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Collective Bargaining for the 'New' Working Class: Putting 'Personal Work Relations' to Work for Street Vendors

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ABSTRACT

Robert Hale's famous proposition is that the propertyless man needs to eat and in order to eat, he exchanges his labour for access to property. Indeed, labour law is constituted by these property relations. Historically, most of the workforce (in the global North) has accessed property for livelihood purposes through an employment contract. However, in developing countries, most of the workforce is structurally unable to access property for livelihood purposes by means of an employment contract. These worker-citizens nevertheless need access to property to eat; street vendors need access to public space to trade. The question is whether the scope of labour law, particularly the institution of collective bargaining, can expand to

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include informal self-employed workers? The article discusses the capability, regulatory, human rights and personal work relations theories; it shows that Freedland and Kountouris' theory of 'labour law as personal work relations' could incorporate informal self-employed workers and illustrates how it might be operationalized to realise collective bargaining laws for street vendors. Informal self-employed workers challenge labour law to examine its assumptions of how property relations are constituted; and to re-theorise property relations to account for workers accessing property by means of an employment contract as well as accessing property based on worker-citizens making rights-based claims.

1. INTRODUCTION

Robert Hale's famous proposition is that the propertyless man needs to eat; he is 'free' to eat, but if he eats someone else's bag of peanuts, goes onto someone's land to consume the products of the land, or uses their tools to produce income to eat, they can resist. Indeed, they have the right to resist; this right is backed up by the force of the state, which both creates and enforces property rights. His only option, according to Hale, is to exchange his labour power for access to property.[1]

Labour law is constituted by these property relations.[2] Historically, most of the workforce (in the global North) has accessed property for livelihood purposes by means of an employment contract.[3] However, a significant percentage of the workforce in many developing countries is structurally unable to access property for livelihood purposes through an employment contract.[4] According to the International Labour Organisation (ILO), 61% of the global workforce is informally employed, of which 64% is genuinely self-employed.[5] These worker-citizens nevertheless need access to property

[1] R. Hale, 'Coercion and Distribution in a Supposedly Non-Coercive State' (1923) 38(3) *Political Science Quarterly* 470.

[2] See H. Collins, G. Lester and V. Mantouvalou, 'Introduction: Does Labour Need Philosophical Foundations' in Hugh Collins, Gillian Lester and Virginia Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford: OUP, 2018) 9: 'an employer's power is based on ownership of private property'.

[3] W. Streeck, *How Will Capitalism End?* (London: Verso, 2016) 2.

[4] See A. Brown and P. Mackie, 'Politics and Street Trading in Africa: Developing a Comparative Frame' [2018] 17–18 *Journal of Urban Research* 4 for ILO statistics for 31 African countries that show informal employment as a percentage of the workforce: informal employment comprises over 60% of the workforce for 26 countries, and over 90% in Angola, Benin, Burkino Faso, Cote D'Ivoire, Ghana, Nigeria and Togo.

[5] International Labour Organization (ILO), *Women and Men in the Informal Economy: A Statistical Picture*, 3rd edn (International Labour Office—Geneva: ILO 2018) 4.

to eat. For example, waste pickers need access to moveable property—waste—to reclaim recyclables, and street vendors need access to immovable property—public space—to trade.

The question is whether the scope of labour law, and in particular the institution of collective bargaining, can expand to include informal self-employed workers? There are normative, conceptual and practical dimensions to the question. Labour law scholars have advanced normative arguments for labour law to expand its scope to include workers in the informal economy.[6] Several scholars have also proposed a conceptual basis for labour law to include the informal economy: Deakin has put forward the regulatory theory[7]; Langille has developed the capability theory of labour law[8]; Sankaran and others have argued for re-theorising 'labour rights as human rights'.[9]The article discusses the afore-mentioned theories as well as Freedland and Kontouris' theory of 'labour law as personal work relations'(PWR). It argues that the first three theories address labour law's insider/outsider problem, but decentre collective relations—that is, none of these theories privilege rights to freedom of association and collective bargaining over other labour rights nor theorise power relations. The effect of decentring collective bargaining is to de-politise workers' struggles.

By contrast, Freedland and Kountouris' theory of labour law as PWR does not displace labour law as the law of collective relations, which is premised on the ongoing divergent class interests of workers, on the one hand, and the

[6]See E. Fourie, 'Women Workers in the Informal Economy and the Function and Future of Labour Law' (2020) 31 *Stellenbosch Law Review* 398; P. Bamu-Chipunza, 'Extending Occupational Health and Safety Law to Informal Workers: The Case of Street Vendors in South Africa' (2018) *University of Oxford Human Rights Hub Journal* 6; R. Johnstone, 'Informal Sectors and New Industries: The Complexities of Regulating Health and Safety in Developing Countries' in J. Fudge, S. McCrystal and K. Sankaran (eds), *Challenging the Legal Boundaries of Work Regulation* (Oxford, Hart Publishing, 2012) 67–80; S. Marshall, 'A Comparison of Four Experiments in Extending Labour Regulation to Non-Standard and Informal Workers' (2018) 34(3) *International Journal of Comparative Labour Law and Industrial Relations* 281.

[7]S. Deakin, 'Labour Law and Development in the Long Run' in Shelley Marshall and Colin Fenwick (eds), *Labour Regulation and Development* (Cheltenham: Edward Elgar Publishing, 2016) 41–3.

[8]B. Langille, 'Human Freedom: A Way Out of Labour Law's Fly Bottle' in H. Collins, G. Lester and V. Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford: OUP, 2018) 90; B. Langille, 'What is Labour Law? Implications of the Capability Approach' in Brian Langille (ed), *The Capability Approach to Labour Law* (Oxford: OUP, 2019) 131. Also see S. Routh 'The Need to Become Fashionable' in Brian Langille (ed), *The Capability Approach to Labour Law* (Oxford: OUP, 2019).

[9]K. Sankaran, 'Protecting the Worker in the Informal Economy: The Role of Labour Law' in Guy Davidov and Brian Langille (eds), *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (Oxford: Hart Publishing, 2006) 205.

owners of capital (who provide access to property), on the other. Rather, it replaces the employment contract as the institution that identifies which workers are included in the scope of labour law; it proposes a labour law that centres the worker rather than the employment relationship and recognises the plural legal relations that impact on workers' terms and conditions of work.

This article has three objectives. First, it seeks to show *conceptually* that Freedland and Kountouris' theory of labour law as PWR can incorporate informal self-employed workers and that the PWR theory best realises rights to collective bargaining for informal self-employed workers.[10] Second, it seeks to illustrate *practically* how labour law as PWR might be operationalized for street vendors to realise their right to bargain collectively with the entity that controls their workplace, namely the municipal arm of the state. It does so, first by analysing case studies of collective agreements between organisations of street vendors and local authorities in Liberia and Zimbabwe in the light of the jurisprudence of the ILO's supervisory mechanism, and second, by discussing case studies of collective bargaining laws for self-employed workers in Canada, Australia, and the USA and extracting from these case studies statutory innovations that offer options for collective bargaining laws for street vendors.

Third, the article challenges labour law to reflect on the implications for the discipline of incorporating informal self-employed workers. In the global South, informal self-employed workers are structurally unable to access property through an employment contract. They rely on the state for access to (immoveable moveable and/or intellectual) property for livelihood purposes. Informal self-employed workers challenge labour law to re-theorise property relations to account for workers accessing property by means of an employment contract as well as rights-based claims. Ultimately, labour law must grapple with the reality that almost half the global workforce (which is in the global South) is informal and self-employed. The paper concludes with the provocation that these workers—the working class in much of the global South—could be the tipping point that shifts the discipline to a plural conception of labour law as both contract and status.

The article proceeds as follows. Part two describes the political economy of street vendors' workplace and the relations between street vendors, on

[10]The article focuses on street vendors because they represent a significant share of informal self-employment: between 2% and 24% of informal urban workers in African, Asian and Latin American cities are vendors. In sub-Saharan Africa, street vendors constitute 43% of workers in informal employment. Women comprise a significant share of the sector, particularly in sub-Saharan Africa; 51% of women in sub-Saharan Africa who are informally employed are vendors.

the one hand, and the state and middle-and-upper classes on the other, which determine whether, and on what terms, vendors can access public space for purposes of trading. It will be argued that their workplace (markets, pavements, transport hubs and streets, that is to say, public space) is a site of class struggle.

Part three discusses the four labour law theories that could incorporate self-employed informal workers into collective labour law with a view to assessing which theory will best realise rights to collective bargaining for street vendors. Part five discusses two case studies of collective agreements between street vendors and local authorities in Liberia and Zimbabwe; and part six draws on case studies of collective bargaining laws for self-employed workers in Canada, Australia and the USA to distil lessons for institutionalising collective bargaining for street vendors. Part seven reflects on the lessons for labour law and concludes with a provocation.

2. STREETS AS WORKPLACES AND SITES OF CLASS STRUGGLE

According to Saskia Sassen, some cities in the global South—usually capital cities—are ear-marked for capitalist insertion and expansion.[11] Globally, capitalist 'territorial insertions into cities' take two forms: First, financed and managed by global property investors, satellite cities are constructed contiguous to the existing city. Poor people who live and work on the edges of the city are evicted from their homes and workplaces and are relocated to make space for the newly constructed satellite city.[12] These global developers make demands on the state for 'world class' infrastructure and for decision-making that by-passes the usual urban planning processes.[13]

Second, many governments are undertaking urban renewal plans that cater to, and expand, the middle- and upper-income market.[14] These plans are often financed by the World Bank and begin with campaigns to clean up the public space. For example, in 2017, Thailand's Bangkok Metropolitan Administration launched a 'return the pavement to the public' campaign, which was translated into banning hawking, revoking street vendors' trading permits, and forcibly removing and arresting resistant vendors from 21

[11] S. Sassen, 'Global Inter-City Networks and Commodity Chains: Any Intersections?' (2010) 10(1) *Global Networks* 159.
[12] V. Watson, 'African Urban Fantasies: Dreams or Nightmares?' (2013) 26(1) *Environment & Urbanization*, International Institute for Environment and Development (IIED) 216.
[13] Ibid.
[14] Ibid. 217.

districts in the city.[15] It is estimated that only 10,000 vendors out of approximately 240,000 street vendors did not have their permits revoked and are trading legally.[16]The administration was apparently motivated by a desire to 'maintain order and hygiene' as '[m]any in the administration view[ed] street food as an eyesore in its effort to modernize the megacity'.[17]

Similarly, in October 2021 in Ghana, President Akufo-Addo launched the World Bank funded 'Let's make Accra work again'. The campaign gained huge public support as middle-and upper-class residents bought into the idea of Accra becoming 'the cleanest city in Africa'. The campaign is managed by the Greater Accra Regional Coordinating Council, which is comprised of twenty-nine local authorities from the Greater Accra Region. All twenty-nine assemblies gazetted sanitation by-laws to implement the initiative.[18] In February 2022, thousands of street vendors were forcibly removed from their trading sites because of their 'unsanitary activities' in public spaces. Similar scenarios have played out across major African cities, including in Kampala, Uganda[19]; Dar-Es-Salaam, Tanzania[20]; Johannesburg, South Africa; Dakar, Senegal[21]; and Nairobi, Kenya[22].

