1. Labour law and development: Characteristics and challenges
Shelley Marshall and Colin Fenwick

1. INTRODUCTION

The book explores the question of whether labour law has a positive role to play in promoting economic development, in the face of arguments that labour regulation is likely to play a negative role in this respect. It explores methodological issues, and pays attention to developments in different regions of the world. The book considers conceptual frameworks for labour market regulation that go beyond the purely economic – or econometric – and directly addresses the issues that arise in designing effective labour regulation for developing economies. The contributions in this volume do so very largely from qualitative, and/or socio-legal perspectives. They examine the employment effects of liberalising international trade, and also consider the role of the ILO in supporting labour law reforms at the national level. The book concludes that labour law can play a positive role, but that there are significant challenges to pursuing this goal.

The aim of this introductory chapter is to canvass some of the particular challenges for regulating labour and promoting development in the economic South. Though the focus of this volume is on poor and middle-income countries, in an era where the classical paradigm of labour law is under attack, a focus on the relationship between labour law and development is broadly relevant. In ‘old’ Europe, for instance, labour law has been commemorated in recent funeral services. The ideas canvassed for revitalising labour market regulation in the economic South may also be applied to the economic North, particularly in relation to precarious and atypical workers.

The second section of this chapter, following this introductory section, describes the challenges for labour law – and for labour regulation more generally – in poor and middle-income contexts, in so far as it is possible to generalise. The third section explores various approaches to development, and the ways we might think about the role of labour law in those
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contexts. The fourth section summarises the contributions of the authors to this volume.

2. LABOUR REGULATION CHALLENGES IN THE ECONOMIC SOUTH

The desire to promote development is common to all nations of the world. However, there are markedly different labour market conditions in poor and middle-income countries from those in higher and middle-income, and/or OECD countries. Research on the specific dynamics of labour markets is only just accumulating with sufficient volume to say anything with certainty about some countries, with very little still known about many poor countries. A significant research gap exists. Variation in labour market characteristics is not only explained by differences in income level and the varying priorities and policy approaches of governments in relation to trade and labour protection, but also by endogenous socio-economic structures and institutional complexes. Still, research documented within the chapters of this book (and beyond) suggests the following generalised challenges for labour regulation in poor countries:

● A rapidly growing labour force;
● A large proportion of the labour force engaged in agriculture with very low average productivity of labour, with opportunities for increasing real output and income within agriculture;
● Low levels, or highly uneven levels of productivity and wages across much of the workforce, and hence, high rates of working poverty;
● Economic growth accompanied by sluggish increases in formal employment opportunities, with large urban informal and rural labour markets accounting for the majority of workers, who are not afforded employment or social protection;
● A high proportion of youth in the labour force, who are more likely to be un- and underemployed than the adult population;
● Gender disparities, particularly in terms of the underrepresentation of women in the formal economy (and overrepresentation in the informal economy and unpaid work);
● Rapid increases in urban populations in most developing countries in the past several decades with ‘non-market’ driven labour supply to these non-rural areas; and
● Dynamics of ‘non-market’ (cultural/social and institutional) influences on the level and structure of wages.
It might be said that the main issue for these countries is not the lack of work per se, but the lack of better paid and more protected work in the formal economy, and the inadequacy of social protection in general.

The subsequent sections of this first part of the chapter explore these points in greater detail.

2.1 Informality, Inequality and Decent Work Deficits

Informality and inequality are significant barriers to the proper functioning of labour market regulation and of economic growth, and both are major challenges for policy makers concerned with promoting development and decent work. The term ‘informal economy’ includes informal employment relations in formal enterprises, and work that occurs in informal or unregistered enterprises (Hussmanns, 2004; ILO, 2013). It thus assists in focusing on the nature and quality of the work relationship, rather than on the status of an enterprise for which a person works (Bronstein, 2009: 32-33). Informality is attracting increasing policy interest based on recognition of its persistence: for example, in 2015 the International Labour Conference (ILC) adopted a Recommendation Concerning the Transition from the Informal to the Formal Economy (ILO, 2015; La Hovary, 2014).

Informality and inequality are tied to each other in a number of respects. One aspect is empirical: when some workers’ conditions are regulated by labour laws and others are not, this represents a divide in the workforce, with an elite minority of formal workers entitled to enjoy minimum working conditions, including to work in safer environments, while the rest are more likely to be excluded from access to such key entitlements. Inequality also promotes informality. As we shall see, inequality undermines the proper functioning of institutions, including labour market institutions.

The informal economy has been the main source of work growth in recent years, particularly in developing and transition economies (Jütting and de Laiglesia, 2009). ILO global estimates from 2012 suggest that non-agricultural informal employment accounts for 82 per cent of total employment in South Asia, 66 per cent in sub-Saharan Africa, 65 per cent in east and South-East Asia (excluding China), 51 per cent in Latin America and 10 per cent in Eastern Europe and Central Asia. The share of employment in the informal economy only rises with the addition of agricultural employment (ILO, 2012). Over the past decade, many developing countries have experienced a growth revival, some with exceptionally high growth rates. Yet the record of decent employment creation has been very disappointing, and the impact of growth on unemployment,
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underemployment and informal employment has been very limited in many cases (ILO, 2013: 9).

In 2015, the ILO’s *World Employment and Social Outlook* revealed a marked shift away from the standard employment model, finding that fewer than 40 per cent of wage and salaried workers worldwide are employed on a full-time permanent basis – a share that appears to be declining (ILO, 2015: 13). The ILO also reported that, in emerging and developing economies, informal employment continues to be common, and very short-term contracts and irregular hours are becoming more widespread at the bottom of global supply chains (ILO, 2015: 13). The pervasive trend towards informal work is far more apparent in certain regions of the world. In the developed economies and EU, including Central and South-Eastern Europe and CIS, around eight in ten workers are employees – whereas in South Asia and sub-Saharan Africa, around 75 per cent of workers are either in own-account work or employed as contributing family workers (ILO, 2015: 28).

As this trend towards informal work continues, so too do the deleterious consequences of these insecure work arrangements. Unsurprisingly, informal employees earn far less than formal wage employees. In 2015, the ILO reported that the wages of informal employees were between 43 per cent (Philippines) and 64 per cent (Uruguay) lower than wages of formal employees (ILO, 2015: 41). The ILO also reported that poverty disproportionately affects temporary employees, the self-employed and unemployed (ILO, 2015: 47). In emerging and developing countries especially, the incidence of poverty when the household head is engaged in temporary/part-time/informal employment is especially high. In Mexico, for example, the poverty rate is just under 50 per cent when the household head is not permanently employed (compared to around 25 per cent when the household head is permanently employed) (ILO, 2015: 48). Figure 1.1 illustrates how, over the last 30 years, growth in selected countries in Southeast Asia and Latin America was accompanied by increasing informal employment.

