

1. Property rights and the regulation of immigrant labour

In fact, 'property' is always a bundle of rights, responsibilities and prohibitions each of which is contested and historically determined ... perhaps today all would agree that humans themselves should not be private property ... ¹

INTRODUCTION

Through the examination of fundamental and fraught intersections between law and private property arrangements this book challenges law's regulatory utility. From the critical understanding of exclusionist and oppressive private property relationships, endorsed, enabled and empowered by law, which shore up the cavernous and catastrophic wealth gaps threatening to irretrievably divide emergent and transitional economies, we critique law in failing the global sustainability project. We argue it need not be so.

This analytical endeavour would chart an easy path if it remains examining normative and practical contradictions.² However, our more proactive enterprise is advancing a strategy whereby legal regulation, particularly in its contract mode can be transformed in order to assist in making private property arrangements more inclusive, accessible and generally beneficial. If this can be achieved, rather than undermining such aspirations, law and legal regulation will contribute to the essential social bonds that establish and ensure sustainable market economies now and into the future as economic frames change.

The governing theme in this text is the emergence of sustainability as a new global regulatory principle, advanced or retarded through law's role

¹ Schutz (2011), p. 155.

² For a discussion of contradiction in legal analysis see Norrie (2001). This is not to suggest that Norrie's conceptualisation and theorising of contradiction is simple or direct, which it is not. Rather, if we remained in that space we might not have to tackle the 'what next' questions which are an important motivation for what follows.

in private property relations. What gives it particularity is the assertion that law's regulatory function in protecting and perpetuating private property rights can either preclude or promote crucial economic and social relationships essential for sustainability.

In the analysis to follow (see chapters 2 and 7), and in our previous work,³ sustainability is viewed as social bonding, and compatible regulation therefore becomes a force for bonding which is socially embedded.⁴ Social solidarity and resultant sustainability are arguably a *general good*.⁵ We have proposed in a broad vision that by looking at South World and transitional societies and economies the regulatory importance of social bonding is more apparent than what often features in North World regulatory states.⁶ For our purposes in this book, the focus of our regulatory attention is the manner in which private property relationships act as forces for and against social bonding. Through the later comparative case studies of migrant labour (see Chapter 6) South/North market transitions (as with migrant labour transaction) can be critiqued in a sharper market analysis specifically employing legally-endorsed private property relations to explain the exploitation of labour power.⁷

This introduction sets out law's essential role in regulating private property relationships as a precursor to arguing for a repositioning of law's regulatory purpose and in turn practically reshaping law's regulatory role (see chapters 3, 4 and 5).⁸ More than an invocation for principled regulation at large,⁹ the argument engages a unique perspective as far as contemporary private law theorising is concerned; social sustainability.¹⁰ The overarching analytical context of this chapter is that contemporary crises in global regulation and governance priorities¹¹

³ Findlay and Lim (2014a).

⁴ For a discussion of our approach to embeddedness see Findlay and Lim (2014a), chapter 3.

⁵ Cotterrell (1996).

⁶ Findlay and Lim (2014a); Krippner et al (2004).

⁷ We use the notion of 'power' to represent labour as a dynamic and should not be confused with any assumption of the empowerment of labour relations. Such empowerment, we argue, is only possible through a repositioning of private property relations enunciated in contracts of employment.

⁸ Also Findlay and Lim (2014a), chapter 7.

⁹ For this see Findlay and Lim (2014a), chapter 2.

¹⁰ What work there is in this area has a heavy focus on the construction industry and sustainability through building contract formats. See NBS (2014). The International Institute for Environmental Development has done work on sustainability and investment contracts. See Cotula (2010).

¹¹ Findlay (2013), preface and chapter 1.

reveal shifts away from individualised wealth creation and exponential economic growth at any price, as the driving motivation for regulatory determinations.¹² This transition, as the recent international financial meltdown and its aftermath reveal,¹³ will not be painless. To date legal regulation has not assumed much more than a reactive or curative role in this journey.¹⁴ This arguably being so, the chapter proposes that by reshaping the regulatory principles motivating law's influence over private property rights and protections (and activating law's regulatory involvement through such motivations), social and economic sustainability can be fostered in market settings,¹⁵ which would thereby ensure more enduring social location for labour force and for law.¹⁶

This text builds on our earlier arguments (Findlay and Lim, 2014) that through considering mechanisms of social bonding in transitional and developing economies, and contrasting these with the regulatory features which dislocate North World market economies,¹⁷ it is possible to speculate on how regulation can advance sustainability in a new economic model. For the purposes of this chapter any such new model, when it comes to the use of legal regulation over private property relations, will value conditions of social bonding and responsibility in a similar way that wealth creation and growth have been the regulatory values of the global economic system now under strain.¹⁸

What does all this have to say about a more specific appreciation of law and its regulatory utility in emerging and transitional economies,

¹² This is not to be confused with the movement for sustainable wealth creation even though we agree with its emphasis on 'recapitalising' social capital. See Singapore Institute of Directors (2008). Rather it involves a fundamental redirection in regulatory principle. See UNESCO (1997).

¹³ See Findlay and Lim (2014), chapters 3 and 4.

¹⁴ Buckley and Arner (2011).

¹⁵ Again in this brief discussion we cannot pause to develop our conceptualisation of markets and market settings. Our thinking is shaped by the caution that in perceiving markets in terms of their social embeddedness, we should not take the market itself for granted (Krippner et al (2004), p. 110). The market is a theoretical entity in its own right. Markets are social objects and for the purposes of this project markets provide a framework for the exchange of value through identified social bonds.

¹⁶ See the discussion of market economies and social embeddedness in Findlay (2013), chapter 3.

¹⁷ Courts enforce legal values such as justice as an 'expression of requirements for stable social interactions and for predictable expectations in social relations' (Cotterrell (2010)). See also Cotterrell (1996), p. 17.

¹⁸ Laffont (1994).

such as many of those in South East Asia? The present chapter commences with a brief consideration of the wealth gaps which feature prominently (and some say disturbingly) in market economies where sustainability is in question. From here the argument asserts that an important dimension of unsustainable market economies is exclusionist and oppressive private property relationships, endorsed by law. Building on this position the chapter briefly introduces (to be developed as the analysis evolves) ways in which legal regulation can be transformed to assist in making private property arrangements more inclusive, accessible and generally beneficial, thereby contributing to the essential social bonds which establish and ensure sustainable market economies. These imperatives will drive the development of the book's analysis ongoing.

The case study selected to later demonstrate the unsustainability of market economies, where legal regulation (and its absence) currently contributes to disaggregated private property arrangements, is the migrant labour workforce in transitional and developed markets in the EU¹⁹ and ASEAN.²⁰ In Chapter 5 we particularly focus that investigation on migrant domestic workers as a unique population made vulnerable and dependent as law (migration and employment directed) perpetuates the discriminatory values of disembedded market economies through labour commodification as a depressed market value. The current chapter will explain the comparative enterprise utilising markets in these regions, and foreshadows the selection of essential characteristics which the law offers private property arrangements that currently challenge sustainability (such as contract and agency – chapters 4 and 5). In the chapter to follow we outline the fragile situation of workforce regulation (or under-regulation) against the migration/employment law nexus. Before that, we return to a critical theoretical matrix for appreciating market sustainability utilising the concepts of markets, morality and mutuality. So as to fully appreciate the utility of this frame we commence by examining income inequality as both a product of neo-liberal economic adventurism and a reason behind the challenge that this model poses to market sustainability. If we locate law's role in propping up the private property arrangements which feed and are fed by income inequality then the importance of this phenomenon is clear.

¹⁹ Bauer, Dietz, Zimmermann and Zwintz (2005).

²⁰ Hall (2011).