[15] A. Bemma, 'Thai Street Food Sellers Battle Bangkok's Clearance Campaign' *Al Jazeera* (Bangkok, 21 October 2018) <https://www.aljazeera.com/features/2018/10/21/thai-street-food-sellers-battle-bangkoks-clearance-campaign> accessed 27 March 2022.

[16] N. Nirathron and G. Yasmeen, 'Street Vending Management in Bangkok: The Need to Adapt to a Changing Environment' (2019) 41(1) *The Journal of Public Space* 21.

[17] See Citi newsroom 'Heavy Duty Truck Drivers Ready for Operation Clean Your Frontage' *Citi Newsroom* (11 December 2021) <https://citinewsroom.com/2021/12/heavy-duty-truck-drivers-ready-for-operation-clean-your-frontage/> accessed 4 July 2022.

[18] D. Adogla-Bassa, 'Temo Won't be Left Out of Operation Clean Your Frontage Initiative – Henry Quartey' (1 February 2022) *Citi Newsroom* <https://citinewsroom.com/2022/02/tema-wont-be-left-out-of-operation-clean-your-frontage-initiative-henry-quartey/> accessed 4 July 2022. Also see A. Spire and A. Choplin, 'Street Vendors Facing Urban Beatification in Accra (Ghana): Eviction, Relocation and Formalization' (2018) 17–18 *Journal of Urban Research*.

[19] See P. Gumisiriza, 'Street Vending in Kampala: From Corruption to Crisis' (2021) 20(1) *African Studies Quarterly* 81.

[20] See T. Nnkya;An Enabling framework? Governance and Street Trading in Dar es Salaam, Tanzania' in A. Brown A (eds), *Contested Space: Street Trading, Public Space and Livelihoods in Developing Cities* (ITDG Publishing 2006) 79–98.

[21] See A. Soumare, 'Street Vendors Organize Against Street Vendors in Dakar' (*WIEGO Blog*, 24 March 2024) <https://www.wiego.org/blog/street-vendors-organize-against-evictions-dakar> accessed 16 April 2024. Also see T. Marchiori, 'Justice for Street Vendors' *Project Syndicate* (Washington DC, 14 November 2023) <https://www.project-syndicate.org/commentary/street-vendors-need-access-to-public-space-by-teresa-marchiori-2023-11> accessed 15 April 2024; W. V. Mitullah, 'Street Vending in African Cities: A Synthesis of Empirical Findings from Kenya, Cote D'Ivoire, Ghana, Zimbabwe, Uganda and South Africa' *World Development Report background papers* (2003) 1, <https://openknowledge.worldbank.org/handle/10986/9211> accessed 5 August 2024.

[22] D. Linehan, 'Re-Ordering the Urban Archipelago: Kenya Vision 2030, Street Trade and the Battle for Nairobi City Centre' (2007) 1 *Aurora Geography Journal* 21–37.

On one level, the evictions are puzzling since informal vending is a significant job creator, particularly in Africa. Moreover, the coronavirus disease 2019 (COVID-19) pandemic underscored the importance of informal food vendors for food security. At least 18 African countries recognized informal food vendors as 'essential services' that were exempt from restrictions to freedom of movement during lockdowns.[23] And indeed, informal vendors also contribute to city coffers: in cities as varied as Bangkok, Mumbai, and Accra, tourists patronize informal markets, and vendors pay daily and monthly fees that in low-income countries contribute significantly to the city fiscus.[24]

On another level, it is not surprising. Despite their socio-economic contributions, street vendors have always struggled for recognition as workers, as citizens, and as residents of cities. Indeed, 'the propertied, privileged, and powerful have always sought to establish … [the] rules governing the use of urban space that is compatible with their city vision'.[25] This is the case all over the world.[26] For example, in New York, the 'politically connected real estate lobby' succeeded in keeping a cap on the number of permits issued to food vendors for almost 40 years by arguing that vendors are 'disorderly and out of step with plans for urban regeneration'.[27] Nuisance, vagrancy, traffic, health and sanitation laws and regulations (that mirror colonial laws) are routinely used by officials to harass vendors, confiscate their goods and arrest them for contravening a regulation.[28] Thus, the workplace for many

[23] P. Bamu and T. Marchiori, 'The Recognition and Protection of Informal Traders in COVID-19 Laws: Lessons from Africa' (2020) *WIEGO working paper*, <https://www.wiego.org/sites/default/files/resources/file/WIEGO_COVID-19%20Laws_Lessons_Africa_Dec_2020_EN_Web%20FINAL.pdf> accessed 2 July 2022.

[24] See Michael Rogan, 'Tax Justice and the Informal Economy: A Review of the Debates' *WIEGO working paper* 41/2020 <https://www.wiego.org/sites/default/files/publications/file/Rogan_Taxation_Debates_WIEGO_WorkingPaperNo41_2020.pdf > accessed 17 April 2024.

[25] Murray cited in Thomas Coggin Marius Pieterse, 'Rights and the City: An Exploration of the Interaction Between Socio-Economic Rights and the City' (2012) 3 *Urban Forum* 257.

[26] See K. Graaff and H. Noa (eds), *Street Vending in the Neoliberal City: A Global Perspective on the Practices and Policies of a Marginalized Economy* (New York: Berghahn Books, 2015).

[27] R. T. Devlin, 'Winning a Right to the Sidewalks: Street Vendors in New York' (2021) *WIEGO Organising Brief* No 11, pp. 2,5. >accessed 3 May. Also see Karen Alpuche Caceres, 'The Legalization of Street Vending in Los Angeles: Exploring the Impact on Vendors and their Livelihoods' (2019) (Bachelor of Arts Senior Thesis, Pomona College 2019) 207; also see M. Victoria Quiroz-Becerra, 'Street Vendors Claiming Respect and Dignity in the Neoliberal City' in N. Flores-Gonzales and others (eds), *Immigrant Women Workers in the Neoliberal Age* (University of Illinois Press 2013).

[28] See P. H. Bamu, 'Street Vendors and Legal Advocacy: Reflections from Ghana, India, Peru, South Africa and Thailand' (2019) *WIEGO Resource Document* No. 14 <https://www.wiego.org/sites/default/files/publications/file/Bamhu-WIEGO-Resource_Document-14-Street-Vendors-Law-Five-Countries-2019.pdf> accessed 2 July 2022.

informal self-employed workers—public space in many cities of the global South—is a site of class struggle.[29]

3. THEORIES OF LABOUR LAW THAT COULD INCLUDE THE INFORMAL SECTOR

Deakin, Marshall and Pinto note that the employment contract is not only a legal but also 'a social mechanism of inclusion and exclusion'.[30] The legal implications are that workers who have an employment contract are entitled to labour rights, including the right to social protection and to bargain collectively, and that all other workers are classified as independent contractors who fall outside the protection of labour law.[31] The social implications are that workers who do not qualify as employees are not only denied 'membership of that magic circle'[32] but are invisible to the state. This has significant socio-economic and political implications.

Early debates, particularly between Deakin and Freedland, centred on whether the employment contract could be expanded (to include non-standard work) by defining subordination to include economic dependency, or whether labour law should jettison the employment contract and transcend its binary conception of work. This section discusses four theories that transcend, rather than expand, the employment contract for labour law to include the informal sector: the capability approach, the regulatory approach, the human rights approach, and labour law as personal work relations. It concludes with a comparison of the four theories and argues that labour law as personal work relations is best able to realise rights to collective bargaining for informal self-employed workers.

A. The Capability Approach

Langille, the most prominent advocate of the capability approach, argues for a 'worker-centred approach' to reflect the reality of work in the twenty-first

[29] For an analysis of the colonial origins of this class conflict in Africa, see A. Brown and P. Mackie, 'Politics and Street Trading in Africa: Developing a Comparative Frame' (2018) 17–18 *Journal of Urban Research.*

[30] S. Deakin, S. D. Marshall and S. Pinto, 'Labour Laws, Informality, and Development: Comparing India and China' in D. Ashiagbor (ed), *Re-Imagining Labour Law for Development: Informal Work in the Global North and South* (London: Bloomsbury Publishing, 2019).

[31] This is necessarily stylised. Many jurisdictions have a third category, such as 'worker' in the UK, 'para-subordinate' in Italy, and 'independent contractor' in other countries.

[32] S. Fredman and J. Fudge, 'The Legal Construction of Personal Work Relations and Gender' (2013) 17(1) *Jerusalem Review of Legal Studies* 115.

century: 'if we could cast off from our land of contracts, we would be in a position to account for the diversified forms of productive activity that permeate our modern economy'.[33] Langille sees labour law's focus on unequal bargaining power (ie, its relational perspective) as its conceptual limitation to incorporating all workers.[34] Drawing on Sen and Nussbaum's capability approach to development and social justice, Langille argues for a human-centred approach to labour law.

Sen's idea of 'development as freedom'—the freedom to live the life one chooses and to participate in the social, political, and economic life of their community'[35]—challenges heterodox theories of economic development; his capability approach challenges the idea that equality of opportunity will lead to such freedom. He argues that people enjoy different capabilities that enable them (or not) to 'convert' these opportunities into freedoms to enable them to live lives that they value.[36] In sum, a person's 'internal capabilities' (comprised of skills, abilities and opportunities) are often only converted into functionings if the right 'external conversion factors' are present.[37] Langille argues that labour law is a conversion factor. By providing 'substantive and procedural protections … labour law provides the necessary external legal structure (or "conversion factors")' for workers to realise two types of freedom: first, the human freedom of work that is dignified and allows them to live a good life; and second, a 'process freedom'—a place to exercise representative democratic decision-making through the institutions of freedom of association and collective bargaining.[38] Previously I critiqued the capability approach as a basis for labour law[39]; one reason being that the capability approach lacks a political economy analysis and under-theorises power: as a liberal, Sen

[33] B. Langille, 'Human Freedom: A Way Out of Labour Law's Fly Bottle' in H. Collins, G. Lester and V. Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford: OUP, 2018) 90.

