measures to ensure legal protection for workers in non-standard forms of employment (Deakin, 2013). These measures include requiring equal treatment for workers in non-standard forms of employment; introducing new regulation of working time; attempting to remedy the misclassification of workers; restricting employers' right to engage workers in non-standard forms of employment relationship (ILO, 2016a). Some labour inspectorates pursue a strategic approach to compliance (Weil, 2008), in order to respond to the challenges posed for the employment relationship by the increasingly fissured workplace (Weil, 2014). For their part, workers' representatives have tried new means of collective organization and action (ILO, 2015).

However, state measures built around the established concept of subordinate work under a single employer's control may not be able to respond to all challenges. They may not be able to capture multi-party arrangements. Nor may they be apt to reach those in the informal economy, or to promote transition from informality to formality, accompanied by equal access to rights at work.

These and other challenges to the effectiveness of the established mode of legal regulation of the employment relationship have prompted alternative proposals. These include the provision of "social drawing rights" (Supiot, 2001; see Issue Brief No. 7); recognition that labour markets are "transitional" (Gazier and Gautié, 2011); insistence upon a "single employment contract" rather than a multiplicity of forms of work engagement (Casale and Perulli, 2014); recognition of "personal work relations" as the basis for legal regulation of individual work (Freedland and Kountouris, 2011); allocating the responsibilities of an employer to any party with a "legal right to exercise an employer function, or a legal right to have a decisive role in the exercise of such a function" (Prassl, 2015, p. 165); and the adoption of a "labour constitution" to secure the social rights of those in subordinate work (Dukes, 2014).

Ultimately much will depend on whether States will continue to pursue the economic and social policy goals that have effectively been delivered by the employment relationship. Much will also depend on whether social forces militate toward that end. And much will depend on the impact of other modes of governance on workers in employment relationships.

International labour standards and transnational labour governance

International labour standards provide an essential reference point for the governance of work. The ILO is examining the body of international labour standards in a standards review mechanism to update them and ensure their ongoing relevance in the future. A range of transnational governance mechanisms draw on this body of international labour standards. They include regional arrangements, private governance initiatives and international framework agreements. International labour standards in general, and the fundamental principles and rights in particular, provide a reference point for labour provisions in international trade and investment treaties, and labour clauses in the investment and lending practices of international financial institutions.

A number of regional economic arrangements include frameworks for labour governance, either protecting workers' rights and/or encouraging the application of international labour standards in national laws and the convergence of these legal frameworks. Both the European Union and the Council of Europe protect fundamental labour rights, while the European Commission has direct regulatory authority on some topics (Hendrickz and Giubboni, 2015; Novitz, 2010). Fundamental labour rights are protected in different ways in the inter-American human rights system (Belle Antoine, 2015; Novitz, 2010); the African Union (Novitz, 2010); and the Southern African Development Community (Bamu and Mudarikwa, 2015). The Organization for the Harmonization of Business Law in Africa (OHADA) has promulgated a uniform labour law for its member States in Central and West Africa (Blackett, 2010), while the Caribbean Community has promulgated model labour laws on certain topics (Corthésy and Harris-Roper, 2014).

Labour provisions have become increasingly common in bilateral and multilateral trade and investment agreements, including between developing countries (ILO, 2017a). They vary greatly in their normative content; in the mechanisms for oversight of state practice; and in the structure and the outcomes of dispute settlement processes. Each of these elements has been widely studied, in many agreements (e.g. Compa and Brooks, 2015). Recent analysis suggests that assessing the effects of labour provisions in trade agreements requires attention to the balance of policy measures in any given clause, and the way they may affect the capacity of States, stakeholders, and/or firms (Aissi, Peels and Samaan, forthcoming). An important finding is that labour provisions may be unlikely to mitigate any harmful effects of trade liberalization unless accompanied by other policy measures, especially support for civil society action and participation (Cheong and Ebert, 2016).

For its part, the International Finance Corporation (IFC) began considering social issues in its lending practices during the 1990s (Sims, 2009). Since 2006 it has systematically required compliance with Performance Standards that include labour provisions (Cradden, Graz and Pamingle, 2015). From 2013 the World Bank replaced its former safeguards with the IFC Performance Standards, although from 2018 they will be superseded by a new Environmental and Social Framework that will apply to all new Bank investment projects.¹ The Framework will include performance standards in the four areas of the ILO's core labour standards.

1 http://www.worldbank.org/en/programs/environmental-and-social-policies-for-projects/brief/the-environmental-and-social-frameworkesf#policies (last visited 16 January 2018). The Performance Standards have also influenced other international private sector lending, whether by public or private institutions (Ebert, 2014). As with labour provisions in trade and investment agreements, the IFC Performance Standards give rise to questions about their normative content; the scope of their application; the mechanisms for oversight; and their effects in practice (Ebert, 2014). While they include a complaints mechanism, the evidence is unclear on their usefulness. One study found that these performance standards created a "regulatory space" within which local actors could claim their legal entitlements. However, the study also found that the ability to do so depended on the effectiveness of capacity for collective representation. As many as 95 per cent of workers potentially covered were unaware of the complaints mechanism, or even of the performance standards themselves (Cradden, Graz and Pamingle, 2015).

International framework agreements (IFAs) between global trade union federations and multinational enterprises (MNEs) frequently make reference to the promotion of fundamental principles and rights at work.² These agreements leverage the sound and constructive labour relations that exist between these actors to promote respect for fundamental principles and rights at work in the operations of these MNEs. By entering these agreements, both parties recognize each other as legitimate industrial relations partners at the global level, and cooperate in the application and monitoring of these principles at the country level. Studies show that by encouraging respect for these principles and the resolution of disputes on their non-application by national industrial relations actors, IFAs build and reinforce the capacity of national industrial relations systems and governance systems (ILO, forthcoming).