SUSTAINABILITY AND INCOME INEQUALITY

In 2011 the International Monetary Fund produced a Staff Note dealing with interpretations of the income inequality/sustainable growth nexus.²¹ The report explores the connection between income gap and unsustainable growth:

The relationship between income inequality and economic growth is complex. Some inequality is integral to the effective functioning of a market economy and the incentives needed for investment and growth. But inequality can also be destructive to growth, for example, by amplifying the risk of crisis or making it difficult for the poor to invest in education. The evidence has also been mixed: some find that average growth over long periods of time is higher with more initial equality; others find that an increase in equality today tends to lower growth in the near term.²²

Despite the division of empirical opinion one important finding of their research was that in developing economies growth is not persistent. Therefore, in looking at the projection of a nation state's economic growth where its sustainability is most perilous, it is important to explore how income distribution relates to these sharp growth breaks. The authors speculate that longer growth spells are robustly connected with more equality in income distribution. So the issue for growth in economies, particularly those that have sparked growth through fractured income distribution and structural inequality, is the clear medium-to-long-term damage these policies present for growth if not addressed.

Income inequality is fuelled by distorted labour value. Some commentators put this down to fundamental discrimination in the labour market.²³ In the chapter to follow we will identify how labour pricing inequities create profound conditions of dependency and vulnerability relationships that risk the sustainability of all key stakeholders in the labour market.

Much research on labour market sustainability relates to impoverished workforces.²⁴ Our analysis chooses to look at how income inequality in host countries, fuelled by labour pricing dysfunction in home and host

²¹ Berg and Ostry (2011).

²² Berg and Ostry (2011), p. 3.

²³ Much of the writings on gender income inequality in labour markets identify discrimination as the structural cause. See Arrow (1971); Humphries and Rubery (1984).

²⁴ Kitson M., Martin R. & Wilkinson F. (2000) 'Labour Markets, Social Justice and Economic Efficiency', *Cambridge Journal of Economics* 24(6): 631–41.

countries, has a critical impact on the sustainability of markets in both settings (see Chapter 6). In the case of much of labour migration it is rural poverty which triggers the journey to new markets of exploitation. The chapters to follow will show that labour migration is far from a passage of rags to riches. Even the argument that through remittances, the migrant worker is able to supplement failing markets in their home setting is in fact unsustainable. When NGOs in particular assert that even undervalued migrant labour benefits the worker and those reliant on this income in the home country,²⁵ they do so by taking the conditions of domestic poverty and economic underdevelopment as a given. While an issue too broad for adequate treatment in this text, the economic/political environments of many if not most of these home nation states are riddled with corruption and economic mismanagement. These essential structural failings are the drivers for rural impoverishment more than any inherent deprivation of organic work opportunity. Sustainable wage and subsistence labour levels would grow in the home economy if these core market characteristics were attacked. Migrant labour remittance relief provides respite for these market vulnerabilities and could be seen indirectly as buffering the inevitable social unrest that their perpetuation must produce. Justifying migrant labour and remittance dependency while not at the same time exposing the agents of domestic impoverishment (and the income gaps which expose their social destructiveness) is in policy terms to maintain unsustainable labour market flows driven from home to host by poverty. Indeed without this poverty trap the depressed labour price feeding migrant worker migration may indeed see some natural correction from home to host economies.²⁶

The full impact of migration on a village's income distribution is multifaceted and complex, and many components of this impact may not be quantifiable. For example, estimates of migrants' net contributions to household income need to take account of the full opportunity cost of migration, including income migrants would have contributed to their households had they not migrated. Migrants' net contributions to household income are a subset of the overall impact of migration on the household's resources and opportunities. For example, migration affects the household's income risk, the household's

²⁵ Jean, Causa, Jimenez and Wanner (2007); Hanson (2008).

²⁶ The other end of this momentum is evidenced in the employment preferences of migrant workers possessing basic wage labour information on which they can exert some job choice. For instance, many migrant domestic workers accept low paid employment opportunities in Singapore and Malaysia, in the eventual hope of using agency contacts to migrate on to the better paid and somewhat more secure labour markets of Hong Kong and Canada.

production and investment decisions, the household's rank, and so on. And remittances may favorably affect the distribution of income also via a filtering down effect, e.g., if they result in an increased demand for the products and services of the poorest households within the village.

This World Bank research into the income distribution realities of migrant labour goes on to suggest the development of unsustainable dependencies in home economies which are remittance dependent, especially in workforce markets which often are the least socially unsustainable:

Diverging views concerning the effect of out-migration on the distribution of income by size in rural sending areas and on rural welfare reflect assumptions about both short-term and long-term externalities associated with migrants' departure from their villages, the size of migrant remittances, and the position of migrant-sending households in the rural income distribution. They also reflect value judgements, in particular the weight attached to distributional versus mean income objectives and the weight attached to incomes of households at different points in the income distribution when calculating indices of inequality.²⁷

So it is not just wealth gaps in home or host countries that benefit from the critical lens of sustainability. The dependencies that develop economy-to-economy and market-to-market suggest dynamic forces at work which may assist the understanding of how migrant labour-sustained wealth gaps challenge market sustainability internal within and external beyond the migrant labour market.

Often the inequitable labour pricing of migrants is justified either by the assertion that even meagre wages are much superior to survival subsistence at home, and that the migrant is the rich-man on his/her return. Whether the latter is real or apocryphal, the research suggests that any such introduced wealth gaps do little to enhance social bonding in the home setting.²⁸ The issue of why the poor stay poor is not only a consequence of urban bias.²⁹ Studies that examine the wealth gaps between native and migrant workers indicate:

As pointed out by Gibson et al.³⁰ wealth differences between immigrants and natives contribute to an intergenerational transmission of disadvantage and to a slowing of immigrant assimilation ... policies seeking to reduce income

²⁷ Stark, Taylor and Yitzhaki (2013).

²⁸ Barajas, Chami, Fullenkamp, Gapen and Montiel (2009).

²⁹ Lipton (1977).

³⁰ Gibson, Le and Stillman (2007).

inequalities may remain ineffective in reducing wealth inequalities, as wealth and income are likely to be distributed differently and be driven by different determinants, with bequests and intergenerational transfers being two such examples ... Our results show that native-born households are wealthier than immigrant households, even after controlling for household characteristics, the country of origin and migration cohort. This result is robust across the entire net wealth distribution, and is not affected by different economic structures and migration situations of the countries considered although the estimated effects vary. We also find that a higher age at migration carries different penalties across countries.³¹

Associated with this concern, and its ramifications for social cohesion, is the ancillary justification for migrant labour into developed economies: that in the short-to-medium-term at least this population flow can ease the cost of an aging population. Into the longer-term this economic benefit will be negatively offset if migrant workers are not assimilated into the domestic labour market and thereby contributing to social welfare and income taxation (discussed in Chapter 6).³² Wealth gaps, native to migrant workers, whatever direction in which they are perceived to flow, are a potent impediment to productive assimilation.

To extrapolate further on the consequences for sustainability of wealth gaps and inequitable income distribution, if law facilitates such inequality through private property relations, it should be instructive to examine migrant labour markets in a nation state where this correlation is clear. Singapore provides just such a market example. However, before we examine this example, we engage economic externalities that are challenging the form of domestic labour markets in ways similar to the devalued commodification of migrant labour, to seek out similarities in the way regulation or its absence can negatively impact the longer-term sustainability of labour markets.

LABOUR VALUE AND THE FAST-APPROACHING DEMAND LABOUR AGE

Rousseau in his *Discourse on Inequality* argues on from the dominion of greater physical strength, that in modern societies the creation of laws and property has corrupted natural men and created new forms of inequality, neither being in accordance with natural law or natural selection. As unjustifiable, unacceptable forms of *morality* through legal

³¹ Mathä, Porpiglia and Sierminska (2011), pp. 8 and 31.

³² Dustmann (2000); Castles (2006); Portes (2007).

inequality, they must be contested. For Rousseau, whatever causes man to leave a state of nature and enter civil society, private property and law create a conflict between rich and poor. Thereby man is corrupted only by his own delusions of perfectability and the harmful elements of his capacity for reason. Social contract, with a major focus on the artificial division of labour, is in significant part a negotiation of private property, away from the harmony of natural man.

Migrant labour markets have perfected the corrupting potential of private property arrangements. As the book progresses we will return to the market forces which unnaturally deflate the value and pricing of migrant labour. We will argue that it is not enough to explain discriminatory migrant labour value and pricing in terms of the poor public protection of property rights or wasted private protections, but rather it is much more fundamentally about how the market perceives the individual dignity of migrant workers and their property in their labour. Confirmation of this lies in the argument that devalued migrant labour would not be possible without the acquiescence of the migrants themselves. The implication of this justification is that impoverishment within sending countries, while not being the sole driver of migrant labour markets, is the essential context in which migrant workers struggle with each other for the dubious privilege of labour exploitation in the receiving labour markets. The terms on which migrant labour pricing is struck feed on the disempowerment of migrant labour as their labour force is commodified against the shadow of poverty and desperate survival obligations.