[34] Ibid. 101.

[35] A. Sen, *Development as Freedom* (Oxford University Press1999) cited in M. von Broembsen, 'A New Constituting Narrative for Labour Law: A Critique of Development and Making a Case for Fraser's Conception of Justice' (June 2013). <https://www.upf.edu/documents/3298481/3410076/2013-LLRNConf_VonBroembsen.pdf/90e2f7f9-7a00-4caf-8cf7-0082345e2dc6> accessed 26 January 2020.

[36] A. Sen, *The Idea of Justice* (Harvard University Press 2009) in Von Broembsen (n35) 7.

[37] B. Langille, 'What is Labour Law? Implications of the Capability Approach' in Brian Langille (ed) *The Capability Approach to Labour Law* (Oxford: OUP, 2019) 93.

[38] Ibid.

[39] See Von Broembsen (n 35).

depoliticises distributional struggles. Langille[40] responded to my critique and similar critiques voiced by Judy Fudge;[41] arguing that unlike the capability approach, labour law's lens is trained on 'one site … one problem', namely the terms and conditions of work, which are expressed in the contract of employment. Indeed, the fundamental problem with the labour law, he argues, is that the 'standard account of itself … makes it impossible to see the informal sector (no contract, no employer or employee) as part of labour law's world at all'.[42] Sen's capability approach enlarges labour law's limited 'normative vision and empirical scope' to include informal workers. He suggests two legal mechanisms for including informal workers: articulating labour rights as human rights, and constitutionalising labour rights.[43] Langille maintains that freedom of association and collective bargaining should remain central to labour law.

Davidov concedes that a capability theory of labour law provides a normative rationale for labour law. It can, he argues, be deployed both legally and politically to realise labour rights. Legally, it can be used to justify a purposive interpretation of labour law when judges weigh up competing interests, or when the constitutionality of labour laws is challenged. It can be deployed politically to oppose the doctrine of labour-market flexibility.[44] However, he questions the theory's relevance for determining wages or for the institution of collective bargaining because it fails to speak to the 'conflict of interest and imbalance of power between employers and employees'.[45] Routh supports Langille's argument, namely that the capability approach addresses 'the empirical reality' of many different forms of work 'without assuming a now outdated institutional of industrial employment'.[46] In sum, the capability approach makes it possible for workers who are excluded from labour law to become subjects of labour law; but its proponents have not offered substantive counter-arguments to the critiques that the capability approach fails to theorise power relations.

[40] Langille (n37) 131–2.
[41] Judy Fudge, 'The New Discourse of Labour Rights: From Social to Fundamental Rights?' (2007) 29(1) *Comparative Labor Law and Policy Journal*, 29–66.
[42] Ibid.
[43] Ibid. 34.
[44] Guy Davidov 'The Capability Approach and Labour Law: Identifying the Areas of Fit' in Langille (n 37) 45.
[45] Ibid.
[46] S. Routh, 'The Need to Become Fashionable' in Brian Langille (ed), *The Capability Approach to Labour Law* (Oxford: OUP, 2019).

B. The Regulatory Approach

Instead of focussing on the worker, Deakin[47] and Marshall[48] focus on labour-market laws and the functions that they perform. Deakin identifies five functions: economic co-ordination, risk management, democratisation (presumably though social dialogue), empowerment and 'redressing specific vulnerabilities in a region or country'.[49] Their solution is pragmatic: disaggregate labour law's functions, identify different institutions to perform some or all these different functions, and legislate accordingly.

Fudge operationalise's regulatory theory. With a focus on informal workers, she disaggregates labour rights into individual rights and proposes street vendors and their organisations identify the 'functional equivalent' of an employer in respect of each right.[50] She argues that 'different labour rights could be exercised against different entities, including the state, and through different regulatory mechanisms'.[51] She envisages that these 'regulatory mechanisms' should include laws that provide default contractual terms and procedural rules for the collective bargaining relationship, as well as 'platforms or techniques', including 'licensing'.[52] She argues that the 'entities' would internalise norms created by regulation, which would strengthen informal workers' 'regulatory power'.

The appeal of the regulatory approach lies in its pragmatism, its potential to be operationalised, and its inclusion of workers without a notional employer. It eliminates the messiness of working out how traditional collective bargaining laws could be extended to workers without an employment relationship, and it is analytically satisfying. Nevertheless, I have two concerns. First, like the capability theory, the proposal is abstracted from power relations. Part two showed that public space (the workplace for many self-employed informal workers) is controlled by the municipal arm of the state and that it is a site of class struggle. Legislation that 'redresses vulnerabilities' or 'empowers' workers is invariably the product of long, hard,

[47] Deakin (n7).

[48] S. Marshall, 'Revitalising Labour Market Regulation for the Economic South: New Forms and Tools' in S. Marshall and C. Fenwick (eds), *Labour Regulation and Development* (Cheltenham: Edward Elgar Publishing, 2016).

[49] Ibid. 293.

[50] J. Fudge, 'Revising Labour Law for Work' in Martha Chen and Francoise Carre (eds), *The Informal Economy Revisited* (New York: Routledge 2020) 107.

[51] Ibid. 106.

[52] Ibid. Having worked with street vendor organisations for nearly a decade, the author disagrees that 'licensing' is a platform for realising labour rights. Most often, it is a mechanism for the state to exercise state power.

political struggle. National legislation has been achieved in only one country—India[53]—and it took more than 20 years. Second, if different regulations apply to different occupational groups, the effect will be to fragment the labour movement and to dilute the political and social power of the working class.

C. Labour Rights as Human Rights

One stream of the literature on labour rights as human rights is responding to the exclusion of workers from labour law.[54] The contention of these authors is that human rights may prove more durable legal pathways for the realisation of labour rights for excluded workers than labour law. Construing labour rights as human rights remedies labour law's binary construct—protecting insiders (employees) at the expense of (informal, non-standard, non-unionised) outsiders.[55] The argument is that everyone who works has a right to claim labour rights by virtue of their being human.

For labour law scholars from developing countries where labour law excludes most of the workforce, understanding labour rights as human rights presents a politically legitimate means for the working poor to claim labour rights. Writing about the 92% of the workforce that is excluded from labour laws in India, Kamala Sankaran[56] makes a powerful argument for

[53] See Street Vendors (Protection of Livelihood and Regulation of Street Vending) Act 7 of 2014.

[54] P. Alston, 'Core Labour Standards" and the Transformation of the International Labour Rights Regime' (2004) 15(3) *European Journal of International Law*, 457–521; P. Alston, 'Facing Up to the Complexities of the ILO's Core Labour Standards Agenda' (2005) 16(3) *European Journal of International Law* 467–480; P. Alston, *Labour Rights as Human Rights* (Oxford: OUP, 2005). Also see P. Alston and J. Heenan, 'Shrinking the International Labor Code: An Unintended Consequence of the 1998 ILO Declaration on Fundamental Principles and Rights at Work?' (2004) 36 *NYU Journal of International Law and Policy* 101. Other authors include M. Risse, 'A Right to Work? A Right to Leisure? Labor Rights as Human Rights' (2009) 1(3) *Law and Ethics of Human Rights Journal* 1 (developing a broader theory of human rights that encompasses labour rights, particularly with respect to the right to work and the right to leisure); also see C. McCrudden and A. Davies, 'A Perspective on Trade and Labor Rights' (2000) 3 *Journal of International Economic Law* 43.

[55] See R. Dukes, 'Insiders, Outsiders and Conflicts of Interest' in Diamond Ashiagbor (ed), *Re-Imagining Labour Law for Development: Informal Work in the Global North and South* (London: Bloomsbury Publishing, 2019) for a discussion on the insider/outsider implications of labour law.

[56] K. Sankaran, 'Protecting the Worker in the Informal Economy: The Role of Labour Law' in G. Davidov and B. Langille (eds), *Boundaries and Frontiers of Labour Law: Goals and Means in the Regulation of Work* (London: Bloomsbury Publishing, 2006) 205.

labour lawyers in developing countries to embrace labour rights as human rights. Human rights thus represent a pathway for workers excluded from the ambit of labour law—workers who do not have a contractual relationship with the entity that controls their access to property for livelihood purposes, and which controls their terms and conditions of work—to be recognised as workers. It presents a more direct response to the exclusion of much of the global workforce from labour law than the capability approach. In section 3E shows that human rights is indeed the basis for the recognition of street vendors as subjects of labour.

D. Labour Law as Personal Work Relations and Street Vendors

In the words of Simon Deakin, Freedland and Kountouris's book, *The Legal Construction of Personal Work Relations*, provides 'a new cognitive map for labour law'.[57] Adopting an institutional approach,[58] the authors propose replacing 'employment' with 'personal work', and 'contract' with 'work relations'.[59] The concept of personal work relations (PWR) therefore plays the employment contract's classification function, determining who is covered by labour law.[60] The adjective 'personal' is necessary, the authors claim, as '*all work'* is too 'loose' and 'open-ended'.[61] The work must be performed *personally* for another person or entity, but the relationship between the two parties is not necessarily one of subordination or dependency.

Imagine the worker at the centre with a web of relationships radiating out; each strand with a different party and each of these relationships impacting on her work. Consider Tozama Maka, a street vendor in Cape Town, South Africa. Tozama has a permit, issued by the municipality of Cape Town, to set up her stall outside the main Cape Town train station. A statute stipulates the terms and conditions for her work. Every day she sets up a table with her wares—packets of potato crisps, sweets and single cigarettes. She

[57] S. Deakin, 'What Exactly is Happening to The Contract of Employment? Reflections on Mark Freedland and Nicola Kountouris' *Legal Construction of Personal Work Relations*' (2013) 7(1) *Jerusalem Review of Legal Studies* 135.

[58] Fredman and Fudge (n 32) 114.

[59] M. R. Freedland and N. Kountouris *The Legal Construction of Personal Work Relations* Oxford Monographs on Labour Law (2011) 31.