Informality is a multifaceted and diverse phenomenon (International Labour Office, 2013: 4) that has old, structural causes as well as more recent causes. Older structural causes include the occupation of land by colonisers leading to loss of traditional work and food sources, internal migration and modernisation. Newer factors contributing to the growth of the nonstandard and informal workforce are numerous (Goldberg and Pavcnik, 2003). The vertical disintegration of production and the end of ‘Fordist’ production techniques have contributed to the growth of nonstandard and informal work for many years (Collins, 1990). Financial crises also contribute to this growth (Dao and Loungani, 2010; Atkinson and Morelli, 2011). Informal economies have grown most in countries that
**Figure 1.1** Informal employment and GDP in Latin America and South-East Asia

*Source:* Jütting and de Laiglesia (2009), Chapter 2, Table 1.
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experienced financial crisis where social security was underdeveloped, as people sought any means for survival (Atkinson and Morelli, 2011; Court and Cornia, 2004). Informal employment also grew after the implementation of structural reform packages which entailed trade liberalisation and the privatisation of formerly state-owned enterprises (Goldberg and Pavcnik, 2003) without a sufficient focus on job growth and decent work.

Informality is both a symptom of inequality, poverty and decent work deficits, and a cause of them. Previous research conducted for the ILO suggests that job quality within the informal economy and the micro- and small enterprises that constitute it is often far lower than the formal sector (Fenwick et al., 2008). Incomes are generally much lower in the informal economy than in the formal economy, and informal economy workers generally receive no health benefits, no work-related childcare, no sick leave and no pensions (Reinecke and White, 2004). Instability and insecurity are pervasive in the informal economy, by its very nature. In addition to this, if treated unfairly by employers, workers have no recourse to the courts, because the employment relationship is rarely documented (Sankaran, 2002, 2008).

The most undesirable of work practices are found disproportionately in informal economies (Freije, 2001; ILO, 2012; Solorzano and Cid, 2002). Most forced labour is likely to occur in informal economies. Bonded and forced labour remain major problems for labour market regulation in many poor countries. Sankaran (this volume) argues that this demands a rethinking of the definition and identification of bonded labour, and the degree to which it overlaps with forced labour as understood in the ILO Conventions on the subject. Courts in India can presume the existence of bonded labour where forced labour exists.

Often, children are engaged in forms of work that are linked to the informal economy, including agriculture, mining, fishing and manufacturing, mainly as contributing family workers. Workers in the informal economy are more frequently exposed to workplace hazards and suffer more work-related injuries and illnesses than employees in larger workplaces (Lamm and Walters, 2004). Compliance with occupational health and safety regulations in the small and micro enterprises that constitute the larger part of the informal economy is very limited (Scott, 1998).

Recent studies have reiterated key findings that workers in non-standard forms of employment face more risk at work. Generally, workers in non-standard forms of employment have higher rates of workplace accidents than permanent employees, and the work may be associated with psychological factors that increase the risk of adverse health outcomes (ILO, 2015: 29). In OECD economies, temporary employment con-
tracts are strongly associated with lower job quality in all three measures assessed by the OECD (earnings quality, labour market insecurity and job strain) (OECD, 2014: 120). The higher incidence of job strain among temporary workers tends to be driven by both higher job demands and lower job resources. In particular, temporary workers report higher exposure to physical health risk factors at work and workplace intimidation, while having less autonomy and learning opportunities, and receiving lower support from their colleagues (OECD, 2014: 120).

The assumption that employers in the informal economy of developing countries have maximum flexibility is inaccurate, particularly if flexibility is seen as not only the ability to reduce employment but also to increase it. Though there may be few, if any, regulations that hinder hiring or firing (external numerical flexibility) or working time (internal numerical flexibility), these employers are constrained by poor access to credit, infrastructure and other factors, which act as a break on employment growth in these enterprises. High labour turnover in enterprises also operates as a disincentive for training and investment and thus further inhibits the economic and social development of both the enterprise and the individual worker. Informality acts as a barrier for individuals to increase their income through becoming more highly trained and progressing into more highly paid jobs. It is a factor in maintaining a gap between those who are already educated and those who might otherwise make progress in the workplace.

We can see, then, that informality and inequality are intertwined, though growing inequality has a number of causes. Bensusán’s chapter in this volume discusses the ways that structural problems and segmentation in Latin American labour markets have resulted in greater inequality. This is related in particular to the emergence of the new economy alongside older, low productivity labour markets, with the two remaining remarkably separate. It is estimated that low productivity work constitutes 30.7 per cent of the labour market in Chile and 64.6 per cent in Peru (see Bensusán’s chapter).

Economic modelling conducted by Sen and others indicates that whilst income inequality at very low levels may accelerate growth, income inequality at a high level diminishes growth (Sen, 1992). The reason for this appears to lie, to a significant extent, in institutional contexts. There

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1 According to the OECD, job strain is characterised by a high level of work stressors combined with insufficient resources and support in the workplace to accomplish duties, including, for example, exposure to physical health risk factors and workplace intimidation. Job strain constitutes a major health risk factor for workers (OECD, 2014: 87–88).
is strong empirical support for the proposition that inequality impacts negatively upon the *quality* of institutions (Chong and Gradstein, 2004; Saavedra and Chong, 1999). Institutions (including labour institutions) assist in overcoming collective action problems. This entails generating the expectation that repeat actions will result in the same or similar outcomes. Institutions are distrusted when they are perceived to be predatory or are believed only to operate in the interests of elite groups in society. When this is the case, people tend to avoid formal institutions and instead rely upon informal networks. For this reason, Bardhan reached the conclusion that the ‘history of underdevelopment suggests that a major stumbling block to beneficial institutional change in many poor countries lies in the distributive conflicts and asymmetries in bargaining power among social groups’ (Bardhan, 2005: 512). A high degree of economic and political inequality enables elites to resist efforts to reform inefficient institutions and to capture rents from existing institutions. In recent years this has been accompanied in some contexts by greater difficulties for lower income groups to engage in collective action that can translate to effective political action. The outcome can be a vicious circle of institutional underdevelopment (Lee and Gerecke, 2015). As Picketty writes: the ‘forces of divergence can at any point regain the upper hand, as seems to be happening now, at the beginning of the twenty-first century’, and if current trends continue, ‘the consequences for the long-term dynamics of the wealth distribution are potentially terrifying’ (quoted in Cassidy, 2014).

When institutions are performing poorly, informality is more likely. In the field of labour regulation, this vicious cycle of institutional underdevelopment is readily apparent. For example, when inequality is high, and the wages of the majority of workers are low, rich companies can more easily pay off labour inspectors. The cost to the company may be low relative to net profit. Such is the case in Cambodia where labour inspectors frequently do not make it past the administrative office of factories, and companies may even pay the fuel costs for the labour inspector’s visit (Hall, 2000, 2010). Breaches of core labour standards remain unchecked in larger companies and labour inspectors unable to visit smaller enterprises due to fuel costs and the lack of bribes to augment low wages. This contributes to distrust in the institution of labour inspection. Workers perceive that the labour inspectorate is ‘not for them’. This reduces the number of complaints to the labour inspectorate, and thus the effectiveness of the inspectorate. This regulatory failure results in the labour inspectorate acting as a conduit for reproducing inequality instead of reducing it.