In a recent article discussing the current market trend towards *work on demand*, lack of job security, unpredictability of opportunity and the absence of genuine agency are identified as the dangers inherent in this developing labour market model.³³ If employees morph into independent contractors, the threat of a *Mechanical Turk Economy* through the monetisation of downtime has the article asking of conventional labour environments: what kind of private lives can we possibly have, what kind of relationships, what kind of families? However, at the same time developed economies thrive on migrant labour markets with undervalued workers, about whom no such fundamental life-style questions are considered, nor are measures of individual dignity valued even as a pricing base-line.

³³ Manjoo (2015). An interesting comparison can be drawn with the insecure conditions of employment which fuel the EU job flexibility/economic growth policy discussed in chapter 6.

LABOUR PRICING AND WEALTH GAPS – THE SINGAPORE EXPERIENCE

The *Financial Times*³⁴ singles out the exploitation of cheap labour as both a key factor in Asia's recent economic growth, and in the wider perspective, the suppression of general wages which this distorted labour market feeds. Where migrant labour sustains construction and real estate development, local labour either eschews or is excluded from such an employment band. As a result the unskilled labour market for local workers is contracted, and the price of that labour is constrained through comparison with prevailing salaries in the construction (and domestic services) sectors where migrant labour dominates. On the other side of the market, real estate development is an artificially lucrative investment as a consequence of high margins of return ensured through suppressed labour value.

As the experience of many Asian transitional economies shows, these conditions overheat all levels of real estate commerce creating wealth bubbles, over-extended credit gearing and barriers to entry which produce conditions of unsustainable economic inequality and eventual social unrest.³⁵ It is argued that along with the advance of technology and the eradication of poverty, the promotion of *employment friendly* workforce regulation is crucial for contracting the wealth gap and creating a future for sustainable economic growth through a more balanced labour market where value and exchange are more aligned.³⁶ In her review of globalisation's impact on Singapore's socio-economic development, Amaldas speculates:³⁷

As the Singapore economy moves into higher value-added goods due to globalisation, the widening income gap amongst its population becomes the key political challenge. The rate of accumulation of human capital through education and training needs to keep pace with the rising demand for more skilled workers as the economy moves on to a higher value-added industrial structure. This will increase the wages of skilled workers relative to low skilled workers and increase the income inequality and vulnerability of local

³⁴ Rhee (2012).

³⁵ In Singapore this has recently manifested in anti-foreigner sentiment, focused on the assumption that migrant labour challenges local employability, and migration upsets established racial balance. Concerning the former it takes no account of the critical economic reliance on migrant labour in the present workforce frame. See Tan (2013).

³⁶ Berg and Ostry (2011); Topel (1999).

³⁷ Amaldas (2009).

workers to the global trends. This suggests that education alone would be inadequate to manage income inequality in the future. Singapore may need more social welfare schemes to balance economic growth and the widening economic gap.³⁸

To date the Singapore government's approach to income inequality has not involved significant structural workforce reform. On the other hand the government seems to manage the widening income gap not by reducing income inequality but preferring,

... transparent attempts to reduce the real and imagined frustrations arising out of growing or high inequality. Managing may take various forms: national public discussions, ensuring equality in education and other opportunities, use of targeted and general subsidies and various other forms of asset redistribution, the extent of redistribution being a function of political will, economic imperatives and stage of development.³⁹

Despite this policy direction, and the continued ideological subscription to meritocracy, the Singapore government, following its recent 'national conversation' policy engagement, is selectively introducing mechanisms for transmitting gains throughout the economy and especially to the poor. Yet, as is later argued, without a radical repositioning of private property relations in Singapore, directed at the manual labourers and migrant workforce and the transaction of their labour, economic and social sustainability are at risk. As migrant workers and unskilled labour in Singapore only have their labour to sell, economic growth can only reach the poor if it increases the demand for their labour, by more realistically revaluing its price or providing complementary inputs that make their labour more productive.⁴⁰ In addition, a repositioning of law, as a determinant of private property relations that construct the workforce, can have direct influence on revaluing labour beyond skewed pricing through exploitative employment contracting.⁴¹

The Singapore migrant labour microcosm suggests a need to analyse current workforce practices and their economic attractiveness in generating selective individualised wealth, and promoting short-term economic growth, against even the domestic political realisation of this nexus as being economically and socially unsustainable in the medium-to-long-term. Consistent with this assertion that legal regulation repositioned to

³⁸ Singh (2008), pp. 313–30.

³⁹ Rao (1996), p. 360.

⁴⁰ Amaldas (2009), p. 995.

⁴¹ Findlay and Lim (2014a), chapter 4.

promote socially sustainable property relationships provides a regulatory solution to this unsustainable nexus, this work next offers three regulatory conditions which, depending on their contextual relationship with law and property, can either promote or retard sustainability.

CONTEXTUAL CONDITIONS FOR AND AGAINST SUSTAINABILITY

This year will represent almost two decades since the Kyoto protocol in 1995, over 20 since the Rio Summit in 1992 and disturbingly distant is the creation of the Brundtland Commission (1983) whose subsequent report, *Our common future* (1987), defined Sustainable Development as: Development that meets the needs of the present without compromising the ability of future generations to meet their own needs.⁴² It appears that we are now that future generation. But are our needs any closer to being met in even a market sense?

In proposing a guide for sustainable investment contracts the International Institute for Environment and Development identified the following issues:⁴³

- Choice among, and framing of, contract models to maximise sustainable development outcomes, for example through promoting more inclusive business models in the design and implementation of an investment project;
- Tools to maximise the economic benefits to the host country, including public revenues and non-revenue benefits like investment commitments, technology transfers and infrastructure development, as well as local content provisions that shape the extent to which the investment project creates local employment and business opportunities;
- Tools to balance economic with social and environmental considerations: environmental and social impact assessments and management systems, safeguards in land takings, social investment requirements and legal remedies for groups adversely affected by an investment project;
- Stabilisation and renegotiation clauses, which concern the evolution of the contractual relation over time and may be used to reconcile

⁴² UN General Assembly (1987), para. 1.

⁴³ Cotula (2010), pp. vi–vii.

the investor's need for a degree of stability with preserving host state capacity to take action in the public interest even if it adversely affects the project;

- Dispute settlement, including contractual provisions to regulate investment disputes that may arise under the contract and proper handling of disputes when they arise;
- Confidentiality provisions – acknowledging that although commercial confidentiality concerns may be at stake, openness and public scrutiny are essential to maximising sustainable development outcomes.

The list demonstrates a commitment to community inclusion. It is more than a celebration of law's collaboration in the autonomy of privileged interest (discussed in the context of dignity in Chapter 7). Maximising choice through inclusive business models, creating local employment and business opportunities, offering remedies for adversely affected groups, action in the public interest particularly through dispute settlement, and openness as the counterbalance to confidentiality each and all arguably represent more egalitarian legal regulation. In addition, these commitments speak to a more socially embedded market frame with a communitarian morality, reliant on and promoting mutual interests in a wider outreach. Choice in worker/employer negotiations is obviously empowering. As is discussed specifically in this book's later consideration of contracting, choice is nothing without essential knowledge regarding the contexts and constitutions of any choice preferred or imposed. The discussion of agency reveals how a denial of knowledge to workers disproportionately empowers agency influence and confuses the fiduciary relationships in favour of the agent/employer bond, at the cost of labour entitlement. These are not only considerations of rights compromised, but markets perverted in the cause of depressing labour value. In Chapter 4 where we examine the contract as a sustainable regulatory frame, and in Chapter 5 where we critically unpack law's role in agency, the significance of throwing a wider regulatory net over stakeholders' – now largely excluded from private property arrangements presently essential in market sustainability – exclusivity becomes the crucial justification for redirecting and expanding law's regulatory role. In order that the impact of regenerating law back to some of the central normative principles of agency and of contract can be evaluated, we suggest that the context of the market, its morality and the mutualities of interest which it expresses (and perhaps as yet excludes) need to be employed as analytical locations for the case study to follow. In addition, these locations provide the

opportunity to view law as currently a force against market sustainability, and then to base the trajectory for its move into sustainability 'insurance'.