[60] See S. Deakin, 'The Many Futures of the Contract of Employment' in J. Conaghan, R. Michael Fischl and K. Klare (eds), *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford: OUP, 2004) for a description of the functions of the employment contract, including its 'classification function'.

[61] Freedland and Kontouris (n 59) 21.

has a contractual relationship with the wholesaler, from whom she buys these goods. She has social relations with other vendors, some of whom are her competitors, while others are members of the association to which she belongs.

According to Freedland and Kontouris's theory, labour law can only recognise the relations that have a legal basis. Tozama's social relations must therefore be disregarded, even if they impact how much she sells or how much she charges, because they do not have a legal basis. These relations are excluded from her 'work nexus' or 'personal work relations': 'the personal work nexus, indeed the personal work relation itself is made up of the totality, or bundle of these legal connections'.[62] The legal relations are not necessarily of a contractual nature. Indeed, the authors state that the contractual relationship might not be the most significant relationship affecting the terms and conditions of work. They cite the *Harrods* case as an example of where a non-contractual relationship was most significant. In this case, an employee of Shaeffer Pens, a franchise that sold pens inside the Harrods store, successfully brought a case of discrimination against Harrods, in its capacity as Shaeffer's principal.[63]

Fredman and Fudge describe the socio-legal implications of de-centering the employment contract as follows: '[Freedland and Kountouris] have detached the legal analysis of personal work arrangements from its anchor of the contract of employment and they have reclaimed the empirical and legal ambiguity of personal work relations'.[64] The implication of the PWR institution for labour law is that it shifts labour law's focus from determining whether an employment relationship exists to the worker herself.[65] It follows therefore that the legal questions become, is this worker entitled to rights? If so, from whom? Since the worker enjoys plural legal relations with plural parties, the realisation of labour rights may be distributed among several parties and may indeed include the state.[66]

Although she departs from the broader concept of 'work', Rochelle le Roux's intervention[67] shows how this distribution of obligations might work in practice. She argues that de-centering employer/employee relations to focus on the activity of work allows labour law to conceive of labour

[62] Ibid. 320.
[63] Ibid. 321.
[64] Fredman and Fudge (n 32) 114.
[65] Ibid. 118–9.
[66] Ibid. 118.
[67] R. le Roux, 'The New Unfair Labour Practice' (2012) 41 *Acta Juridica* 56.

rights as a bundle of rights with potentially different duty bearers. Citing the example of a voluntary worker, who is usually excluded from labour law rights and protections, she illustrates her theory: some rights, such as the volunteer's occupational-health-and-safety rights, might be realised through employment-law regimes[68]—that is, the duty to realise the health-and-safety right falls to the beneficiary of the volunteer's services, whereas the rights of a volunteer as worker to social protection (primarily the duty of the state) might be provided in a variety of ways, ranging from universal state provisioning, private insurance, or a combination of the two.

Fredman and Fudge argue that the PWR theory would probably include the informal sector. They add that the PWR concept is narrower than work, 'since it must be a relationship, and not simply an activity'.[69] In a subsequent contribution, Fudge[70] categorises work as: (a) a 'work relationship', if 'an entity that exercises economic power or labour process control' is identifiable;[71] and (b) a 'work activity' in the absence of such an entity. She includes street vendors in this latter category.

For the PWR theory to apply to informal self-employed workers such as street vendors, it is necessary to identify a legal relationship between the state (which controls their access to property for livelihood purposes) and street vendors. For vendors with a permit, the legal relationship is defined by the permit to trade, and by the statute in terms of which the licence is granted; it is a moot point whether the permit distributes property rights.[72] Most vendors, however, cannot obtain a licence or permit, and trade illegally. What then, from a PWR perspective, is their legal relation with the state? Arguably, street vendors could address the state as citizen-worker and assert a rights-based legal relation. Indeed, street vendors in India did just this. They litigated on the basis of their constitutional rights to life and to trade in order to establish a right to trade on pavements.

In *Olga Tellis v Bombay Municipal Corporation*,[73] the Supreme Court stated *obiter* that the constitutional right to life should be interpreted to include a right to trade and to earn a living. The court recognised that if the state does not create employment, it cannot deny citizens the right to

[68] Ibid. 52.
[69] Fredman and Fudge (n 32) 115.
[70] Fudge (n 50) 105.
[71] Ibid. 106.
[72] The Indian Street Vendors' (Protection of Livelihood and Regulation of Street Vending) Act 7 of 2014 includes a clause stating that permits are not to be construed as granting property rights, which suggests that at common law the permits may indeed grant property rights.
[73] *Olga Tellis v Bombay Municipal Corporation* (1985) 3 SCC 545.

create their own livelihood, upon which their very existence depends.[74] In 1989, in *Sodan Singh v New Delhi Municipal Corporation*[75] the court upheld the constitutional right to trade on pavements and sidewalks[76] and directed the local authority to 'frame a scheme' in terms of the Delhi Municipal Corporation Act, 1957 to realise the right of hawkers and vendors to trade basic commodities. In a second *Sodan Singh* case,[77] the New Delhi Municipal Corporation (NDMC) argued for the removal of 33 sites from the allocation process because trading would hinder pedestrians, add to congestion, and destroy the character of a suburb. The court rejected the NDMC's arguments and, recognising street vendors' contribution to the economy and to consumers, upheld the vendors' claims.[78]

Deriving *locus standi* through claims of citizenship, street vendors realised the right to access public space (in this case, pavements) to trade. The court held that, since the right to life is meaningless unless people can make a living, nested in the right to life is a right to trade. Realising the right to trade involves the local authority providing vendors with regulated access to pavements for livelihood purposes. The court played a supervisory role over a period of nine years to ensure that the local authority provided vendors with access to public space to trade, and it intervened when the local authority tried to reduce the number of designated sites for trading, or to reduce the hours of trading. Street vendors used these legal victories to pressure the national government for enabling legislation for vendors—a 16-year struggle.[79]

Similarly, waste pickers in Argentina and Colombia have relied on the right to equality and the right to work, and constitutional courts have ruled, based on the right to equality, that the state has a duty to give waste pickers access to waste.[80] In Johannesburg South Africa, over 2000 street

[74] Ibid. 548–50.

[75] *Sodan Singh v New Delhi Municipal Corporation* (1989) 4 SCC 155.

[76] This is subject to three caveats. First, the right can only be exercised if it does not interfere with the freedom of other citizens to use the space. Second, it does not translate into a right to a particular spot. Third, in terms of art 19(6) of the [Indian] Constitution, the state may restrict the right if the restrictions are reasonable.

[77] *Sodan Singh v New Delhi Municipal Corporation* (1992) 2 SCC 458.

[78] Ibid. at [168].

[79] See K. Joshi, 'Conditional' Citizens? Hawkers in the Streets (and the courts) of Contemporary India' *Journal of Urban Research* (2018) 17–18 for a discussion of the political history of street vending in India and an analysis of the court cases, the rise of the National Association of Street Vendors of India (NASVI), and of the Act.

[80] See A. Ossom, 'Defending Waste Pickers' Livelihoods: Lessons From Litigation in Latin America' (2023) *WIEGO Law and Informality Insights* No 7, <https://www.wiego.org/resources/law-informality-insights-march-2023≥ accessed 12 August 2023.

vendors who were forcibly removed from their trading sites took the City of Johannesburg to court. The Constitutional Court held that '[t]he ability of people to earn money and support themselves and their families is an important component of the right to human dignity'.[81]

In the absence of justiciable human or constitutional rights at the national level, workers could address the state on the basis of rights (such as the right to work, the right to equality and the state's duty to not discriminate) enshrined in the International Covenant on Economic, Social and Cultural Rights (ICESCR)[82] to which 169 states are signatories; the Covenant on the Elimination of Discrimination Against Women (CEDAW);[83] the Convention on the Rights of the Child; and regional instruments, including the African Charter on Human and People's Rights.[84]

In 2006, the UN Economic and Social Council (the Council), which oversees the implementation of the ICESCR, published General Comment No 18, which outlines how the Council interprets the provisions on the right to work.[85] The Council made explicit that work includes 'all forms of work' including 'independent' work i.e., 'genuine' self-employment. Under the duty 'to protect', the Council states that the state must 'reduce to the fullest extent possible the number of workers outside the formal economy'. Implicit in this obligation, therefore, is the duty to formalise, or stated differently, to bring the informal economy with the ambit of the law.

Since the legal relationship between street vendors and the state is rights-based, the obvious question is, what is to be gained—both for street vendors and for labour law—from realising vendors' right to participate in workplace decision-making through labour law as PWR as opposed to through human rights law?

In a thoughtful contribution, Judy Fudge[86] argues that from the perspective of human rights law, workers' claim to labour rights is made on the basis that they are human. She argues that, politically, this is much weaker than

[81] *South African National Traders Retail Association v City of Johannesburg and Others* [2014] ZACC 8 at [31].

[82] United Nations General Assembly *International Covenant on Economic, Social and Cultural Rights* 993 UNTS 3 (1966). Adopted: 16/12/1966; EIF: 03/01/1976.

[83] United Nations General Assembly *Covenant on the Elimination of All Forms of Discrimination Against Women* (1979). Adopted 34/180/1979;

[84] For a full list and the applicable articles see Colm O' Cinneide 'The Right to Work in International Law' Work' in Virginia Mantouvalou (ed) *The Right to Work*: *Legal and Philosophical Perspectives* (Oxford: Hart Publishing, 2015).

[85] Ibid. 102.