Private governance

Many firms have adopted corporate social responsibility (CSR) policies to influence labour conditions in their operations. Others participate – sometimes in addition to their CSR policies – in multi-stakeholder efforts to improve labour conditions in production for global value chains (GVCs).³ The ILO's own Better Work programme, developed with the IFC, incorporates elements of such private governance.⁴

The effects of private regulation in practice have been widely examined. Many studies find that private regulation is more likely to have a positive impact on relatively more simple issues, such as wage violations, than on more complex ones, particularly freedom of association (Barrientos and Smith, 2007). In the long run, a sustainable impact may therefore require the development of durable institutional mechanisms (Rodríguez-Garavito, 2005). Consistent with this, the presence of active civil society can be supportive for the effective operation of private governance (Amengual and Chirot, 2016). Yet the evidence is mixed on the extent to which private governance is itself effective in empowering industrial relations actors, even among studies on the same country (Polaski, 2006; Kolben, 2004). And attention must also be given to the broader governance context, including the extent of press freedom (Amengual and Chirot, 2016; Toffel, Short and Ouellet, 2015).

A wider concern is the interaction of private and public governance. In the abstract, they could operate in parallel; they could complement each other; or private governance could displace/substitute public governance of work. In practice, private governance may be more effective where the State itself is relatively more effective (Locke, Qin and Brause, 2007; Locke, Rissing and Pal, 2013). A study in the sugar sector in Brazil (Coslovsky and Locke, 2013), and another in the apparel sector in the Dominican Republic (Amengual,

² These are: freedom of association and the effective recognition of the right to collective bargaining, the elimination of forced or compulsory labour, the abolition of child labour and the elimination of discrimination in respect of employment and occupation.

³ Examples include the Ethical Trading Initiative (www.ethicaltrade.org) and the Fair Labor Association (www.fairlabor.org).

⁴ www.betterwork.org

2010) each found that private regulation could have the positive effect of enabling state institutions to maximize their comparative advantage – and limited resources – even with limited formal interaction with public governance. Ultimately, private and public governance do not operate in isolation from one another (Coslovsky and Locke, 2013). Thus, private governance does not transcend public governance: it adds a further layer (Bartley, 2011). A study of the interaction of Better Work in Indonesia with the national labour inspectorate found that layering may strengthen public governance, if it changes actors' incentives and capabilities to comply, and if it engages directly with public governance (Amengual and Chirot, 2016).

New governance

The interaction of public and private governance of work is characteristic of the "new governance" approach to public policy. Increasingly common in many fields, new governance emphasizes, among other things, the participation of non-state actors, and stakeholder collaboration (Lobel, 2004). In the context of the governance of work, this can be understood as the State, and representatives of employers' and workers' interests, coming together to design and implement policy (World Bank, 2017).

The shift to (new) governance reflects the realization that – while indispensable to guide and legitimize the process – government is not the only means to ensure governance (Ruggie, 2014). The shift also reflects both the increasing complexity of public policy challenges and the ever-present reality of resource limitations that constrain state capacity to ensure compliance with relevant norms. Thus, new governance is a strategic means to draw on private incentives to achieve public ends more effectively (Weil, 2008). New governance offers the opportunity to adapt governance to the institutional context – and its success depends upon it (Dubash and Morgan, 2012).

Tripartism has long relied on approaches typical of new governance. Effective tripartism is only possible with institutional scope for participation by authorized representatives of legitimate employers' and workers' organizations. And while the representative role of employers' and workers' organizations may be narrower than some of the broad concepts used in the new governance literature of "civil society participation" (Novitz and Fenwick, 2010), process of social dialogue involving employers' and workers' organizations can be understood as advancing the goal of deliberation which is at the core of new governance (Bogg, 2009).

Some considerations

States, citizens, employers' and workers' organizations, enterprises and international institutions have all responded to challenges to the governance of work with new institutions and modes of governance. The evidence to date points both to the possibilities and to the potential shortcomings of these new approaches. Enlisting non-state actors to promote and/or to require compliance with labour standards may broaden and reinforce governance. Yet the proliferation of governance regimes may lead to normative inconsistency. New modes of governance may create space for local actors (particularly workers' organizations), but these actors may lack the capacity and knowledge needed to take advantage of that space. National governance through "traditional" labour market institutions remains essential, even if it may have trouble reaching all workers.

Despite the uncertainties, the accretion of layers of governance may be positive. Governance of work need not necessarily be either an overcrowded market, or a zero-sum game: coordination of private and public governance in a form of "social governance" may be possible, and mutually beneficial (ILO, 2016c). Realizing that possibility, and achieving effective governance for the future of work, will require answers to key questions:

- Does the contract of employment remain fit for purpose and, if not, how should the regulatory model be modified?
- How can progress be made toward normative consistency across regimes of governance: international, regional and national; or, private and public?
- What circumstances would create scope for further innovation in the international labour standards system, and what might that innovation be?
- How can private and public governance best be combined so as to reinforce each other?
- What new institutions and modes of governance might be needed?
- Given the fundamental role of employer and worker organizations in the governance of work, for democracy, and in the pursuit of social justice: what will be the forms of employer and worker organization – of collective solidarity – that will insist on accountable governance of work?

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Notes