The frame of our analytical matrix⁴⁴ for understanding the forces which work towards and away from social embeddedness, and thereby economic sustainability, is designed as three Ms: markets, moralities and mutualities. Advancing our thesis that the legal regulation of private property relationships can be a positive force for sustainability and social bonding, by examining these forces against our three general themes, we anticipate a clearer understanding of how law (as a regulatory agent) should actively contribute to social bonding within situations where such bonding is disembedded. In the context of currently unsustainable migrant labour workforce markets we argue that the sustainability of workforce relationships crucially depends on positive social bonding, which law is presently failing because of regulatory capture or inaction. From this example, in order to understand sustainability in terms of markets, moralities and mutualities, we propose a useful measure of the outcomes of a sustainability project through a model role for law as a purposive regulatory agent with sustainability as its objective. In so doing the later analysis of migrant labour dependencies and vulnerabilities in particular, suggests crucial conditional interpretations of regulation which must move from individualised to mutual interests, advancing and not retarding positive social bonding within labour forces. Law is chosen as a regulatory agent with social justice at its normative core and discriminatory private property relationships as its contemporary labour market regulatory focus.

Markets

The resilience of the market as an idea, a place, a framework of exchange and mechanisms of interest enhancement depends on the social and economic interconnectedness of human beings from which exchange relationships grow.⁴⁵ Law as a regulatory terrain defines, delimits and determines these exchange relationships. As such, law retains a potential to reposition exchange relationships as forces for market sustainability. Market morality and stakeholder mutuality are platforms from which the

⁴⁴ Which is introduced and developed in greater detail in Findlay and Lim (2014a), chapter 4.

⁴⁵ Whether for primitive subsistence, or as the recent global financial collapse has shown, for corporate greed (revealed through excessive amounts of risk in order to gain 'free money' (Leith (2008)).

expressive and facilitative roles for the legal regulation play out.⁴⁶ Property rights ensuring either individualised wealth or sustainability as a general good, help standardise the form of products for market exchange (both tangible and intangible), being adapted for diverse, massive and frequent transaction; wage labour being an important example.⁴⁷ In the case of labour markets, the worker sells labour and the owner/manager purchases productivity under conditions essentially determined by private property relations (such as contracts), or by their absence which creates conditions determined by more predatory power relations if labour is in surplus. Migrant labour markets are attractive to the more powerful interests in an employment contract (and often to the state) because labour power is in surplus and transacted in conditions of poverty compulsion. The unbalanced and often discriminatory regulatory purpose of private property rights and obligations within the migrant workforce marketplace is revealed when considering the fictional instruments of exchange⁴⁸ which delineate ownership and entitlement provided by private property rights, from the transfer of labour power resources in arrangements which exploit labour surplus and exclusion from actionability (such as migrant workforces moving from underprivileged to more lucrative work opportunities).⁴⁹ It is well documented how the specialisation and division of labour cut across organic social bonding such that capitalist/labour relations become intensely distorted.⁵⁰ For migrant labour, its dispossession into environments of exploitation, moving from situations of deprivation, means that the host market feeds off and depends on fundamental social dislocation (see Chapter 2). In theory (or in labour markets which value labour power), law steps in to regulate such situations back to order for the benefit of private property value and exclusivity, or for the benefit of organised labour and collective bargaining. Law's failure in this regard, where migrant labour is concerned, is a consequence of exploitative and under-regulated workforce governance, and the incapacity of the market to correctly value labour power in situations of oversupply, the absence of organised labour representation and of collective bargaining in any balanced sense (see Chapter 2).⁵¹

⁴⁶ Morgan and Yeung (2007), introduction and chapter 1.

⁴⁷ De Soto (1993), p. 3.

⁴⁸ Dale (2010).

⁴⁹ Athukorala, Fukao and Yuan T. (2009).

⁵⁰ Silver (1994); Sirianni (1984).

⁵¹ This is obviously so, when supply contracts and the market is forced to consider and compensate productive labour rather than always gear down to

In the context of private property relations within the labour market, it is not difficult to imagine how a similar transformation takes place when the categories of property multiply as market players try to distinguish a new and more valuable labour relationship from what already exists in market exchange. This is a destructive trend for social bonding if externally unbalanced market interactions lose connection with critical and essential social backgrounds and contexts, where sustainability is their primary value.⁵² In migrant labour markets for instance, wage is not a measure of the objective or productive value of labour but rather of how little disempowered market players (comprising the supply of labour) are willing to tolerate.

Any convincing attack on disembedded market economies and their proclivities will first address the neo-liberalist conflation of the market's function as an analytical tool with its associated normative ideal (distorted by unquestioning acceptance of problematic variables such as competition and unregulated currency exchange).⁵³ For migrant labour markets, competition has been neutered by over-supply and poverty compulsion. The organic regulatory counterbalances which come with the realistic market value of labour have been disengaged and replaced by a mechanical rush to the bottom, being lowest tolerable wages and conditions often enforced by state prohibitions on industrial dissent, and immigration policies which create intense job insecurity.

Even if we seek to constrain law's role to facilitating the efficient allocation of scarce resources, it should not follow (if law is just) that the resultant market analysis has to be actualised into material benefit largely for those who profit from resources which are much more renewable (such as all resources with a focus on the productivity of labour power rather than raw materials).⁵⁴ Accepting (which we essentially do not) the retention of markets as the mechanism for determining who has the greatest need or who is able to produce the most value, it does not follow that owners/managers of the means of production, being protected through law by the existing scheme of private property rights, should receive as their personal income, monetary equivalents offset by the market's evaluation of labour force product, which does not materialise in the form of reasonable or proportionate wage compensation for that labour power. Rather, the prices arrived at through the operation of the

labour markets where capacity and productivity are lower, but labour value remains cheap.

⁵² Markova (2006).

⁵³ Boettke (1994), p. 272; also see Findlay and Lim (2014a), chapter 3.

⁵⁴ Rawls (2008), p. 350.

market can only retain their function as realistic or commensurate economic indicators used to derive a scheme of economic activities based on allocative efficiency, when they are determined consistently against features of social sustainability which value other things besides money and exchange. Where migrant labour is concerned this enhanced determination of value may well be an emphasis on the nexus between worker satisfaction, work security and productivity (absent considerations in the present 'free movement of labour' policy model).⁵⁵

For migrant labour an equitable market price actualisation of wages is unlikely where the value of labour is overtaken by factors within and beyond the host market; within it could be the weakness or absence of legal regulation which would otherwise require fair payment practices or empowered inclusion in contractual bargaining, and external are the conditions in the home market which make migrant workers willing to tolerate exploitation or be powerless to resist it. In this state of learned helplessness the migrant worker is vulnerable to any market under-valuation of labour power.⁵⁶

While the prices paid as income for labour power can be quantified in terms of the actual cost of renewing such resources, the prices imputed to consumption and production, unlike labour power, may have no distributive role because consumption in particular is both fragmented and sometimes indifferent to resource renewability. For instance, as mentioned in our later consideration of contracting and intellectual commons, the production and consumption of knowledge, released from copyright price may enhance renewability and general social valuing, but do nothing to redistribute the economic value of pre-existing knowledge commodification. Particularly for migrant labour markets, the link between renewability and sustainability, we argue, is crucial. In this sense we are not conceiving renewability as just the next worker when the last has been expended. More essentially, for sustainable labour markets with a mix of local and migrant workers, it is the renewability of orderly market bonding such as that which leads to trust and loyalty that we would argue is an important and viable project for legal regulation.

In the capitalist world order, the distributive role for inputs of productivity other than labour (such as natural resource allocation or managerial innovation) still exists, and more critically now in times of

⁵⁵ Ruhs (2013).