[86] J. Fudge, 'The New Discourse of Labour Rights: From Social to Fundamental Rights?' (2007) 29(1) *Comparative Labor Law and Policy Journal*, 29–66.

making claims through democratic, representative participation in workplace decision-making.[87]

The political implications affect both street vendors and the trade union movement. As subjects of labour law, street vendors could register their associations as trade unions, bargain collectively with local authorities and participate as social partners in national tripartite structures. It thus establishes them as part of the demos, as part of the labour movement. For the trade union movement, the recognition of informal self-employed workers as 'labour' has political and financial implications because it swells their ranks. For example, in Zimbabwe, the Zimbabwe Congress of Trade Unions (ZCTU) actively supported street vendors to organise because it realised that when members lose their jobs, they turn to vending to earn a living. ZCTU recognises that the boundaries between workers in employment and workers in self-employment is porous. And in Uganda, with the support of the International Transport Federation, the Amalgamated Transport & General Workers Union (ATGWU) approached organisations of informal transport workers to affiliate to ATGWU some 10 years ago. In 2015, the 36,000 member-strong Operational Taxi Stages Association (KOTSA) and the 38,000 member-strong Kampala Metropolitan Boda-Boda Association (KAMBA) joined ATGWU, among several other organisations of informal (self-employed) workers.[88] Spooner and Mwanika argue that 'by rebuilding a mass organisation of transport workers through the affiliation of informal workers' associations, ATGWU is poised to become financially fully self-sustainable'.[89]

The choice between PWR and 'labour rights as human rights' also has implications for how workplace decision-making is institutionalised. India's Street Vendors (Protection of Livelihood and Regulation of Street Vending) Act 7 of 2014 (Street Vendors' Act) is an example of designing workplace cooperation autonomously from labour law. The Act mandates

[87] See also S. Routh, 'Do Human Rights Work for Informal Workers?' in D. Ashiagbor (ed), *Re-Imagining Labour Law for Development: Informal Work in the Global North and South* (Oxford: Hart Publishing 2019)) on the role of human rights in legitimising workers and their claims for labour rights. Also see R. Gopalakrishnan, 'Enforcing Labour Rights Norms Through Human Rights: The Approach of the Supreme Court in India' in C. Fenwick and T. Novitz (eds), *Human Rights at Work: Perspectives on Law and Regulation* (Oxford: Hart Publishing, 2010).

[88] D. Spooner and J. Mark Mwanika, 'Transforming Transport Unions through Mass Organisation of Informal Workers in Uganda'(August 2017) Friedrich Ebert Stiftung (FES) 6, <https://library.fes.de/pdf-files/iez/13643.pdf > accessed 13 January 2023.

[89] Ibid. 11.

local governments to create multi-stakeholder town vending committees (TVC) responsible for all decisions related to street vending. Street vendors must comprise 40 per cent of the committee, of which women and scheduled castes must comprise at least a third, and civil society representatives must constitute at least 10%. Section 22(2) of the Act stipulates that the TVC should be chaired by a 'Municipal Commissioner or Chief Executive Office' and that the government official may nominate officials to represent the local authority, the planning authority, traffic police and police. Local authorities have to 'frame a scheme' within six months of the promulgation of the Act after due consultation with the TVC and have to issue street vending plans to address the 'identification of vending zones', specify 'spatial plans for street vendors' and establish 'measures for efficient, and cost-effective distribution of goods and services'.[90]

According to a 2022 report by the Parliamentary Standing Committee on Urban Development, despite the statutory obligation on local authorities to 'frame a scheme' that designates public space as trading areas, only 1,169 out of 4,372 local authorities have complied.[91] In only 17 out of 28 states have all the 'eligible' cities established town vending committees. Vendors report that meetings are held without a proper agenda and that they have been coerced into signing documents 'without being given the opportunity to read'. They continue to work without basic infrastructure (such as toilets and shelter from the elements), despite paying licensing and permit fees, and harassment and evictions from trading sites continue unabated.[92]

This example of workplace cooperation, which was designed autonomously from collective labour law—which anticipates and designs procedural rules for conflict in the workplace and includes dispute resolution procedures and mechanisms—shows that the parties failed to: anticipate power tactics on the part of the local authority (as the entity controlling the workplace); recognise that organisational rights (such as for organisations to elect representatives to town vending committees, rights to organise, and rights to information) are necessary for the proper functioning of

[90]Shruti Gupta, 'Standing Committee report summary: Implementation of Street Vendors (Protection of Livelihood and Regulation of Street Vending) Act, 2014' < (*PRS Legislative Research* 15 September 2021). <https://prsindia.org/files/policy/policy_committee_reports/Report%20summary_Street%20Vendors.pdf> accessed 28 May 2022.

[91]Roopa Madhav, 'India's Street Vendor Protection Act: Good on Paper but is it Working?' (*WIEGO Blog*, 13 June 2022) <https://www.wiego.org/blog/indias-street-vendor-protection-act-good-paper-it-working>.

[92]Ibid.

workplace cooperation; and include a mechanism for dispute resolution. Institutionalising workplace cooperation autonomously from labour law easily institutionalises a win-win partnership model that depoliticises the inherent conflict in workplace/work relations.

E. A Comparison of the Four Theories

Labour law is founded on property relations, encapsulated by Robert Hale's image of the propertyless man exchanging his labour power for access to property to generate a livelihood to eat.[93] The two institutions foundational to the architecture of labour law—the employment contract and collective bargaining—are superimposed on these property relations. According to Deakin, the employment contract performs three functions. First, it encapsulates the terms of the exchange of labour power for access to property to generate a livelihood. Second, it acts as a mechanism of redistribution because it places obligations on the property owner/employer to collect and make social security contributions, and to transfer the contributions to the state for redistribution. Third, it classifies people into those entitled to a suite of labour regulations and rights, and those who can access property for livelihood purposes independently.[94] The capability, human rights and PWR theories each propose a different mechanism to replace the employment contract's classification function. In the capability and human rights approaches, the basis for inclusion in labour law is being human and working. The PWR theory is narrower and the criteria for inclusion stricter: the person must *personally* undertake the work, and the person must have a legal relationship with the entity to which they address the obligation to realise labour rights. The regulatory approach does not address the classification issue directly but assumes an all-inclusive position. To assess whether the approaches facilitate redistribution and democratic participation, it is necessary to consider each approach's position on collective bargaining.

Labour law's institution of collective bargaining is premised on the assumption that the interests of the property owner and the person exchanging their labour power for an income are fundamentally divergent; at a fundamental level, the workplace/work relation is a site of struggle—not at an

[93] Hale (n 1); also see Streeck (n 3) 2.

[94] Simon Deakin, 'The Many Futures of the Contract of Employment' in J. Conaghan and others (eds), *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (2004) 184–5.

individual level, but structurally, it is a class struggle—hence Kahn-Freund's truism that collective bargaining is a source of countervailing power to the power of capital. In many systems, the state regulates the framework within which collective relations occur. This regulatory framework may include imposing obligations on the property owner to bargain in good faith, and protecting pressure tactics that redistribute power before and during negotiations (namely, the right to strike or secondary boycotts) and trade union organising rights, including obligations on the property owner to allow trade unions onto premises to organise workers and to deduct union dues from workers' salaries to pay to unions.

The objective of the PWR theory is to replace the classification function of the employment contract/relation. That is not to say that it replaces the contract of employment; rather it de-centres the employment contract as the only legal relation that triggers an entitlement to labour rights. The PWR theory does not displace labour law as the law of collective relations with a different philosophical basis. All it does is dismantle the institution that imagines only one significant relationship—the employment relationship—as determining workers' terms and conditions of work. In so doing, it broadens the scope of labour law to include a range of workers who are otherwise excluded.

By contrast, the capability and human rights approaches purport to replace not only the classification function of the employment contract/relation but also to re-theorise labour law; in the process, collective relations are displaced as the *raison-d'être* of labour law. With the capability approach, collective relations are replaced by individual freedom and labour law's relational aspect is rejected in terms. Addressing asymmetrical power is therefore not central to the theory. Labour laws, including collective 'process rights' are viewed instrumentally. The capability theory assumes the pre-existence of labour laws as 'conversion factors' that allow workers to access dignified work and live a good life. Since it rejects a relational perspective, it is unclear how 'process rights' for informal workers would be realised and I therefore agree with Collins, Lester and Mantouvalou that 'it is unclear where [Langille's proposal] leads' since it does 'not appear to provide a conceptual apparatus' to translate the ideas into a labour law that can be operationalised.[95]

[95]H. Collins, G. Lester and V. Mantouvalou, 'Introduction: Does Labour Law Need Philosophical Foundations?' in H. Collins, G. Lester and V. Mantouvalou (eds), *Philosophical Foundations of Labour Law* (Oxford: OUP, 2018) 18.

Similarly, the human rights approach re-theorises labour rights as human rights. In other words, it does not centre a relationship and asymmetrical power relations as its 'constituting narrative'.[96] Instead, it places an individual—not a relationship, not a class—at the centre and makes claims for the individual, including a claim to be able to bargain as a collective based on being human. Although the right to collective bargaining is enshrined in human rights instruments, it is not privileged over other human/labour rights. Moreover, a justiciable right assumes a corresponding duty bearer—yet, the labour law literature on labour rights as human rights has not progressed beyond recognising self-employed informal workers as subjects of labour law. It has yet to do the work of identifying the corresponding duty bearer in relation to the right to collective bargaining and the nature of the duty.

The regulatory theory, by contrast, does not offer an alternative constituting narrative to labour law as collective relations. However, if the different functions of labour law are disaggregated, the parts no longer necessarily add up to the whole because disaggregation invites cherry picking. The power relations described in section 2 suggest that the state will privilege economic co-ordination and risk management over democratisation and empowerment, unless informal self-employed workers enjoy sufficient social, economic, and political power to push for democratic participation in work-place decision-making.

The discussion that follows, in section 4, of collective agreements between associations of street vendors and local authorities in Liberia and Zimbabwe; and collective bargaining laws for self-employed people in Australia, Canada and the USA, in section 5, begins to chart how the PWR theory of labour law might be operationalised for street vendors.

4. CASE STUDIES OF COLLECTIVE RELATIONS BETWEEN STREET VENDORS AND LOCAL AUTHORITIES

This section first discusses cases studies of associations of vendors in Liberia and Zimbabwe that have engaged in collective negotiations and have concluded agreements with local authorities. Thereafter, it considers whether these agreements could be interpreted as collective bargaining agreements.

[96]Brian Langille 'Labour Law's Theory of Justice' in Guy Davidov & Brian Langille (eds), *The Idea of Labour Law* (Oxford: OUP, 2011) 101.

A. Collective Negotiations Between Street Vendors and the Local Authority in Liberia[97]

Almost the entire workforce of Liberia —86%—is employed in the informal economy.[98] Street vending employs a significant percentage of workers. Fifiteen years ago, vendors in Monrovia, the capital city, organized and registered the Federation of Petty Traders and Informal Workers Union of Liberia (FEPTIWUL), which grew to 3,000 paid members. The relationship between the city's officials and vendors was tense: the police blamed street traders for garbage in the streets routinely carried out raids, confiscated street vendors' goods, and assaulted vendors. Street vendors blamed the city for the collapse of the city's solid waste management. FEPTIWUL initiated negotiations with Monrovia City Corporation (MCC), the statutory body that manages the city, to reach agreement on the management of vendors' workplaces.