We can see, then, that informality, inequality and decent work deficits have intertwined causes and operate in an unvirtuous cycle. Recently,
such conditions of inequality, under-employment and informal work have led to social unrest, as seen in the ‘Arab Spring’ and the 2014 protests in Cambodia which shut down the country’s capital. In 2011 the ILO developed a ‘Social Unrest Index’, a composite indicator reflecting the social and political unrest in any given state. The index weighs variables related to respondents’ confidence in government, standard of living, personal freedoms, job opportunities and access to the internet (ILO, 2011: 12 fn 11). In 2010, the social unrest index increased for all regions in the world except Latin America and the Caribbean and sub-Saharan Africa – with sizeable increases in the index reported in the Middle East, North Africa and South Asia (ILO, 2011: 13). In 2013, the ILO reported that economic growth and the unemployment rate are the two most important determinants of social unrest (ILO, 2013: 14). The ILO’s figures also suggested that, out of 71 economies for which information was available, the risk of social unrest increased in 46 of them between 2011 and 2012 (ILO, 2013: 14).

Labour market institutions have an important role to play in interceding in unrest of this type by providing agonistic, democratic avenues for mediating the often deeply conflicting interests that lie behind these forms of upheaval. Labour market institutions can play a positive role in reducing informality (ILO, 2014b: Chapter 6), in reducing inequality (Berg, 2015), and in promoting justice more broadly (Berg and Kucera, 2008). Where inequality is concerned, labour market institutions and policies with redistributive effects are essential (Luebker, 2015; ILO, 2014a), and can be developed without necessary risk to overall growth (Ostry et al., 2014).

2.2 Socio-Economic Drivers and Characteristics of Labour Markets in the South

Though socio-economic factors shape labour markets everywhere, what is often referred to as ‘non-market factors’ are particularly strong determinants of labour market dynamics in poor countries. The expression ‘non-market’ is misleading, because markets are always socially embedded: market relations are social relations, but because the expression is an accepted term in the labour relations literature it is used in this chapter. Disparities in power and social status between men and women as well as caste, ethnicity and a host of other characteristics are particularly strong determinants of worker behaviour and labour market structures which deserve the attention of the designers of labour regulation.
2.2.1 Gender

Though gender disparities in the labour market are not unique to poor and middle-income countries, the gendered nature of work also has an impact on informality, and on the particular expression of poverty. Women workers are particularly overrepresented in informal work, comprising around three-quarters of informal workers (Kucera and Xenogiani, 2009). Workers in the informal economy typically experience both direct and indirect discrimination in the level of their working conditions. The gendered dimension creates specific vulnerabilities which must be addressed through labour market regulation. In most countries for which data disaggregated by sex are available, the share of women in informal employment in non-agricultural activities outnumbers that of men. In sub-Saharan Africa, 74 per cent of women’s employment (non-agricultural) is informal, in contrast with 61 per cent for men; in Latin America and the Caribbean the figures are 54 and 48 per cent; in South Asia, 83 and 82 per cent; and in urban China, 36 and 30 per cent (ILO and WEIGO, 2002; ILO, 2002).

This data has several features, outlined by Chen (2001). First, the informal economy is the main source of work for women in most developing countries. The majority of economically active women in developing countries are engaged in the informal economy. In some countries in sub-Saharan Africa, virtually all of the female non-agricultural labour force is in the informal economy. For example, in India and in Indonesia, the informal economy accounts for nine out of every ten women working outside agriculture. In five Latin American and four East Asian countries, for which data are available, more than half of the female non-agricultural workforce is in the informal economy. Second, the informal economy is a larger source of employment for women than for men. The proportion of women workers in the informal economy exceeds that of men in most countries. Third, women’s share of the total informal workforce outside of agriculture is higher than men’s share in nine out of 21 developing countries for which data are available (Chen, 2001). A final and important dimension of the gendered nature of informal work is that women are more likely to be engaged in work from their homes (Chen estimates that over 85 per cent of home-based workers in most countries are women (Chen, 2001: 76)) and in industrial subcontracting chains as outworkers. These factors exacerbate their powerlessness and their lack of visibility in statistics and to regulators.

Sankaran (Chapter 7 this volume) suggests that labour law needs to render this contribution visible by granting the status of ‘worker’ to such unpaid family ‘helpers’. The undervaluation of women’s work in the gender segregation of occupations and the law’s failure to value women’s work adequately is another source of discrimination.
2.2.2 Discrimination based on particular social categories
Discrimination on the basis of caste and other social categories remains an important factor influencing the structure of labour markets. In India, for instance, Sankaran (this volume) notes the increasing recognition of large numbers of the socially discriminated (dalits or scheduled castes), tribals and members of religious minorities such as Muslims in informal employment and their relative absence in regular, formal employment. Religious affiliations, caste and ethnicity impact upon access to housing, credit, customers and storage facilities, and thus also affect workers’ abilities to build their own account micro-businesses. Anti-discrimination laws either do not exist or fail to contribute to the systematic restructuring of labour markets to the extent necessary.

2.2.3 Non-market drivers of internal and between-country migration
Migrant workers are one of the more vulnerable contingents of the workforce in less-developed countries. One of the reasons that urban underemployment is so high in many countries in the economic South is because internal migration is not driven by supply, it is triggered by other factors (Breman, 2010). Much of this migration is driven by poverty, as whole families migrate in search of work, becoming part of the vulnerable urban poor. Migration due to displacement because of violence and conflict is a further cause of impoverishment in many less-developed countries, as is displacement for major development projects such as dams and mines. Some authors have suggested that something akin to the enclosure movements of British industrialisation is occurring in many poor countries around the world that are feeding demand for the fuel and building materials required for rapid industrialisation. Such circulation of workers who have been expelled from their land for various reasons to urban settings in search of work is observed throughout the economic South (Breman, 2010).

2.3 Institutional Challenges for Labour Regulation
As is documented in Colin Fenwick’s contribution to this book, one of the biggest barriers to effective labour market regulation is lack of institutional capacity. A number of the countries that Fenwick considers have labour laws that in large measure reflect much of what might be sought from the point of view of conformity with ILO standards. But it is notorious that the law on the books is not applied effectively in practice: labour laws are weakly enforced by state inspectorates, and trade unions and civil society bodies may have limited capacity to fill that gap. State inspectorates are small and poorly funded, because the revenue base is insufficient. One reason for this is that the scale of informal enterprises and work means
that little tax is being paid. Alternatively, funds are being prioritised for other policy areas. As a consequence, labour inspectors can often easily be bought off, and/or are simply overworked and poorly trained.