⁵⁶ Valuation here should not be seen simply in terms of wages, as a fictional exchange commodity wage alone cannot ensure sustainable labour market arrangements. Wider issues of worker bonding to the market must also be factored into the sustainability argument.

radical resource depletion. It is another regulatory role for law to ensure the efficient distribution of resources designed to direct these inputs and prevent any downward spiral denying income equity, maintained by a system of private property rights which risks market sustainability through the selfish exploitation of resources, particularly wage labour. Law's normative frame, as we see in the discussion of contract and agency (in chapters 4 and 5), is well designed to this task. Legal regulation towards sustainability can distinguish between the use of the market to organise economic activities efficiently, and to endorse a system of private property relations in which the worth of resources is only measured through the personal income of the owners by virtue of what are often coincidental rights of ownership. In such contexts law needs to participate in a remoralising of corporate advantage in labour markets and property benefit, if these markets and benefits are to be sustainable into the economic and social future. This re-directive role does not need a moral justification, though it has one, but in a market context may essentially achieve a mutual objective of market viability in a new sustainable form.

Moralities

Moralities are significant as a social bonding context. This view recognises more than the need for a *human face* covering the inhumanity of economic despotism. Arising out of the earlier proposed correlation between sustainability and social bonding, such social ties can be determined as sustainable or strained. Sustainability implies greater equity and that necessitates at least a consideration of social responsibility which is built on mutualised moralities. Mutualising morality does not necessitate a common stand on all moral questions. Rather, it anticipates that diverse views will congregate around the essential aspiration for a sustainable society, in which market economy may play an important role. A corollary to this is that disembedded market economies may be immoral because their emphasis on individualism and exponential growth for wealth is socially unsustainable. The move from individual to mutual interest is both motivated by fearful necessity and mutualised morality.⁵⁷ Where the wealth creation regulatory focus for motivating regulatory principle has time and again failed society, it is only through a remoralisation of market relationships that sustainable outcomes can be ensured. The morality argument for private property rights as it stands is limited in

⁵⁷ Michnik (1990).

scope, and we see it mainly as providing these conditions for individualist advancement, which our analysis determines to be an unsustainable moral motivation.⁵⁸

A facilitator of market remoralisation, and a bonding agent for market mutualities is trust. Trust is a major player in the regulatory game within more communitarian and subsistence world contexts. Social bonding relies on trust as a regulator in such contexts, thereby enabling society to maintain crucial mutualities of interest such as market sustainability. Realising that these mutualities can be sustainable even without the interference of law as constructed by and for the essential pre-conditions enabling economic order, explains law's role being where and when trust is lost. Contract arrangements, if they are to be viable as constructive market arrangements, rely on compliance rather than rigid recourse for breach. If trust does not underpin contracting, then the contract becomes a punitive regulator rather than a reassurance of market mutualities (see Chapter 4).

There can be no better example of a trust barren regulatory space than exploitative migrant labour markets. Within this set of arrangements, crucial trust deficits in private property market frames are agency relationships (or their constraint, even denial) wherein the worker has no genuine representation, and where the worker cannot play any actual role as a free and responsible agent (see Chapter 4).

Reflecting on *free and responsible agents*, conceptualised to describe individuals and corporate personalities interacting within the market and governed by contract law or agency, we argue against the self-centred and power-imbalanced moralities (or lack thereof) in systems where sometimes exploitative individualised ownership is supported by exclusionist private property rights.⁵⁹ Marketing migrant labour under capitalist conditions, is not a libertarian exercise of parity, 'clean hands' and unconscionability. At the most basic level of worker/agent/employer/state engagement, there cannot be said to be any individual, interest-free independence guaranteed by the freedom of contract in reality where participation is not equal and parity is only really normative. The surplus value assumed for labour if it is in abundant or non-discriminating supply, means that the bargaining value offered by surplus labour eventually dispossesses workers from the essential commodity necessary to sustain and maintain their labour power – that being a living wage. This outcome results from exchange/price disempowerment experienced

⁵⁸ Boettke (1994), p. 274.

⁵⁹ Rawls (2008), p. 324.

by workers who have no actionable way to anticipate or influence how much labour power they have to invest and gain returns from, in order to purchase commodities for their own subsistence, when price and cost are determined by markets in which they have no moral or practical purchase.⁶⁰ This disconnect between the normative guarantees of contract law, and the reality of labour price bargaining is another critical opportunity for the corrective influence of legal regulation principled on market sustainability rather than the protection of exploitative wealth creation.

In our earlier work we proposed the pathway to being *responsible agents* within liberated contract arrangements is that workers and owners need to enter into and respect *binding social agreements* which ensure compliance with orderly and amicable price and cost frameworks, guaranteed by the legally-endorsed certainty that the cost of breaching such agreements outweighs the benefits of doing so.⁶¹ In order that legal regulation might return systems of commercial transaction, through trust-based contracting to the normative preconditions of contract law, the market has to value sustainability above the wealth creation and growth benefits for the powerful interests in constrained contract domains.

Mutualities

This field of analysis is critically reliant on achieving successful outcomes in market and morality arrangements. Currently law's role in negotiating benefit in labour force arrangements is very much dependent on the nature of the interests being advanced and the positions of power (or the lack of it) enjoyed by key stakeholders in these arrangements. All too commonly law, in the form of labour contracting, is not designed to achieve mutuality. Rather law protects the individualised property interests of those parties dominating the exchange environment. Regulatory mechanisms ensuring the mutualisation of interests should be mechanisms guaranteeing that productive and valuable workforce arrangements are attained and sustained. In the case of migrant labour it is the significant structural imbalances of power to contract and to negotiate and enforce mutually beneficial contract terms which makes employment contracts unbalanced regulatory implements. The powers of the employers, often enhanced through a patchy canvas of employment protection laws, is off-set by institutional impediments to the workers' bargaining

⁶⁰ Rawls (2008), pp. 326–7.

⁶¹ Findlay and Lim (2014a), chapter 4. Also see Birmingham (1970), p. 284; Goetz and Scott (1977).

position. This imbalance mocks some of the fundamental principles (and fictions) of contract law, such as parity (see Chapter 4). For migrant workers, the poverty compulsion out of the workforce options in their home jurisdiction, and their uncertain residency status in the guest market (discussed in Chapter 2) further destabilises and disempowers their bargaining capacity. In such market conditions the contract is a regulatory device which implicitly or explicitly skews the more organic market forces which value labour. In addition the power differential between employer and employee makes the contract largely nonactionable from the worker's point of view when her meagre contractual protections are not forthcoming.

Polanyi intimates that organised labour is a mechanism which can redress contractual imbalance in workers' bargaining power.⁶² The potential in a guild labour model offers the possibility of stronger and more diverse bargaining terrain, and if such organised labour mechanisms are available to migrant workers then the contract can be transformed into a mutualising mechanism. Unfortunately as chapters 2 and 6 detail, some state law specifically excludes migrant workers from this mutualising mechanism.

Positive market *mutualities* are social bonds forming market relationships, which in turn should maintain wider social sustainability through ensuring the essential social benefit of market outcomes. In the migrant labour force context, mutuality has been substituted by exploitation and simmering hostility. For the sake of medium-term market productivity alone legal regulation needs to intervene and create bridges and pathways for the mutualisation of common market interests which are both sustainability and productive market exchange.

Mutuality of interests can be determined and engineered by law through the establishment and maintenance of *binding social agreements* (as distinct from flimsy and one-sided contractual constellations). These arrangements are a new way of conceiving labour contracts and depend on inclusion and accessibility of private property benefit for ultimate market sustainability. We later touch on these as market sector contracts which benefit classes of market stakeholders (see Chapter 7).