It took a decade of negotiations with two different administrations to conclude, in September 2018, a Memorandum of Understanding (MOU). The agreement established institutions for co-decision-making, outlined the responsibilities for both parties, and included breach of contract provisions. It established two institutions: a Federation Task Force (Task Force) and a sanitation team. The Task Force, which is the decision-making and implementation body, comprised three FEPTIWUL members; nine members from different MCC departments and state institutions (including the departments of planning; solid waste; environment; and community service); the city police, and the mayor's office. The transport union and, interestingly, the media also enjoyed representation. The Task Force's vision was to ensure that street trading is 'organized and regulated' so that streets are clean and there is a 'unity and a good working relationship' between the city police and the Task Force. Terms of reference are annexed to the agreement. The sanitation team (run by FEPTIWUL) is responsible for overseeing that traders clean the streets where they trade. The MCC in turn committed to introducing a daily collection and disposal of garbage.

FEPTIWUL took responsibility for keeping a database of its members and sharing it with the MCC within three months, issuing members with identity cards, and collecting annual permit fees from members. It assumed

[97] This case study has been discussed previously in M. von Broembsen 'Collective Bargaining for Self-Employed Street Vendors?' (2022) 2(36) *Global Rights Reporter* 39–40.

[98] International Labour Organisation (ILO), *Social Dialogue and the Transition to the Formal Economy* (2020) < https://www.ilo.org/wcmsp5/groups/public/---ed_dialogue/---dialogue/documents/publication/wcms_750495.pdf> accessed 26 October 2021.

responsibility for ensuring that its members stay within designated zones (according to a map annexed to the agreement), comply with regulations that require them to give pedestrians space, and always have their identity cards and permits on them. In exchange, the MCC undertook to 'protect FEPTIWUL members and their goods' on streets designated for trading. The MCC had a contractual obligation to take disciplinary action against any staff member that violated the agreement. Should an official breach the agreement three times, FEPTIWUL could take legal action. Where vendors traded in sites that were not designated for trading, the parties would 'design a strategy' for their relocation within an agreed upon timeframe. The parties agreed to hold monthly and quarterly meetings and to monitor implementation of the agreement. If street vendors failed to pay their 'municipal taxes', they would be fined between twenty-five and fifty dollars and issued a warning. FEPTIWUL members are given three warnings before the MCC institutes legal proceedings. Should street vendors contravene regulations their goods may be confiscated but must be returned within a day of paying the fine (if perishable) and seven days (if non-perishable). Failure to pay the fine resulted in legal proceedings.

In case of a breach of agreement, either party could give thirty days' notice to terminate the agreement. 'Management' would meet within thirty days to resolve the difference, and if unresolved, either party could take the matter to arbitration or institute legal proceedings.

B. Collective Bargaining Between Street Vendors and Local Authorities in Zimbabwe

Supported by the Zimbabwe Congress of Trade Unions (ZCTU), 22 informal traders' associations across Zimbabwe established a national federation in 2002—the Zimbabwe Chamber of Informal Economy Association (ZCIEA). Its 205,327 members include street vendors, construction workers, waste pickers and other informal workers, with street vendors constituting the majority.

In 2015, leaders from ZCIEA participated in regional workshops organised by WIEGO, a research-advocacy network, to prepare a platform of demands for the General Discussion on Formalising the Informal Economy at the International Labour Conference (ILC) in Geneva in June 2015. The conference agreed to ILO Recommendation 204, 2015 *Concerning the Transition from the Informal to the Formal Economy* (R 204), which recognises public space as a workplace and enjoins members states to realise

rights to freedom of association and collective bargaining for informal self-employed workers:

> Members should ensure that those in the informal economy enjoy freedom of association and collective bargaining, including the right to establish and, subject to the rules of the organization concerned, to join organizations, federations and confederations of their own choosing.[99]

ZCIEA officials were elected to represent street vendors at the ILC and participated in discussions in the Worker Group. When the leaders returned, they began to strategise to implement ILO Recommendation 204 in Zimbabwe, especially the right to freedom of association and collective bargaining. They decided to focus on street vendors for two reasons: vendors comprised the largest group within their membership and R204 recognised their workplace—streets and pavements –as a workplace. And, as an affiliate of StreetNet International, and with support from the Solidarity Centre,[100] ZCIEA's leaders received negotiation and collective bargaining training. These leaders went on to train leaders of its chapters in collective bargaining and negotiation skills.

The national government devolves certain powers and authority to provincial governments ('the territories'). Within each province, there are urban councils in the case of municipal areas, and rural district councils in rural and agricultural areas. Between 2019 and 2021, ZCIEA signed 19 'memoranda of understanding' with local authorities of both kinds. The first MOU was concluded between ZCIEA and the Chikomba Rural District Council. ZCIEA's branch leadership approached the district council in 2018 to begin negotiations; initially the district council declined. ZCIEA adopted an interesting strategy: it undertook development activities in the district to gain credibility. The strategy paid off and the council recommended that ZCIEA approach the provincial administrator to authorise an MOU. The provincial administrator duly issued a letter of authorisation—a form of recognition. Then followed a vetting by the provincial offices of the Department of Social Services to ascertain that ZCIEA was independent of political parties. Armed with the necessary credentials, ZCIEA made representations to a meeting of councillors from all 30 wards in the district. Two of the councillors were members of ZCIEA and persuaded a majority to vote in support

[99] Section VII para 31.
[100] The Solidarity Centre was established by the North American AFL-CIO to support trade unions in developing countries.

of the district council concluding an MOU with ZCIEA; the council passed a unanimous motion in support of the Chikomba Rural District Council concluding an MOU with ZCIEA. Approximately eighteen months later, negotiations between the parties concluded with an agreement.[101]

Similar processes were followed with other local authorities, except that the accreditation process was less complex since the urban councils could make the decisions without requiring authorisation from the provincial administration or district offices. According to a councillor in Gwanda, when ZCIEA leaders approached the council to negotiate, the council considered ZCEIA's level of representivity; its Constitution; its willingness to engage with the council; and its list of demands.[102] One of these agreements is analysed below.

ZCIEA and the Chitungwiza local authority concluded an agreement in July 2020—during the COVID-19 pandemic. According to the clause that sets of the purpose of the agreement:

> [Its purpose] is to establish a bipartite social dialogue and engagement principles to form a negotiating forum and structures to improve the conditions of [informal] workers as well as their environment. The purpose of the MOU is to express the willingness of both parties to engage in an effort to promote the rights of informal workers. That is working together to make sure that informal workers' concerns are addressed as they arise.

The MOU proceeds to list the concerns, which essentially deal with two issues: access to space and infrastructure to trade on the one hand (stalls, bins and toilets, including making stalls and toilets accessible for people with disabilities); and finances—collection and management of rentals and taxes—on the other. The clauses on finances seek to regularise the collection of rentals for the use of space and to address corruption through three mechanisms: First 'a once-off charge to avoid the demand of payments anytime'; Second, that rent for stalls could be paid using an electronic platform rather than cash, and third the need for a 'proper council revenue collection system that promotes transparency and discourages corrupt practices'.

The agreement outlines a process to give effect to the agreement: A one-day meeting to formulate a 'community-based strategic plan' to 'allocate tasks for both parties'. The parties would independently evaluate

[101] R. Mudarikwa and M. von Broembsen, 'From 'Battles' To Collective Agreements Between Street Vendors and Local Authorities In Zimbabwe' *WIEGO Organizing (Law) Brief* No.16 (forthcoming).
[102] Ibid.

the progress made in relation to the agreed activities 'from time to time'. ZCIEA is obliged to (a) report on 'activities' on the first of every month; (b) implement the programme 'using government structures that are in the district'; (c) disseminate any study or survey results to 'all stakeholders'; (d) plan, implement, monitor and evaluate programmes with communities; (e) network and cooperate with organisations and similar 'development programmes'; (f) attend the local authority's social services and reconstruction and development meetings; (g) maintain transparency with respect to its sources of funding. The Rural District Council is obliged to (a) allow ZCIEA to 'undertake development activities'; (b) provide an 'overall development framework' for the implementation of development programmes and 'assist' in carrying out needs assessments (c) support ZCIEA to mobilise communities to support these development programmes; (d) assign a senior council official to coordinate these activities on behalf of the Chief Executive Officer.

The agreement outlines ZCIEA's vision and objectives, which reflect the dual roles reflected in the agreement thusfar: those of a trade union and a development organisation.

The period of the agreement is for two years. The termination clause states that the 'partnership' will end on the agreed date, or ZCIEA may end the agreement on one month's notice. In the event of a breach of contract by either party, the other party may cancel the agreement immediately. The agreement does not provide for a dispute resolution procedure, nor for notice calling for specific performance in the event of breach as a step prior to cancellation.

C. Are These Agreements Collective Bargaining Agreements?

The ILO supervisory bodies—the Committee of Experts on the Application of Conventions and Recommendations (CEACR) and the ILO Committee on Freedom of Association—agree that Convention 87 on Freedom of Association and Protection of the Right to Organise, 1948 and Convention 98 on The Right to Organise and Collective Bargaining, 1949 apply to all workers, irrespective of their contractual status.[103] The ILO Committee on Freedom of Association has stated that '[t]he criterion for determining

[103] ILO 'Social Dialogue Report: Collectively Bargaining for an Inclusive, Sustainable and Resilient Recovery', (2022) 51 <https://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_842807.pdf > accessed 20 June 2022.

the persons covered by that right [protected by C98] … is not based on the existence of an employment relationship, which is often non-existent, for example in the case of agricultural workers, self-employed workers in general or those who practice liberal professions, who should nevertheless enjoy the right to organize'.[104] It went further to state that self-employed persons are entitled to collective bargaining rights as constituent of their association rights.[105] The rights to collective bargaining enshrined in international labour standards therefore also apply to street vendors.

Both FEPTIWUL and ZCIEA entered collective bargaining processes—in both cases negotiations and discussions were undertaken with an agreement in mind. The question is whether the agreements constitute collective bargaining agreements.