Union activity has frequently been repressed under non-democratic governments, as in Fenwick’s case study of El Salvador, for example. In her chapter in this volume Bensusán describes how the murder of trade unionists in Colombia and barriers to the creation and operation of independent trade unions in Mexico act as obstacles to the emergence of an independent trade union movement. In state-socialist countries, unions played a non-agonistic role, and recalibration takes time. In other countries, civil society is thriving, but conflicts over ideology and competition for power makes cooperation during reform processes nigh impossible. Thus, Fenwick writes, despite the ILO’s mandate to engage in tripartite consultation when providing technical assistance to countries that are reforming their labour laws, the capacity for the social partners to participate effectively may be severely constrained. This, combined with weak state capacity, can raise the risk of the ILO – or any other external actor – preparing draft texts with only very limited input from the state, unions or employer organisations. Fenwick describes how this occurred in Liberia in 2009–10.

Cazes and Verick (2010) suggest that the principal constraints on the capacity to implement labour regulation for low-income countries are the lack of fiscal space and inadequate administrative/institutional capacity. In addition, social dialogue is weak, while active and passive labour market policies only reach a small proportion of the population. Added to this is the relatively strong power of large enterprises compared with labour departments and the state more broadly, as well as the limited jurisdiction of labour market regulation (see Table 1.1).

The authors in the present volume suggest various ways to incrementally build the capacity of state and social partners. Indeed, it is one of the roles of labour regulation to contribute to the democratic capacity of the various players – workers, employer organisations and other users of labour, and government. Adapting social dialogue processes for the informal economy is a special challenge addressed by various authors. Since a large number of such workers are self-employed or own account workers, there are generally no unions which represent them. Kevin Kolben, for example, focuses on partnerships between state and international organisations aimed at bolstering the capacity of states. These themes are explored further in the final chapter of this volume (Chapter 9, Marshall).

The chapters of this book demonstrate that the challenges for labour law in developing contexts are vastly different, in many respects, from those of industrialised and richer nations. As such, it is a mistake to imagine that the debates about the nature of labour law can be transferred
and applied from richer country settings to poorer countries. The particular challenges, aims and deficits of labour regulation in poor nations are a matter of empirical study and local debate. By drawing data and debates from different corners of the globe, this book hopes to bring these localised debates to a broader audience.

3. APPROACHES TO DEVELOPMENT AND LABOUR

This volume asks whether labour law can promote development. An important starting point, therefore, is to ask what we mean by ‘development’. There is a great wealth of literature exploring the meaning and purpose

Table 1.1 Institutional challenges facing developing countries in improving decent work

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<thead>
<tr>
<th>Policy element</th>
<th>Challenges for developing countries</th>
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<tr>
<td>Fiscal capacity</td>
<td>Many developing countries have inadequate tax bases and little fiscal space.</td>
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<tr>
<td>Institutional capacity</td>
<td>Often there is little administrative and institutional capacity to administer labour market and social protection, and enforce labour legislation.</td>
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<tr>
<td>Social dialogue</td>
<td>Worker and employer organisations are often weak in developing countries, and social dialogue and collective bargaining mechanisms are typically inadequate.</td>
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<tr>
<td>Passive labour market policies</td>
<td>Income replacement mechanisms, such as unemployment insurance, are either inadequate or non-existent.</td>
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<tr>
<td>Active labour market policies</td>
<td>Active labour market policies, such as training systems, are few, often weak, and inappropriate for relevant skill development. Public employment services are also inadequately developed and ineffective. However, innovative employment guarantee and conditional cash transfer programmes are nonetheless observed.</td>
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<tr>
<td>Relative power</td>
<td>Large enterprises operating in developing countries often have far greater financial and institutional capacity than the labour departments of the state.</td>
</tr>
<tr>
<td>Jurisdiction</td>
<td>Labour market regulation is limited to national jurisdictions, while a high proportion of production (for export, in particular) occurs in transnational supply chains and for companies headquartered outside the developing country.</td>
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Source: Modified from Cazes and Verick (2010).
of ‘development’ reflecting the fact that development, as a concept, can be conceived of in a vast number of different ways. This section briefly canvasses something of the history of the concept in the post-war period in relation to labour, including the thinking of the ILO in this space.

3.1 What is Development?

Perhaps the dominant purpose development in the post-war period has been understood to be the alleviation of poverty. Although, as we shall see, this approach has its problems, the emphasis on increasing the per capita income of the poor remains vitally important. As Kaushik Basu puts it, privation is the norm rather than the exception (Basu, 2003). In 2014, the United Nations reported ‘remarkable progress’ towards the alleviation of extreme poverty – citing the fact that between 1990 and 2010 the absolute number of people living in extreme poverty decreased from 1.9 billion to 1.2 billion (United Nations, 2014: 9). The measure of ‘extreme poverty’, utilised by the World Bank, is taken according to the number of people living below an average daily income of $1.25 (United Nations, 2014: 8). It is estimated that around a quarter of the world’s population live in extreme poverty (United Nations, 2009). Over 2.1 billion people worldwide, or 35 per cent of the world’s population, were living on less than US$3.10 a day in 2012, and 12.7 per cent of the world’s population were living at or below $1.90 a day. In international development discourse, the poverty line, with its associated measure of poverty incidence, has been a key concept in targeting, monitoring and evaluating interventions in the post-war period. For much of the post-war era, poverty reduction was associated with modern economic growth, which was promoted through varying degrees of state intervention. The idea was that as long as economic growth occurred poverty would be alleviated. In the 1980s, the markets were increasingly seen to be the primary mechanism for

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2 We note that the World Bank’s definition of ‘extreme poverty’ has been heavily criticised by the UN Special Rapporteur on extreme poverty for failing to take into account ‘the realities of poverty on the ground’ (Alston, 2014: 4). A more popular measure of determining poverty levels is the ‘Multidimensional Poverty Index’, utilised by the United Nations Development Programme (UNDP) (United Nations Development Programme, 2014: 4). Going beyond a single indicator of income, the Multidimensional Poverty Index factors in a range of deprivations at the household level, including health, schooling and living conditions. In 2014, the UNDP reported over 2.2 billion people are either near or living in multidimensional poverty (United Nations Development Programme, 2014: 4).

generating economic growth in the West. More recently, there has been a tempering of this view.

A more recent focus in development discourse has been on ‘well-being’; a holistic approach which includes health, happiness, dignity and social capital, in addition to the more basic development goals (Graham, 2005). The Wellbeing and Development approach, developed by the Centre for Development Studies at Bath, for instance, defines the well-being approach as one which considers what people have or do not have (material); what people do or cannot do with it (relational); and what people think or feel (subjective).

The material refers to the ‘stuff’ of well-being, such as food, bodies, shelter and the physical environment. In practical application this typically refers most immediately to economic assets and income, but it should not be restricted to this.