How does law defer or deny the mutuality of interests that would make more available access to property and capital and thereby expand mutualised benefit (and economic social responsibility)? The mutualised advantage of more accessible property arrangements has to first be identified and then acknowledged along with the benefits that more

⁶² Dale (2010), p. 87.

distributive justice can bring, in particular the sustainability of both legal regulation and the property relations that it now normatively endorses. Therefore, with social sustainability as a core regulatory outcome, mutualities become the focus of law as social bonding.⁶³ It may be strange to apply the language of social bonding to labour markets which have for so long been adversarial and at times confrontational. We suggest that this negative mindset is a product of post-Fordist labour relations epitomised in the migrant work force context. If productivity is a genuine purpose for labour relations (and in certain contexts we doubt even this) then mutualities based on trust and shared benefit are much more likely to maximise the conditions and *wealth* of productivity than short-term exploitation and medium-term subjugation. Law can be a corrective agent in this shift of commercial consciousness. The stimulant towards this shift for reluctant market players is the eventually-realised risk of productive labour power drain.⁶⁴

Having foreshadowed our argument regarding the need for a commitment to collaborative, distributive justice, regarding market knowledge and power (see Chapter 4) and other foundations of inclusiveness and shared progress – all of which fall squarely within the term general social good – the procedures or mechanisms to facilitate such shared outcomes require more concentrated analysis. The section to follow briefly returns to the dysfunctional, and socially disembedded features of Singapore's migrant labour force in order to give a location for law's failing as a regulatory mechanism for general social good within a transitional economy which has a clearly unsustainable migrant labour foundation. It identifies for later analysis (see Chapter 6) law's failure as a regulatory agent beyond the advancement of individualised wealth creation and exclusionist capital/labour relations. This discussion is a precursor to any argument for a shift in regulatory principle and a transformation in law's role when regulating a healthy and socially located employment market, and more inclusive and generally beneficial private property relations.

WORKFORCE REGULATION: LAW'S FAILING OR OPPORTUNITIES FOR REPOSITIONING?

Alleging failure of law's regulatory presence (or absence) in the migrant labour market, when measured against sustainable market arrangements

⁶³ Rawls (2008), p. 351.

⁶⁴ Akerlof and Yellen (1985); Boldrin and Horvath (1995).

and the outcome of a general common good, it is necessary to note how the migrant worker/agent/employer/government/civil society dynamic in economies such as Singapore relies on the maintenance of exclusionist and repressive private property arrangements. This reliance is made clearer through examining how law can address its failings when applied across the interests of all contracting parties, and thereby suggesting the need to include vulnerable stakeholders and make accessible to them law's protections as crucial conditions of the workforce market that at present are repressive and exclusionist against labour power's interests. In so doing it will be the absence of law perhaps more than its discriminatory protective dimension which is a feature of its regulatory purchase.

The contexts of disembedding migrant labour transition are sequential and recurrent. The labourer and the agent situated in his home country (the home agent) negotiate terms which are usually exploitative of the worker and his family sponsors, and even these terms are often eventually illusory. The worker embarks on a relentless passage of obligation wherein she is required to invest relatively large capital outlay for tenuous immigration status and employment contracts. The status of the home agent is certainly not as a representative of the worker's interests even in the negotiation of the original contract terms of engagement. For example, it is not clear in the practices of the Singapore agents or of any eventual employer whether or not the agency connections, from home to host jurisdiction, can be enforced by the worker in any legally recognised contractual conveyance. As Chapter 5 suggests, the whole purpose of agency law is to clarify the delegated role of the agent and to specify rather than obfuscate legal lines of responsibility which contract can ensure, and professional trust can reassure.

Market situations of social disembeddedness (and where as of now legal regulation is all but absent) in the migrant labour market involve the:

1. need for the prospective worker to pay home agency fees and travel costs on the uncertain promise of employment;
2. negotiations of contract terms with the home agent acting in their interests, and often with state oversight;
3. immigration status on arrival in Singapore being conditional on the existence and continuation of work contracts;
4. negotiation of contract terms with Singapore agents in the interests of the agent and the eventual employers;
5. reality after employment engagement, of the regular failure of contract conditions either in terms of the home agency, the practice

- of Singapore agents, the industrial arrangements by the employer, each pitted against the reasonable expectations of the workers; and
6. residency vulnerability of the worker if in dispute with an employer or between employment contracts.⁶⁵

Chapter 4 identifies contract law as a crucial platform from which legal regulation either advances or retards private property arrangements, in turn promoting or preventing sustainable market conditions. Legal residualism and regulatory reticence hallmark the manner in which employment law (and employment contractual conditions) in Singapore discriminate matters for contractual attention or legislative selectivity. The distinction drawn between *legislated matters* (matters relating to non-payment of salary or overtime wages, working hours and illegal deductions from the worker's salary)⁶⁶ and *non-legislated matters* (disputes relating to the working conditions, contractual conditions, the job scope, and the amount of salary),⁶⁷ can only be made sense of if the private property relations so regulated are skewed by legislated law away from the worker and towards employer/agency interest. The reason for this conclusion rests in the apparent illogicality of distinctions such that salary payment may have legal protection but not salary terms.

While the heart of law's failing here can be easily exposed through the disconnect between the normative guaranties of contract law principles, and the hard edge of industrial relations, normative cornerstones such as privity and parity of contract, lacking as they seem to be in practice, hold the key to private law rejuvenating more equitable and sustainable legal regulation (see Chapter 3). At present exclusion from contractual advantage and protection is the legal and intended consequence of contractual

⁶⁵ (3) results in (6) because (3) means that the employer has complete power over the worker's eligibility to remain in the country (because the employer has total discretionary power to terminate the employment agreement). Thus if the employee is in dispute with the employer the latter can make litigation of the matter next to impossible through contract termination and the adverse effect that has on the disputant remaining in the jurisdiction.

⁶⁶ Sections 21 (non-payment of salary), 27 (unauthorised deductions) and 38(4) (overtime salary) of the Employment Act (Cap. 91).

⁶⁷ 'Some 600 statutory employment claims (e.g. non-payment of salary or overtime pay, unauthorised deductions made from salary etc.) are processed every month, which are resolved through conciliation or adjudication by the Labour Court. More than 90% of such cases are settled within one month. For non-statutory contractual grievances related to the workplace (e.g. dissatisfaction with employment terms, wages, job scope), workers should raise the matter with the company or their unions who can take up their grievances.' See Tan (2012).

selectivity extended through the preferential positioning of employer interest, and the tolerance of perpetual breaches of limited worker protection through the state's blind eye or hands off approaches to inspection of enforcement. In addition, the exposure of power imbalances between contracting parties can identify the interests behind these disparities and open up possibilities for their reconciliation.

MUTUALISING THE DEGRADATION OF SOCIAL RELATIONS

Lacher highlights that the central thrusts of Polanyi's historico-cultural anthropology was how it distinguishes itself from Marxist and social-democratic political projects: by identifying as the problem of the market system the degradation of social relations, the destruction of the substance of humanity and its natural environment (as compared with targeting exploitation and low wages as the Marxists do).⁶⁸ With resistance to the profit motive and the self-regulating market at the centre of his writing, Polanyi formulates his expectation of a new great transformation (and thereby the conditions of reembeddedness as he sees it):⁶⁹

... the market system will no longer be self-regulating, even in principle, since it will no longer comprise labour, land and money. To take labour out of the market means a transformation as radical as was the establishment of the competitive market. The wage contract ceases to be a private contract except on subordinate and accessory points. Not only the conditions in the factory, hours of work, and modalities of contract, but the basic wage itself, are determined outside the market. ... To remove the land from the market is synonymous with the incorporation of land with definite institutions such as the homestead, the co-operative, the factory ... However widespread individual ownership of farms will continue to be, contracts in respect to land tenure need deal with accessories only, since the essentials are removed from the market. The same applies to staple foods and organic raw materials, since the fixing of prices in respect to them is not left to the market. ... The nature of property, of course, undergoes a deep change in consequence of such measures since there is no longer any need to allow incomes from the title of property to grow without bounds, merely in order to ensure employment, production, and the use of resources in society.

Therefore, Lacher argues that reembeddedness has to go to the root of removing labour, land and money from the control of the market system.

⁶⁸ Lacher (2007).

⁶⁹ Polanyi (1944), pp. 259–60.

And this is envisaged by Polanyi to be achieved through a revision of the notion of property (and thereby private property rights) and the extent to which contracts override other more fundamental means of social bonding through regulation that preserves humanity. The disconnect between our summary of the legal regulatory terrain and migrant employment arrangements can at the very least support a conclusion that the state, often through fundamental misrepresentations of its regulatory objectives (see Chapter 2), aligns with the law it sponsors in advancing employer interests in the private property relations which determine the migrant labour market. The challenge for repositioning law outside this degraded sponsorship/servile relationship for law is to address market interest imbalance, even if for no other reason than medium-term market sustainability, by levelling out in particular, contractual issues of obligation, rights and actionability. Law needs to have a more holistic presence if it is to cover an expanded interest base. Its expressive function must clearly declare an interest in redressing imbalance. Its facilitating bite must be directed to:

- more detailed and objective legislative coverage with clear enforcement pathways;
- the determination of delegated authority with rigorous and transparent oversight powers and practice;
- a framework of independent arbitration and judicial review which is equal to other areas of law;
- dismissal and repatriation protections to enable actionability of protections by workers; and
- uniform insurance reporting requirements.