Article 2 of Convention No. 154 expresses the three goals of collective bargaining: (a) to determine working terms and conditions; (b) to regulate the relationship between individual employers and individual workers; and (c) to regulate the relations between the organisations of employers and the workers' organisations. Typically, a collective agreement includes (a) a set of agreed rules and procedures that govern the relationship between the parties, including the parties' respective obligations, information sharing and consultation processes, and dispute resolution mechanisms in the event of a breach of contract and (b) substantive provisions that relate to terms and conditions of work. In the case of employees, these include wages, working time, social protection, occupational health and safety, terms of employment such as annual leave, notice periods etc. Increasingly collective agreements also include provisions that deal with rights, obligations and entitlements of the parties and their members in relation to climate change, gender discrimination, violence and harassment at work and Covid-19.[106] Indeed collective agreements can also craft specific 'regulatory solutions' for a particular industry, geography, work situation or enterprise.[107]

In the case of Monrovia, the substantive provisions of the agreement relate to (a) regulating the relationship between the parties, with provisions

[104] ILO Committee on Freedom of Association (2001) Report no.326, Case No. 2013, paragraph 416 in N. Countouris and V. de Stefano, 'The Labour Law Framework: Self-Employed Workers and their Right to Bargain Collectively' (2021) 109 *Bulletin of Comparative Labour Relations* 5.

[105] S. McCrystal and T. Hardy, 'Filling the Void? A Critical Analysis of Competition Regulation of Collective Bargaining Amongst Non-employees' (2021) 37(4) *International Journal of Comparative Labour Law and Industrial Relations* 355, 362.

[106] Ibid. 75.

[107] Ibid. 18.

establishing their respective responsibilities and dispute resolution mechanisms; and (b) the terms and conditions of street vendors' work. The agreement therefor meets the criteria of a collective bargaining agreement, except that the bargaining partners are not the parties recognized by labour law as parties to a bilateral collective bargaining agreement.

In the case of ZCIEA, it is less clear. Street vendors' concerns in relation to their working conditions are listed and the agreement describes potential solutions. Parts of the agreement also regulate the relationship between the parties. However, the obligations of the respective parties lack sufficient specificity to be construed as enforceable provisions. And the agreement lacks a dispute resolution mechanism. Although the agreement does not display the characteristics of a collective bargaining agreement, it nevertheless represents the outcome of 'negotiation, consultation and exchange of information' that defines social dialogue. This is itself an achievement. As observed by the ILO, the process builds trust:

> The very process of collective bargaining is a vital contribution to sound industrial relations … irrespective of whether the parties reach an agreement or not … the structuring and institutionalization of compromises made by the respective parties can gradually contribute to trust, stability and labour peace.[108]

And yet it appears to be something more than social dialogue. The analogy, trajectory even, of global framework agreements seems apposite. When the first global framework agreement was signed in 1988 between Danone, a French multinational enterprise (MNE) and the global union federation (GUF), the International Union of Farmworkers, the terms of the agreement were similarly unspecific and signalled an intention on the part of the signatories to engage on labour standards rather than constituting an enforceable agreement. The agreement paved the way for a new type of collective agreement of a different scale—transnational—and between parties not recognized as collective bargaining partners by labour law. In time, over 300 global framework agreements have been concluded between GUFs and MNEs and over time the contents of the agreements have become more specific and wide-ranging.

The objective of global framework agreements initially was to establish a long-term relationship between the parties through negotiating '[a] set of standards that apply to the company and all its suppliers across a supply

[108] International Labour Organization *Social Dialogue: Recurrent Discussion under the ILO Declaration on Social Justice for a Fair Globalization* ILC.102/VI (2013) 32.

chain'.[109] As the name of the agreement suggests, the agreement aimed to provide a framework, a basis for trade unions at the national level to organize and bargain collectively with suppliers in the MNE's supply chain.[110] Hammer's distinction between 'rights agreements' (that only reference core ILO labour standards) and 'bargaining agreements' (that are both more specific, more enforceable, and cover a wider range of issues) recognises that the former more generalised agreement is the typical outcome of weaker union bargaining power and the latter is the more likely outcome of stronger union bargaining power.[111]

Like global framework agreements, where the global rather than national union is the signatory, the agreements between ZCIEA and local authorities appear to be signed by the apex structure rather than by the local affiliates of ZCIEA. The stated purpose of the agreement is 'to establish a bipartite social dialogue (sic) and engagement principles to form a negotiating forum and structures'. The agreement appears to envisage a partnership between the local authority and ZCIEA as stakeholder in local economic development on the one hand, and appears to set up a proposed process for the local chapter to negotiate (starting with a one-day workshop) the terms and conditions of work relating to its members' concerns with access to space, infrastructure, and the fiscal arrangements between the parties on the other.

Although workers in the informal economy are engaging in collective negotiations with local authorities all around the world,[112] in the absence of collective bargaining laws, it is difficult to get local authorities and other bargaining counterparties to the bargaining table. Also, bargaining against the backdrop of common-law rules of contract places workers in a much weaker bargaining position than if there were a statutory framework for collective negotiations.

[109] M. Thomas, 'Global Industrial Relations? Framework Agreements and the Regulation of International Labor Standards' (2011) 36(2) *Labor Studies Journal* 274.

[110] Ibid.

[111] H. Nikolaus, 'International Framework Agreements: Global Industrial Relations Between Rights and Bargaining' (2005) 4 *Transfer* 511, 520.

[112] See V. Schmidt and others, 'Negotiations for Workers in the Informal Economy' (2023) *ILO Working Paper* 86, <https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_864924.pdf> accessed 16 August 2023; also see F. Carré, P. Horn and C. Bonner, 'Collective Bargaining by Informal Workers in the Global South: Where and How it Takes Place' (2018) *WIEGO Working Paper* No 38, <https://www.wiego.org/sites/default/files/publications/files/Carre_Collective_Bargaining_Informal_Workers_WIEGO_WP38.pdf> accessed 16 August 2023.

Labour law as PWR could incorporate informal self-employed workers in two ways: by amending labour laws to include informal self-employed workers only in the collective bargaining aspects of labour law; or through collective bargaining laws tailored to a particular occupational group.

5. THEORISING COLLECTIVE BARGAINING LAWS FOR STREET VENDORS

The first hurdle for the informal sector to enjoy *de iure* rights to collective bargaining is that the labour laws of most countries prohibit informal workers from registering their organisations as trade unions. The registration criteria sometimes also exclude the informal sector: for example, contact details for an employer may be required; union leadership may have to fulfil certain educational requirements; workers with a criminal record may be prohibited from running for union office, which is a problem for vendors in that many countries criminalise street vending; registration fees may be prohibitive; assets may need to be audited; and some laws require assets to be deposited in certain banks whose minimum account balances are too high for unions in the informal economy.[113] Other criteria include the prohibition of funding from sources other than member dues. Since the earnings of informal-sector workers are low, it is difficult for a union of informal self-employed workers to survive on members' fees. Many associations raise funds from development donors and, like the ZCIEA, are operating as part-union, part-development organisation. This could disqualify them from registering as trade unions.

As noted earlier, the two options for the informal sector to enjoy *de iure* rights to collective bargaining are: to amend existing collective bargaining laws; or to introduce collective bargaining laws for different sectors. There is a growing body of collective bargaining laws in countries such as Australia and Canada that extend collective bargaining rights to associations for self-employed workers, such as artists and truck drivers. These laws provide useful examples for street vendors on how to pursue the second option for specific sector-based legislation.

[113] ILAW & WIEGO 'Applying International Labour Law Standards to the Informal Economy: Convention 87 concerning Freedom of Association',< https://www.ilawnetwork.com/wp-content/uploads/2024/03/ILAW-Applying-International-Labour-Standards-to-the-Informal-Economy-Chapter-1.pdf> accessed 17 April 2024.

A. Lessons from the USA, Canada and Australia

According to McCrystal, the Canadian the *Status of the Artist Act* of 1995 established one of the first collective bargaining regimes for self-employed workers in the world. It deems self-employed artists to be employees for purposes of qualifying for exemption from competition law. But for other purposes, artists are self-employed. Artists are heterogenous, may contract with many different parties, and may not have access to work all the time.[114] The Act introduces several features that differ from traditional collective bargaining models: First, the bargaining unit does not have to be a trade union. It can also be an association. Second, recognition is not contingent on majority representation; instead, the labour tribunal issues a bargaining certificate if it is satisfied that (i) it is appropriate for the association to bargain collectively; and (ii) the association is 'most representative' in the sector. Representivity is determined with reference to the size of the sector, 'the density of membership held by the association' and whether other associations have applied for a bargaining certificate.[115] Only artists 'can challenge certification of an association' as not representative. Once an association is certified, it has exclusive authority to bargain and to conclude collective agreements that then extend to whole industry. These collective agreements constitute 'minimum floors' that create a safety net for artists and 'eliminate the worst forms of competition to the bottom that occur when work is scarce'.[116] The real innovation is the statutory creation of mechanisms to coerce parties to negotiate, although McCrystal does not describe what these are. The Act provides for associations of 'engagers' (producers) but according to McCrystal, most often collective bargaining is between an association of artists and a single producer.

A second example is the *Quebec Home Childcare Providers Act*, which established a 'sector-based collective bargaining scheme' as self-employed workers.[117] This meant that they bargain against a common law background without reference to statutory protections afforded to employees. In this case the workers wanted to bargain collectively not with the employers—parents—but with the government, which subsidized childcare.[118] The Act

[114] S. McCrystal, 'Collective Bargaining by Self-Employed Workers in Australia and the Concept of 'Public Benefit'' (2021) 42 *Comparative Labour and Policy Journal*, 686.
[115] Ibid. 687.
[116] Ibid. 688.
[117] Ibid. 689.
[118] Section 8 of the Act defines a home child-carer as someone who takes care of 7–9 children in a private residence and for renumeration, providing them with educational stimulus that promotes their 'physical, intellectual, emotional, social and moral development'.

provided for an association (rather than a trade union) to apply to the labour board for certification if it represented the majority of childcare workers in the territory. Upon certification, the association would have exclusive bargaining rights and all childcare workers in the territory would be obliged to pay it membership dues.[119] The bargaining counterparty is the relevant Minister, and the negotiation issues include conditions of work, including hours of work, annual leave etc. Both parties are obliged to negotiate in good faith and pressure tactics and unfair labour practices are protected.[120] McCrystal notes that the statute avoids the difficulties associated with determining the bargaining unit by relying instead on the territory to determine which workers are covered by the collective agreement.[121]

The third example concerns transport drivers in Australia who are classified as independent contractors. *The Road Safety Renumeration Act,* 2012, sought to address accidents caused by truck drivers who worked too long hours to make ends meet on low rates of pay. The Act introduced a statutory minimum pay rate for truck drivers, irrespective of whether they are independent contractors or employees and established a collective bargaining regime for self-employed truck drivers.[122] The Act establishes an independent tribunal to govern the collective bargaining regime, which is comprised of labour commissioners and industry specialists and collective agreements between truck drivers and their 'hirers' must be approved by the tribunal.[123] Provisions that dilute the truck drivers' bargaining power are: First, the tribunal must approve any collective agreement, using the competition law principle—whether the terms of the collective agreement are in the 'public interest'.[124] Second, industrial action is outlawed.