The relational concerns social interaction: the rules and practices that govern ‘who gets what and why’. It involves power and identity, the connections between people and also the making of difference between them. It is the arena of action which brings the material and subjective to life.

The subjective concerns cultural values, ideologies and beliefs, and also people’s own perceptions of their situation.

These three elements of well-being are not different areas of life, but interlinked aspects of a process (rather than a state or an outcome). Martha Nussbaum and Amartya Sen have referred to well-being as a person’s ability to do valuable acts or reach valuable states (1995: 30). It is easy to see how decent work would contribute towards well-being.

Parallel to the ‘poverty-alleviation’ discourse, a long-standing strain in the development literature has been concerned with attainment of freedoms, either negative (freedom from . . .), focusing on procedural fulfilment of libertarian rights, or positive (freedom to . . .), and of justice, seen most famously in the Rawlsian theory of justice. For Sen, ‘[d]evelopment is understood as the process of removing the unfreedoms that people have to achieve the things they have reason to value’ (Sen, 1999a). Nussbaum accepts ‘substantial freedoms’, such as the ability to live to old age in good health, engage in economic transactions or participate in political activities, as the constitutive parts of development, and understands poverty as an egregious form of capability-deprivation (Nussbaum, 2011a, 2011b; Nussbaum and Sen, 1995). Kolben (Chapter 3 of this volume) stresses the importance of freedoms in the domain of industrial citizenship. For Kolben, ‘labour development’ entails broad concepts of workplace democracy, expanding opportunities for political participation by workers’ movements and developing an effective regulatory state, as well as non-state institutions of labour governance. A key area of exploration
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here is to think about the linkages between workplace democracy and broader political democracy.

This theory has been extended by Sen and Nussbaum in their capability approach. According to this approach, human capabilities are directly relevant to people’s well-being and freedom, while indirectly they have the capacity to influence social change and economic production (Sen, 1999a: 296). In the context of labour, ‘capacity’ refers to the skills, knowledge and values of people (workers), and how, in using these skills, they can take advantage of the labour market and other ‘opportunities’ available to them. In this sense ‘labour market opportunities’ means the alternatives available to people to use their capacity (their skills, knowledge and attitudes) as a way in which to gain financial or personal reward (Tipples, 2004).

Bob Hepple has also adopted the capabilities approach. He suggested that labour market regulation can be viewed as a tool to realise an equality of capabilities. This embraces the substantive freedoms that individuals need in order to survive and prosper, including freedom to pursue education and training and a career of their choosing, freedom of association and freedom to participate in economic and political decision-making that affects their lives as well as the capacity to obtain decent work. (2005: 31)

Some have stressed that development is a process of institutional and capability transformation. Joseph Stiglitz is a proponent of this view. For Stiglitz (2000) transformative change occurs in part through deliberation and the establishment of democratic processes and institutions. Stiglitz argues that such an inclusive, democratic process can, and should, occur at two levels: the micro-firm level and at the broader political level.

For its part, in virtue of its broad mandate, the ILO has always taken a broad view of development as it relates to labour. Langille argues that the link between social justice and peace in the ILO’s 1919 Constitution can be understood as ‘an early expression of what we now call a “comprehensive” or “integrated” view of development’ (Langille, 2003). The 1946 Declaration of Philadelphia in turn marked a shift in international thinking, introducing the idea of the universal social rights of the individual, serving as the basis for the demand that economic policies be shaped by social objectives (Rodgers et al., 2009). In other words, economic growth was never seen as an end in itself, but rather as a means to further social justice and a better living for all the world’s peoples (Jenks, 1969: 64).

The ILO’s contributions to the evolution of the concept of development have consistently gone beyond the narrowly economic. The ILO challenged the trickle-down paradigm promoted by other international institutions. The ILO highlighted the significance of employment generation as a policy goal in addition to growth alone. Over time it moved beyond a
focus on the number of jobs to attention to the *quality* of the jobs created (see, for example, ILO, 2014a). In recent years the quality of jobs has come on to the agenda of other international institutions (OECD, 2014; UNDP, 2015; World Bank, 2013).

Whereas other institutions focused on the concept of the poverty line, the ILO argued for a focus on basic needs, because the notion of an absolute poverty line served to demonstrate the persistence of poverty even where economic growth had occurred (Saith, 2006). The basic-needs approach was critiqued for operating essentially in what Amartya Sen (1982) called commodity space. Moving beyond the focus on poverty, the ILO pursued the concept of social exclusion, which served to highlight the deeper causal and social dynamics of marginalisation. This in turn brought into the frame ‘the notions of political participation, rights, dignity, social equality, citizenship, legal and customary frameworks of inclusion and exclusion’ (Saith, 2006: 132).

In the late 1990s the ILO developed its Decent Work Agenda, with its four, interlinked components:

1. The promotion of labour rights;
2. The promotion of employment;
3. Social protection for vulnerable situations, and
4. The promotion of social dialogue.

The Decent Work concept and the associated policy agenda represent a major intervention in the discourse on deprivation and development. A key feature of the concept is that it is fundamentally about the recognition that ‘all those who work have rights at work’ (ILO, 2002).

Although it can be criticised for trying to encompass too much due to its compound nature, with its four distinct components, there are benefits to its broadness. Saith argues that the decent work concept qualifies as an attempt at setting a new paradigm and ‘opened up space for partially redefining the terms of the development debate, and in the process resurrecting important dimensions that had been obliterated by the neo-liberal bandwagon’ (Saith, 2006: 133). As Saith observes, the Decent Work concept includes several key features that may enable it to make a major contribution to thinking about development. Among these are the continued insistence on the social aspects of development – beyond the economic – as ends in their own right, and the fact that the Decent Work concept is fundamentally labour-ist in nature. Its point of entry into current discourse and debate is through the status, rights and role of labour. This, too, is the premise of this book. The contributions here insist that work is a fundamental aspect of social and economic development.
The Decent Work Agenda has found expression in most of the significant coordinated international development approaches of the current period. Nine years ago, the United Nations’ Millennium Goals, for instance, incorporated decent work as a goal (United Nations, 2009). From 2015 decent work has been included among the United Nations’ Sustainable Development Goals, the eighth of which is to ‘Promote sustained, inclusive and sustainable economic growth, full and productive employment and decent work for all’ (United Nations General Assembly, 2015: 12).

In his address to the ILO Conference in 1999, Amartya Sen summarised many of the themes presented in this brief overview of labour development. He praised the Decent Work Agenda’s goal of promoting ‘opportunities for women and men to obtain decent and productive work, in conditions of freedom, equity, security and human dignity’. He also commended the universality of coverage of the Decent Work Agenda, as it includes ‘not just workers in the organized sector, not only wage workers, but also unregulated wage workers, the self-employed and homeworkers’ (Sen, 1999b). Sen suggested that the Decent Work Agenda extends beyond the need to adopt legal frameworks (Sen, 1999b):

The invitation is not merely to fresh legislation, important as it is, since the realization of rights can also be helped by other developments, such as the creation of new institutions, better working of existing institutions and, last but not least, by a general political and social commitment to work for the appropriate functioning of social, political and economic arrangements to facilitate recognized rights.