Regarding unsustainable migrant labour markets, in order to enable this transition in legal regulation there needs to be, as noted earlier, effective intervention at each critical stage of the work contract formulation. Typically this would involve:

- a claim of extra-territorial jurisdiction from the home (sending) to the host (receiving) states (or through bilateral arrangement) to ensure minimum conditions governing agency representations. In addition, both the receiving state labour agent and the eventual employer would be required to recognise a chain of agency in which each party was responsible for the crucial representations made to prospective employees up to and including the signing of

the agreement. Host state agents would be required to act as the worker's agent, and not as the agent of self-interest and the employer;

- legislation stipulating minimum standard wage amounts and payment conditions, working hours, workplace conditions, and industrial health and safety;
- immigration conditions which would provide reasonable amnesty on repatriation if the worker is dismissed from employment while the worker is in dispute with the employer;
- creation of arbitration and adjudication facilities which are designed to resolve workplace disputes with equal rights and facilities for representation;
- creation of universal insurance requirements and facilities for labour organisation; and
- creation and implementation of an active inspectorate function with specific reporting requirements and detailed compliance and enforcement provisions. The inspectorate should focus on contract compliance and workplace conditions and not just on state licensing requirements. Attached to this should be a worker/employer complaints mechanism and public interest oversight. The inspectorate should have particular responsibility for agency practice, contract term compliance, workplace conditions and worker health and welfare.

Recognising the responsibility of law in enabling private property relations which fuel sustainable market failure, this chapter triggers an argument for redirecting the regulatory focus of law so as to reconsider the meanings and values of crucial market variables such as labour power. Central in this transition is law's expressive and facilitative influence which can move private property rights and obligations in the direction of sustainable social relations.

EPHEMERAL – PERPETUAL

One of the conceptual challenges when employing sustainability (as social bonding) for the purposes of regulatory principle is confronting the ephemeral/perpetual antonyms. In terms of both temporal and spatial considerations something may be ephemeral because it is transitory, transient, fleeting, passing, short-lived, momentary, brief, short, cursory, temporary, impermanent and short-term. As for perpetual we think about everlasting. Sustainability resides somewhere between.

Under the banner ‘Ephemeral was yesterday, sustainable is tomorrow’ a wine producer’s website posts this about sustainability:

In order to face the market evolutions and to respond to tomorrow’s requirements, the wine coop signs up for the 3D process: destination, development and durability, which are the conditions for sustainable development. This process aims to evaluate the impact of the company’s activities on the economic, environmental and social circles of the society ... (we have) launched an action plan with the objective of improving its societal performance.⁷⁰

Borrowing from this mission statement, the analysis to follow looks to sustainability as a destination. Social bonding on its own is a process that can achieve beneficial or detrimental outcomes for individuals and communities. Bonding as enslavement within fundamentalist and exploitative cultures is not a *general good*. Therefore, when advancing sustainability as a regulatory purpose the argument must make clear what sustainable outcomes it prefers. For example, there are many subjective value judgements in constructing and determining political economy which will inform preferences for higher or lower taxation, or more or less rights for workers. Fortunately the normative frames of legal fields such as contract (Chapter 4) and agency (Chapter 5) clearly offer outcomes which define constituents of a common good. Development in a swathe of the sustainability literature is identified as the preferred futurist, even global economic terrain. There seems a resonant timidity to admit that social sustainability may not only sit incompatibly with contemporary development models, but it may be these models premised on exponential growth, which effectively diminish and even undermine sustainable outcomes. In the argument to follow, we embrace Polanyi’s position that even with socio-economic development, economy must be subsumed within and supportive of social bonding towards a general good. Durability might be considered to be interchangeable with sustainability. The application of sustainable regulation and regulating for sustainability does not take durability as a given. This is where the ephemeral becomes the perennial. Advocates of sustainable development argue that the consideration of natural environmental factors when pursuing development, as well as economic and social factors, is vital in order to safeguard the ability of future generations to also enjoy an increased standard of living: what the Brundtland Commission referred to as ‘meeting the needs of present without compromising the ability of

⁷⁰ Cave du Marmandais website.

future generations to meet their own needs'.⁷¹ Despite the obvious *North World-centric* science and rhetoric which argue that the environment and development are congruent, from the perspective of social sustainability many sustainable development projects fail the measure of reflecting and respecting the interests of the community where they locate.⁷² Economic development is primarily prosecuted for the benefit of the modern state,⁷³ along with the supra-national interests of global commerce, and the legal instruments which enable development projects to consciously exclude the interests of local communities which not only fail to benefit in the development push, but are all too often sacrificed on the altar of growth.⁷⁴ Sustainable development may not be about durable sustainability where development priorities prevail over community sustainability inclusive of *general good*. Anthropology has done much to expose this disconnect and it benefits our analysis to follow which works from the premise that economic growth models promoting individual wealth creation are antipathetic to sustainable regulation.

Anthropological critiques of sustainable development, in keeping with the discipline's general 'grass-roots' focus, are based on the argument that the inclusion of environmental concerns within the framework of development projects often results in the interests and expectations of external actors being served over those of the target communities. As we have seen, this is due to the way in which the inclusion of environmental concerns, preferences, etc over emic perspectives, and how, on a more practical level, this theoretical preference within the discourse results in environmental concerns being addressed ahead of the interests of the target communities. This, we have seen, is possible through the way the decision making and planning capacities of both the state and international donors are informed by the dominant discourse.⁷⁵

UTOPIA OR RELEVANCE

Perhaps this juxtaposition can only be raised in an introduction as a caveat designed to instil in the reader the confidence to continue. We anticipate even at this early stage of our argument that some will be wondering whether the analysis can ever extract itself from the land of

⁷¹ Referred to in Smyth (2011).

⁷² Escobar (1995).

⁷³ Scott (1998).

⁷⁴ Brosius (1999).

⁷⁵ Smyth (2011), p. 83. See also Edelman and Haugerad (2004).

dreams. Why would a hard-bitten employer or a pragmatic state policy-maker or a self-interested agent be induced into a paradigm regulatory shift which values market sustainability over shorter-term wealth creation? The answer to this lies in our work on sociability.⁷⁶ The sociability approach argues that despite differing pathways of interest, stakeholders can come together through the appreciation of shared risk (in this case the disappearance of a functional and profitable labour market), and work towards a shared fate outcome (sustainable market conditions in environments of finite resourcing and failing regulatory inoculation).

The larger question is why would law as a regulatory paradigm be amenable to repositioning away from the exclusionist protection of private property arrangements which has made lawyers wealthy for generations? To this we answer, relevance. The text that follows will give regular instances where as a consequence of its suspect alliance with the forces which undermine market sustainability, law is squandering its regulatory relevance. In these terms the question does not simply call on the sacrifice of self-interest but rather it predicts a call for survival.⁷⁷

Relevance is a central evidentiary question for law in determining the tools of proof. However, as Ian Dennis observes:

In contrast to all modern codes of evidence, English law has no authoritative or common law definition of the core concept of relevance.⁷⁸

This absence of definition might reveal the attitude that *relevance* is such a fundamental legal determinant, and so common a question in the application of law that beyond the boundaries of common-sense it does not demand specification. Our application of relevance here is not relevance *in the law* but rather relevance *of the law*. In this text we argue that:

- a central justification for the current regulatory relevance of law is its relationship with exclusionist private property relations;
- the regulatory purpose of this relationship is to maximise and maintain wealth creation for a privileged few with access to enjoy these arrangements;

⁷⁶ See Findlay (2013), Preface, chapters 1 and 10.

⁷⁷ Note the discussion of the ebbing relevance of patent and trademark law in addressing the tidal wave of information piracy which is the crime of the younger generations world-wide. See Findlay and Lim (2014a), pp. 91, 115, 193.

⁷⁸ Dennis (2013).