Estlund and Liebman[125] describe initiatives by taxi and platform drivers and domestic workers. In Connecticut, USA, a Bill was introduced in March 2021 called the Act Concerning Transportation Network Company Drivers. Both drivers and the companies that own the online platforms rejected aspects of the Bill, which meant it was never passed, but the Bill included some interesting features. The Bill provides for (a) a certification process of an association as a voluntary and/or exclusive representative of drivers; (b)

[119] Ibid. 690.
[120] Ibid.
[121] Ibid.
[122] Ibid. 691.
[123] Ibid. 692.
[124] Ibid. 692.
[125] C. Estlund and W. B. Liebman, 'Collective Bargaining Beyond Employment in the United States' (2021) 42(2) *Comparative Labor Law and Policy Journal* 371, 392.

an industry council for sectoral bargaining comprised of the representatives of companies that online platforms and trade union representatives would be established; (c) the council would 'collectively negotiate recommendations' concerning the terms and conditions of work for workers covered by the council.[126] If no agreement is reached, then either side could submit the dispute for arbitration. If agreement is reached, the recommendations are sent to the State Board of Labour Relations, which reviews the recommendations to ensure compliance with laws and that they do not fall foul of antitrust laws. The Board also plays a supervisory role.[127] The arbitration is an interesting feature to consider for street vendors.

Also in New York, an agreement was reached between the Independent Drivers' Guild, trade unions, including the Union Confederation, AFL-CIO, platform driver and delivery companies for a 'Industry Wide Regulation of Network Workers'. Its stated public policy objective was to promote 'stable and sustainable working conditions'.[128] It has the following features: (1) It establishes a Network Worker Relations Board to approve collective bargaining agreements and to supervise the Act; (2) It establishes workers' right to choose union representatives; (3) It establishes two bargaining units – one for couriers and one for 'rideshare drivers'; (4) It provides that every network must enter into a labour peace agreement' and the company has to give the union access to workers and may not discriminate against members on the basis that they are members of trade unions. The union in turn undertakes not to strike, go-slow, boycott, or picket before certification; (5) Once the union is certified, the companies that own the online platforms must charge 10c extra per ride, which is used to finance the trade union; (6) The Industry Council has one year to negotiate recommendations including on a transferable pension fund; an appeals process for drivers who are deactivated; minimum earnings (including for waiting periods); unemployment insurance and workmen's compensation; the formation of a 'Works Council' and possibly a 'multi-employer industry association'; and (7) The recommendations would be put to the vote. If workers approve the recommendations, they would be reviewed by the Board and become 'industry regulations'.[129] It is yet to be enacted and because it is silent on the status of the workers, some worker groups and labour law scholars have rejected it.[130]

[126] Ibid. 396.
[127] Ibid. 397.
[128] Ibid. 398.
[129] Ibid. 399.
[130] Ibid. 400.

Finally, in 2018, the Seattle City Council passed a Domestic Workers' Ordinance[131] which establishes a tripartite Domestic Workers' Standards Board. The board includes six domestic worker representatives, six hiring entities and employers and one community representative. It makes recommendations on working conditions, protections, and benefits, to the city, which regulates the industry standards.

B. Extracting Principles for Street Vendors from the Case Studies

These cases suggest several learnings for realising rights to collective bargaining for street vendors. First, in both Canadian examples, the bargaining unit is an association, not a trade union. Since in many countries labour legislation precludes informal workers from registering their associations as trade unions, this is an important precedent. Second, for artists, recognition is not contingent on majority representation. The association had to show that it is 'most representative' which is determined with respect to the density of membership and whether other associations have applied for a bargaining certificate. Importantly, only artists can challenge the certification or that the organisation is not representative. Third, in case of home child-carers, the bargaining unit is the territory rather than an occupational group or sector. A geographical delineation would make sense for street vendors too because the issues differ in different cities. Fourth, the bargaining counterparty for home child-carers is the relevant Minister, a government official. For street vendors, the most important bargaining counterparty is the local government. Fifth, the Act includes good faith obligations and pressure tactics are protected. Such a provision would be important for street vendors so that their permits are not threatened should they engage in pressure tactics. Sixth, the question of governance: The Industry Wide Regulation of Network Workers established an industry council for sectoral bargaining comprised of the App Company representatives and trade union representatives. This council would 'collectively negotiate recommendations' and if no agreement is reached, then either side could submit the dispute for arbitration. Or if recommendations are reached, they would be put to the vote. If workers approved, the recommendations would become industry regulations. The Industry Council has one year to negotiate recommendations on

[131] Ordinance 125627 <https://seattle.legistar.com/View.ashx?M=F&ID=6451347&GUID=107050D2-BEFC-4B43-BC0D-B7AD73ADABF1> accessed 17 April 2024.

particular issues. It's not clear what happens if the time expires—perhaps either party could submit the dispute for arbitration. This could also be a model for street vendors.

6. CONCLUSION

Urban public space is the workplace for a significant percentage of the two billion workers who are in informal employment. These workers include street vendors and hawkers; waste pickers; informal transport operators; and traditional musicians, to name a few. In Latin America, 51% of workers in informal employment is self-employed. In several African countries, up to 90% of the workforce works informally and the vast majority is self-employed.[132] In an era of post-industrial, financialised capitalism, their status is unlikely to change from self to waged-employment. Yet as they seek regulated access to urban public space to earn a living, they are met by the force of the state that is pandering to, and is complicit in, the development aspirations of global capital, the middle class, and the political elite for a 'world-class' city. I have argued that public space in many cities of the global South is a site of class struggle.

Despite the jurisprudence of the ILO's supervisory bodies obliging member states to realise rights to freedom of association and collective bargaining for *all* workers, irrespective of their status of employment, informal self-employed workers remain legally and socially excluded.

This article has argued that Freedland and Kountouris' theory of labour law as PWR can include informal, self-employed workers and that the legal relationship between workers and the state is rights-based. The article mentioned cases in India, South Africa, Columbia and Argentina where workers are litigating against the state for access to property for livelihood purposes. In the absence of judiciable human or constitutional rights at the national level, workers could make rights-based claims based on the right to work, the right to equality, and the state's duty to not discriminate, which are enshrined in the Covenant on Social, Economic, and Cultural Rights.

The 2002 ILO Resolution on social dialogue and tripartism recognises civil society organisations as participants in tripartite social dialogues and

[132] F. Bonnet, J. Vanek and M. Chen 'Women and Men in the Informal Economy: A Statistical Brief' (2019) 10 < https://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---travail/documents/publication/wcms_711798.pdf> accessed 17 April 2024.

the ILO recognises international framework agreements between global union federations and multinational enterprises as social dialogue; that is to say social dialogue has evolved in terms of scale—from national to transnational—and in terms of recognising new bargaining counterparties. The case studies discussed in this article contribute to the evolution of social dialogue and collective bargaining by recognizing other bargaining parties—associations of informal self-employed workers and local governments—and by introducing a new site or scale for collective negotiations—the city.

Street vendors have fought for the co-regulation of their workplace through statutory workplace cooperation and collective agreements. The next frontier is to conceptualise collective bargaining laws to institutionalise collective bargaining rights for informal self-employed workers. Workers enjoy considerably more bargaining power if they bargain against the backdrop of statutory rights backed by the state rather than against the background of the common law rules of contract. Drawing on (proposed and existing) collective bargaining laws for self-employed workers from different industries in the USA, Canada and Australia, the article has made concrete suggestions for the statutory protection of street vendors' collective rights.

The article has also sought to reinforce labour law's 'constituting narrative' as collective relations. Informal self-employed workers challenge labour law to examine its assumptions of how property relations are constituted; and to re-theorise property relations to account for workers accessing property by means of an employment contract and on the basis of worker-citizens making rights-based claims.

Finally, a provocation: The days of industrial capitalism, both as a socio-economic order and as a mode of accumulation, are in decline.[133] As financial capitalism and AI come of age, it is a question whether most of the workforce in the global North will continue to access property (the means of production) by means of an employment contract. It is certainly unlikely that the developing world will industrialise and provide employment for a workforce that is overwhelmingly informal and self-employed. Indeed, Harry Arthurs[134] and other critical scholars[135] have questioned labour law's continuing relevance. Arthurs argues that labour law should transcend work

[133] See Streeck (n 3).

[134] H. Arthurs, 'Labour Law after Labour' in G. Davidov and B. Langille (eds), *The Idea of Labour Law* (Oxford: OUP, 2011).

[135] See for example A. Hunt, 'The Idea of the Idea of Labour Law' in G. Davidov and B. Langille (eds) *The Idea of Labour Law* (Oxford: OUP, 2011).

relations as the only site of struggle and reconstitute itself as 'the law of economic subordination and resistance'.[136]

And yet, if labour law were to decentre the classification function of the employment relationship in favour of labour law as PWR, it would include in its ambit a different conception of the working class—one which is informal, is genuinely self-employed and is vast. Indeed, might this working class in the global South be harbingers of a post-industrial, plural conception of labour law that is based both on contract and (worker-citizen) status?

[136]See H. Arthurs, 'Labor Law as the Law of Economic Subordination and Resistance: A Thought Experiment' (2013) 34(3) *Comparative Labor Law and Policy Journal* 585; also see D. Trubek, 'Critical Legal Perspectives on Global Governance' in Gráinne de Búrca, C. Kilpatrick and J. Scott (eds) *Critical Legal Perspectives on Global Governance: Liber Amicorum David M Trubek* (Oxford: Hart Publishing, 2014); K. Klare, 'The Horizons of Transformative Labor and Employment Law' in J. Connaghan and others (eds) *Labour Law in an Era of Globalization: Transformative Practices and Possibilities* (Oxford: OUP, 2004) 17.