In keeping with Sen’s invitation, this book examines not only the possible content of labour legislation, but also its interaction with complexes or systems of institutions and the political commitments required to facilitate decent work for the betterment of human kind.

3.2 What is Labour Regulation?

The way that we conceptualise the relationship between labour market regulation and development depends importantly on the way that we understand labour market regulation. Deakin (Chapter 2) suggests that there have been three main strains of thought in relation to the relationship between labour law and labour markets which may be characterised, respectively, as ‘neoclassical’, ‘new-institutional’ and ‘systemic’.

The **neoclassical** view sees labour law regulation as an external intervention in, or interference with, the market. Neoclassical economists are thus concerned that labour laws will distort the free and efficient
operation of the market. For neoclassical economists, the autonomous
decision-making of economic agents – workers, employers, the managers
of labour – can lead to an outcome which is in the interests of society as
a whole. The regulation of labour relations is seen to be prone to capture
by rent-seeking groups which will lead to less than optimal overall market
outcomes for all involved, including labour. Left to their own devices,
markets will self-adjust, reaching a labour market equilibrium. This view
informs influential approaches such as those found in the World Bank’s
Doing Business reports.

This view of labour regulation as having a ‘market limiting’ function is
not confined to neoclassical economics. Many proponents of labour law
who view protective legislation as ‘de-commodifying’ also understand
labour law to be market limiting. They, however, see this in positive
terms.

The new-institutionalist view sees unregulated markets as being affected
by a range of imperfections including transaction costs, imperfect and
asymmetrical access to information, monopsonies (monopoly buyers)
and negative externalities. For new-institutionalists, autonomous deci-
sion making may lead to societally beneficial outcomes, but only under
certain conditions, and regulation may be required to bring these about
or adjust for their absence. To the extent that markets are not perfectly
competitive – relevant information concerning prices and quality is not
costlessly and evenly available, and the factors of production are not
completely mobile – there is scope for intervention on efficiency grounds.

Deakin points out that a problem with this approach is that it is dif-
ficult to know what the hypothetical equilibrium point would look like
in practice within a labour market, so as to know how to design labour
market regulation so it will act as a correction to market imperfections.
What is the ideal market supposed to look like? There are, as Hirschman
put it, many ‘rival views of market society’ (Hirschman, 1982). The same
market could be seen as failing by some people whilst others regard it as
normatively functioning, depending upon their respective theories of the
market (Chang, 2002: 544). Labour law can therefore only be viewed as
offering approximate solutions to the effects of market failure.

A third approach which Deakin outlines is one that is informed by new-
institutionalist economics but takes an empirically informed, comparative
and historical view of the development of economic institutions. This
approach sees labour law as having a far-ranging market constituting role
in which labour market regulations are endogenous governance mecha-
nisms which emerge out of particular economic and political contexts. For
this reason, Deakin calls the relationship between institutions and markets
one of system interaction.
For this approach, like the new-institutional framework, rational economic behaviour depends on an institutional framework, part of which is legal in nature. Institutions arise when economic agents engage in a pattern of repeated economic exchange. Institutions are helpful in overcoming ‘collective action’ or cooperation problems which are created when parties are uncertain of, or unable to predict, the behaviour of others. Rules make it possible for the parties to engage in a form of complex cooperation which generates a surplus by comparison to other modes of work organisation (Deakin and Wilkinson, 2005). The forms of labour market regulation that arise may not be the most efficient. However, the transaction costs of searching from scratch for a new solution may be too great, even if, in theory, the search might result in a superior pay-off (Aoki, 2001). Economic players invest in existing institutions, and history shows that radical upheavals of economic institutions are difficult and have high financial and social costs.

Legal (regulatory) and economic systems have co-evolved in the sense of developing at the same time and in connection with each other in particular national or regional contexts. Indeed, economic institutions are underpinned by the legal or regulatory order in various ways. From this point of view, the core institutions of labour market regulation – the individual employment relationship, collective bargaining and social insurance – have co-evolved with the emergence of labour markets in developed market economies (Deakin and Wilkinson, 2005).

This understanding of labour market regulation as one of many that constitutes the market leads to two further insights which inform the contributions in the volume. One is the idea that institutions operate within the contexts of institutional systems or complexes. The other is that institutions have functions, and more than one institutional form may perform the same function. This idea is pursued further in the final chapter of this volume, in particular.

The contributors to this volume do not offer one particular conceptualisation of the relationship between labour law and development. The aim of the book is to offer a variety of understandings of the relationship between labour law and development in different geographical and institutional settings, in keeping with the third approach outlined in this section. In other words, they accept that the development of labour law institutions is path dependent, and that the operation of institutions depends on and is the consequence of interactions between institutions and economic and social patterns. These conceptions of labour law as an institution of development are explored further in the subsequent part of this introductory chapter.
4. CONTRIBUTIONS OF THE AUTHORS

This section of the chapter introduces in greater detail the contributions as they relate to the key themes and debates outlined in this introductory chapter. They approach these themes in a methodologically diverse manner. Some of the chapters draw on empirical data, such as Simon Deakin’s, which discusses the empirical evidence to support different sides of debates around the functions of labour law, or Cheong and Ebert’s which inspects the empirical literature that considers the relationship between labour standards, trade and employment levels. Others are more normative or theoretical, such as Kevin Kolben’s, who sees labour market regulation as a key site for pursuing the fundamental goals of development. The chapters also focus on different regions of the world. Marlese von Broembsen and Shane Godfrey’s chapter explores the themes of the book in the context of southern Africa. Kamala Sankaran does so in the context of India and neighbouring countries. Graciela Bensusán surveys the recent evolution of labour law and labour regulation in Latin America.

Chapter 2 (Simon Deakin) surveys different economic and development theory approaches to understanding the effects of labour regulation. This is a key contribution to the book overall. Other chapters – including this one – outline different approaches to development and to how labour regulation and development theories interact with each other. Some contributors (Kolben, Sankaran) articulate concepts of labour regulation that the authors argue could be positive in a developmental sense. Deakin places the debate in the context of how key theories of economic development have themselves imagined the impact and the role of labour regulation in the development project. In Deakin’s view, major theories of development have tended to see the relationship between economic development and key institutions such as (labour) law and regulation as linear. In other words, that economic and technological developments will lead to institutional developments, including in the law (Datta, 1986); or, that key institutions, including law, are essential for economic development (New Institutional Economics). More recently, legal origins theory has challenged some of the assumptions of earlier development theories. Whereas Lewis or Kuznets might have predicted that the spread of economic and technological change would stimulate the development of more – and more sophisticated – institutions, in the view of legal origins theory, less institutional architecture should lead to more economic development. But it is still essentially a linear conception – and moreover one that rests on foundations that are at best empirically weak.