- the global economic model of selective economic growth and individualised material wealth creation now appears to be unsustainable; and
- for regulatory paradigms such as law to maintain their relevance (in terms of a general *good and* a particularised social benefit as measures of *wealth* transform) it will be necessary for the regulatory purposes of these paradigms to prioritise social sustainability.

THE COMPARATIVE ENTERPRISE

In order to test the major allegations presented in Chapter 2, which there stand as no more than assumptions, it is necessary to look at the transnational transaction of migrant labour comparatively across regions with similar market dependencies but very different domestic, bilateral and regional regulatory patterns (see Chapter 6).⁷⁹ The labour migration pathways in both case-study regions (the EU and ASEAN) need to be traced from the perspective of home and host jurisdictions, and the ways in which regional regulation influences these. Chapter 2, as a scoping exercise, limits any comparative case-study analysis of guest workers across the EU and Southeast Asia, to considering the negative nexus between labour relations and migration regulation in contexts of employee rights and protections, employment disputation and worker repatriation.⁸⁰ At the outset, the chapter to follow interrogates the assertion that the forms of migrant status accorded to guest workers (for the purposes of their employment abroad) create varying potentials of discrimination and rights abuse. Even when migrant labour regulation includes laws which offer benefits to the migrant labour population through documentation and limited rights protections assuring such benefits, we argue these are predetermined by more fragile residency conditions for the 'legitimate' worker population than that enjoyed by citizen workers. Such vulnerability creates dependency relationships between workers and employers which are ripe for exploitation. It is the

⁷⁹ In this respect the 'ASEAN way', of prioritising state autonomy and requiring concessional and empathetic regulation through compromise, is a long way from more interventionist EU regionalism.

⁸⁰ The larger study presented in chapter 5 will widen the sites of vulnerability and dependency, and will consider the impact on both documented and undocumented workers. For the purposes of chapter 2, undocumented workers will only be considered in terms of their exacerbated vulnerability due to the denial of limited migration status.

human and the market consequences of this exploitation and the rights violations it facilitates, that prompted this research interest.⁸¹ For socio-legal researchers, chilling is the realisation that the law is not simply failing to control, but is facilitating the crucial conditions of discrimination through the regulatory state (functional or fragmented).⁸² Laws governing migration and repatriation enable further market discrimination. The second major theme in the chapter is a speculation on the role of private property interests as they promote and benefit from the market conditions that foster documented and undocumented migrant labour. We conclude that exclusionist private property relations, regulated through legal forms such as the employment contract or the work permit, advantage employers and enable them to exploit the vulnerable residency status of foreign workers for their market benefit.

Both the public (legislation) and the private (contract-centred) legal regulatory frames play important roles in the discrimination process, and each requires examination when analysing the dependency relations from market and labour force points of view. State-imposed legal market controls and contract-centred regulation (or their silence), crucially influence the employment conditions of guest workers and the marketing of their labour power. While migration and employment contract provisions could be vehicles for workers' rights protections, with foreign workers we see a tragic reversal of this potential in favour of enabling employers' market benefits (see Chapter 2).

Comparative analysis here must be dynamic in recognising the tensions between domestic regulation, as forming migration barriers for national interests to transnational labour supply, and regional regulation that endeavours to manage population flow.⁸³ Normatively locating such regulatory tensions within public international law and conventions, setting standards on the conditions of employment to be enjoyed by those in the labour force generally and more universally, is a discourse about action, but not a guarantee of actionability for all. For instance in the European context, international and regional law has developed considerably to cover documented guest worker employment as a migratory

⁸¹ Findlay and Lim (2014b).

⁸² Again further explored in Findlay and Lim (2014a), chapter 4.

⁸³ The intentions behind domestic and regional regulation here may be distinctly different, as the recent Swiss referendum on migration flow, and the EU's response, demonstrates.

process.⁸⁴ However, despite vigorous attempts at the regional level to ensure freedom of movement (for market benefit) that respects essential border protection, regulation of the conditions under which migrant workers are resident remains distinctly within domestic jurisdictions, and develops inconsistently as such.⁸⁵ This realisation reveals that the regulatory state migration focus is more concerned with domestic considerations of economic benefit and privileged citizenship, than it is designed to illuminate the discriminatory passage of migrant labour into disembodied labour markets, the uncertain and vulnerable status of their labour power within those markets and the perpetual fear of indiscriminate and arbitrary repatriation.⁸⁶

Methodologically, recognising the significance of the regulatory state referent, the comparative interest at first instance should be with political paradigms. Initially, the focus is on one nation state to another in two different regulatory 'worlds', one selectively interventionist and the other largely divesting responsibility to other regulatory actors. At this level there will also need to be consideration of labour market 'transaction' from home to host jurisdictions. The next level of comparison is regional: clearly however with the consciousness that as regional configurations, the EU and ASEAN operate under very different constitutional legalities. Finally, the meta comparative level is how international conventions and regulations influence, if at all, each of the other two levels. The latter largely forms a normative restatement, and at worst a regulatory chimera in which rights are offered with no active, accessible and fair process for their enjoyment.

Declaring a political context for comparison should not conceal the essential market concern of our comparative analysis.⁸⁷ As much as they should be social, markets are essentially political as well as economic concepts central to the aggregated states⁸⁸ that form the objects of domestic contrast. Within the political configurations of the market there

⁸⁴ There are some distinct areas of failure here particularly when public and private legal regulation intersect over matters of agency. Barber (2000); Ford and Piper (2007); Anderson (2007); Ruhs and Anderson (2010).

⁸⁵ Kaur (2007); Parreñas (2001); Gibson and Graham (1986).

⁸⁶ NB the detailed case-study in Findlay and Lim (2014a), chapter 5.

⁸⁷ This does not mean that the paper is not concerned with social consequences. Consistent with our work on embedded markets (Findlay and Lim (2014b)) we do not advocate market analysis which is distracted from social context.

⁸⁸ This is a generalised comparative meant to include consolidated states with a generally stable political frame and viable, if unsustainable economies.

is the opportunity to consider, as we do, institutional, motivational and interactive paradigms governing market movement.

As previously indicated, the overarching purpose of the more detailed case-studies to follow in Chapter 6 is to employ private property relations and the conditions of discrimination and dependency they evidence and advance as an explanatory tool for understanding the regulatory failing identified above. Legal regulation thereby offers another comparative level, to test the assumption that the migration/labour nexus crucially advances exclusive private property interests. This will be achieved by theorising migration and employment status as a unique market context, highlighting the current regulatory conditions that exist for the advancement of exclusive and discriminatory private property interests through contract and agency arrangements (see chapters 4 and 5) against the more generalised market interests of employers within the host societies, and those migrating for work. Essentially it is a consideration of the 'marketability' of vulnerable and dependent worker power, and how in particular regulation as private property relations contributes to as well as controls these employment relationships.

CONCLUSION – HUMANITY OR COMMODITY

One of the irreconcilable tensions in the analysis to follow emerges from determining whether migrant labour is an issue of commodity or humanity. This consideration essentially predetermines the role of legal regulation in maintaining human rights frameworks, as well as ensuring sustainable markets of labour value. A sharp and critical examination of the humanity/commodity paradox is essential if we are to understand:

- the practical impact of rights protections for workers who both benefit and suffer from their enforcement;
- the reasons why regional and national priorities diverge when rights are expressed in discretionary enforcement regimes;
- the manner in which the recognition of citizenship rights and national social benefit fuel exclusionist migration regimes;
- how the free flow of labour which may enable essential corrections in market labour value is sieved through domestic political interests;
- how the economy of domestic states is critically supplemented by low-priced labour while the political/social dimension prohibits equitable inclusion in taxation responsibility, welfare benefit and communitarian responsabilisation; and

- why migrant vulnerability and dependence in disembedded markets feeds on and requires rights denial, and what this means for the regulatory reality of rights discourse.

Originally, this work claims that market sustainability and rational rights recognition are not incompatible in embedded market societies. This is neither ephemeral nor utopian. Avoiding the charge of some naïve claim absent of the political/social, this book advances the legal regulation of sustainable market relations as a starting point for making more viable and humane the exploitation of labour value. On the way, we will lay aside some of the fluff in rights rhetoric (see Chapter 7), and demand a reconsidering of the commodification of people, their lives and their suffering.