Thus what is needed is a way of understanding the interrelationship of law and other institutions with developmental evolution. Only such an
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approach can overcome the signal weakness of the linear conceptualisation at the core of other theories: their inability to explain cross-country variation, and even occasional reversals of historical trends. In Deakin’s view, what is needed is a systemic institutional approach to understanding labour regulation, as this enables us to explain ‘how labour law rules can be understood as coevolving with economic institutions as a market economy develops’ (Deakin, this volume, p. 34). To this end, Deakin outlines the key institutional functions that labour law can fulfil: economic coordination, risk distribution, and maintenance of demand. In common with Kolben, Sankaran and Bensusân (all this volume), he also argues that labour laws can be important in facilitating democratisation, social and civil dialogue, and empowerment. Deakin considers his arguments in light of the findings of leximetric studies of changes in labour laws and economic development. His conclusion: ‘over the long run . . . labour law has acted as a developmental institution, that is, as a set of linked mechanisms and practices which has contributed to economic growth and to the achievement of complementary policy goals including poverty alleviation and social cohesion’ (Deakin, this volume, p. 33).

Chapter 3 (Kevin Kolben) draws on current debates and literature in regulation theory and development theory, and engages with questions about the goals of development theory and policy. His project is the articulation of a theoretical basis on which to understand labour regulation as being not only positive for development, but as a key site for pursuing fundamental goals of development. Drawing on Nussbaum and Sen, Kolben argues that the core of the development project ought to be the promotion of human capabilities, in this sense taking the view that development should be understood as a process that is transformative of society and its institutions – as distinct from economic measures of changes in (for example) gross domestic product or poverty levels. A capabilities approach to development therefore ‘seeks to remove the unfreedoms that exist that prevent people from achieving the functionings that they have reason to value, and . . . to ensure that people enjoy certain threshold capabilities’ (Kolben, this volume, p. 64).

From this point of view, work is a central place to pursue the development project, as it is quintessentially a site of unfreedom; it is a site ‘where capabilities are both enhanced, and diminished’ (Kolben, this volume, p. 64). From a strategic point of view, work is a key site at which to pursue a capabilities-enhancing approach to development, even if only from the simplistic perspective that so many people spend so much of their time working. In this sense the strategic value lies in the ability to reach so many people. In addition, this way of seeing things provides a further basis for regulatory intervention: recognising the freedom-promoting function of
Labour regulation addresses the traditional liberal concern that work takes place within a private economic sphere that should be the subject of limited state intervention. On this basis it is possible to articulate specific goals for labour regulation, among them promoting non-discrimination, and ‘facilitating mechanisms of worker engagement and participation in workplace governance such that workers exercise effective control and influence over their work lives’ (Kolben, this volume, p. 73). In the capabilities approach, Kolben finds the basis to insist – as do others in this volume – on the significance for labour regulation and for the broader development project of promoting democratisation, and in particular mechanisms to express voice and to act collectively.

Chapter 4 (David Cheong and Franz Christian Ebert) explores the interrelationships of trade, labour standards, development and employment. Drawing on Blackett, Kolben and Stiglitz, Cheong and Ebert argue that labour law, rather than being inimical to the project of economic development, is needed ‘to mediate people’s participation in areas of the world of work where the market system does not lead to dignified or democratic outcomes’ (Cheong and Ebert, this volume, p. 87). This conceptualisation locates their chapter firmly with Kolben in their emphasis on dignity and democracy, and with Deakin in their emphasis on labour regulation as a means to promote these objectives where the market alone does not do so. Indeed they go on to note some key economic arguments in favour of labour regulation: collective bargaining can promote effective information exchange and coordination; minimum wage standards can drive competitiveness and productivity improvement; safety and health regulation reduces the overall burden on individuals and society by requiring firms to internalise costs; and, more generally, labour regulation can serve as an incentive to invest in human capital.

Cheong and Ebert review the empirical literature that considers how labour standards affect trade, how trade affects labour standards, and how trade affects employment levels. Not surprisingly they, like Deakin in his chapter in this volume, stress the need for caution when drawing on or interpreting the results of empirical studies. A correlation between better compliance with core international labour standards and higher GDP may demonstrate nothing conclusive about the direction of causality. Studies of the development impact of freer trade are often focused on narrowly defined indicators of economic development. Studies of the impact of trade on employment, wages and other standard labour market indicators have produced varying conclusions. Given the emphasis in many chapters in this volume on fundamental freedoms, Cheong and Ebert give pause for reflection when they observe that notwithstanding the diversity of results, ‘one possible conclusion is that trade liberalisation tends to be more...
problematic for the labour standards related to freedom of association and collective bargaining and non-discrimination’ (Cheong and Ebert, this volume, p. 95). They conclude that improved labour standards are unlikely to have adverse effects on trade, and indeed may be positive in the longer run, but that governments may need to devise policy carefully to ensure positive employment effects from trade.

Chapter 5 (Marlese von Broembsen and Shane Godfrey) moves the focus to case studies of labour law in operation in the clothing and textile industry, which is one of those most significantly affected by shifts in international trade. They explore the interconnected but divergent experiences of Lesotho and South Africa. As with other chapters in this volume, the authors argue that labour regulation may have a positive developmental effect. In Chapter 2, Deakin reminds us that labour law took shape in England in the late 19th century in part as a result of political developments: the extension of the franchise enabled the establishment of political parties that pushed for social legislation. In Chapter 5, Von Broembsen and Godfrey take the debate much further towards the question of the role of the political. They draw on Ha Joon Chang’s institutional political economy perspective which, they argue, ‘challenges the neoliberal notion of the market as natural, and renders visible the ways in which the political economy affects whether a regulation or labour market institution is regarded as interfering in the market or not’ (von Broembsen and Godfrey, this volume, p. 138). Their emphasis on the significance of the political economy leads them to argue that if labour law is to be able to realise its potential to contribute positively to development, it must make two major shifts: it must move beyond regulating individual employment relationships to regulating value chains, and ‘in each national/regional context, the goals of trade and industrial policy have to be aligned’ (von Broembsen and Godfrey, this volume, p. 138). The consequence of overlooking either of these demands is that labour law’s only redistributive effects will be between workers, rather than between capital and workers.

Lesotho and South Africa and their labour markets have long been interlinked, most notoriously with the history of men from Lesotho migrating for work in the South African mines. The two countries’ clothing industries have also been interconnected. In South Africa the industry has declined since the shift to democracy and opening up to global economic participation, and despite the use of trade and industrial policy to support it. A key battleground has been the application of labour regulation and in particular the perceived cost of the extension of collectively determined working conditions to the whole industry through a collective bargaining council with roots back to the widespread unionisation of the industry in the early years of its development. Whereas bargaining
councils as a labour law institution were previously not a focus of concern for capital, the new industrial and trade policy conditions after 1994 exposed them to new attacks and pressures. At the same time, one effect of the decline in the South African industry has been the relocation of South African capital to lower wage Lesotho. There, labour law has retained its traditional focus on workers in formal employment and on the regulation, among other conditions, of minimum wages. Given the conditions in South Africa and the lower wages in Lesotho, the minimum wage as a labour institution has not come under the same pressure in Lesotho as was applied to the bargaining council in South Africa. But its capacity to have a redistributive impact (and to promote productivity improvement at firm level) is in very large measure a consequence of wholly outside influences: the growth of a clothing industry that owes its existence in the country to shifts in international trade policy that made it profitable to invest in a previously limited industry.

Chapter 6 (Graciela Bensusán) surveys the recent evolution of labour law and labour regulation in Latin America, drawing on an analytical framework for labour law and its role suggested by Simon Deakin. The goal is to consider the role that labour regulation has played in addressing inequality in the region over the long term. Her working concept of development is one articulated by the United Nations Economic Commission for Latin America and the Caribbean (ECLAC). This concept of ‘inclusive and integrated development’ has three dimensions: structural change, growth to reduce both internal and external income and productivity gaps, and the promotion of equality (Bensusán, this volume, p. 164). The author’s own articulation is refined to a concept of labour regulation as a vehicle to spread quality employment with rights, to improve workers’ capabilities including their bargaining power, and to address inequality gaps in incomes and working conditions. (Bensusán, this volume, p. 165). Here there are very clear overlaps with the key elements suggested by Kevin Kolben in Chapter 3, with emphases on participation, equality and the enhancement of capabilities.

Drawing on Huber, Bensusán identifies key development challenges in Latin America: low skills and productivity, trade unions with limited bargaining power, antagonistic relations between employers and workers, limited tripartite engagement, and paternalistic governments (Bensusán, this volume, p. 168–9). This leads to the specific imperative to address inequality, including through labour regulation: it is an impediment to development. Bensusán highlights some examples of labour market regulation in the region that may be positive for development: facilitation of industry or sectoral bargaining in Argentina and Uruguay; enhancing and improving labour inspection in Brazil; extending legal protection to
domestic workers in Argentina, Brazil and Uruguay; and attempting to address the challenges posed to labour law by changes in labour markets and in particular sub-contracting (Mexico and Uruguay). The chapter concludes that in some cases there have been significant changes that have modified earlier, neoliberal policy prescriptions. Nevertheless, labour regulation in the region is still doing less than it might to reduce inequality, especially given the interplay of high levels of informal employment and social protection systems that for the most part remain best suited to those in formal employment.

Chapter 7 (Kamala Sankaran) considers the role and potential of labour law/regulation from the perspective of the right to development, especially as enunciated in international declarations of the right. The chapter explores these issues in the context of South Asian labour markets, and the Indian labour market in particular. Turning to the international human rights framework adds further perspective to the arguments advanced elsewhere in this volume about the meaning of development. Thinking about a right to development brings attention to the role of the individual: it emphasises their agency and participation in the process, in addition to their role as a beneficiary of the development process. In turn, development is conceived of as ‘a comprehensive economic, social, cultural and political process’, founded on equal participation, that aims to improve ‘the well-being of the entire population and of all individuals’ (Sankaran, this volume, p. 208). For Sankaran, it follows that labour law should be inclusive; should enable workers to exercise some agency, including in how laws and policies are formulated and implemented; and should help to address inequality by giving workers voice through, for example, collective bargaining.

In exploring these arguments in the context of her home country, India, Sankaran argues for a re-conceptualisation of labour law. In particular, she identifies as problematic the origins of Indian labour law as an instrument to preserve industrial peace, in the context of a wider social compact that was expected to see major growth in formal employment and industrial development as a result of massive public investment. This in turn has led to a focus in the debate on labour law and its role in Indian development that largely ignores the fact that fewer than 10 per cent of Indian workers are working under conditions set by formal labour law. Bringing that fact to the centre of the debate leads Sankaran to argue (similarly to von Broembsen and Godfrey) for interconnection between labour law and other areas of policy, in this case, rural and urban development planning. This is particularly relevant for those in the informal economy, and for whom a major obstacle is access to land. Sankaran also considers the extent to which labour law can address the particular challenges faced by
other excluded groups including ethnic, racial and religious minorities. Like Bensusan, Sankaran points to the interrelationship of poverty and limited social protection schemes. In this, both can be seen implicitly to endorse Deakin’s earlier arguments – based in large part on his previous work with Frank Wilkinson – that social protection systems have at times played a key role in creating the conditions in which effective wage labour markets could emerge (Deakin, this volume; Deakin and Wilkinson, 2005).

Chapter 8 (Colin Fenwick) provides an examination of the perspective and the role of the ILO in supporting its member states to revise their labour laws, including in ways that promote economic development. The chapter considers case studies of labour law reform in six countries where the ILO provided assistance: Cambodia, El Salvador, Liberia, Nepal, Romania and South Africa. A key aim of the chapter is to draw on practical experience of labour law reform in a variety of contexts, so as to explore how the ideas developed elsewhere in the volume could be made operational.

The chapter agrees with the broad thrust of the rest of the book, in particular that there is a pressing need to develop institutions and models of labour regulation that can be effective in developing economy environments. At the same time, the chapter raises questions about the assumptions that underlie the project of law reform in aid of development, in particular as concerns the capacity of actors at the national level to engage in the debates and processes that are envisaged. These questions arise naturally from the contexts considered in the case studies, which, in different ways, each raise the same fundamental question: how, and how quickly, can institutions be developed in environments that are institutionally very weak? Moreover – and in this sense connecting to von Broembsen and Godfrey’s reminder of Chang’s emphasis on the political economy – how will the political actors in any given institutional configuration interact, and will the outcome of their contestation redound to the benefit of labour regulation and the wider development project?

Chapter 9 (Shelley Marshall) concludes the book by assessing the ideas developed by the contributors to the present volume and elsewhere for ways that labour law could be reformed and augmented to better promote development in poor and middle-income countries. It begins from the premise that institutions of labour law were often transplanted from industrialised settings and thus new architectures better suited to those countries ought to be constructed. These proposals for reform are understood to be part of a broad toolkit which can be drawn on by those responsible for reforming labour laws in the interests of promoting development, rather than a clear formula. In keeping with the idea that economic and
social institutions are path dependent and operate in connection with one another, it proposes a template for examining existing labour laws and accompanying institutional complexes to design reform programmes that will attune with the existing institutional ecosystem.

5. CONCLUSION

This volume explores the role of labour regulation in the development project. The authors disagree with each other in some key respects. Von Broembsen and Godfrey, for example, question whether Deakin’s highly developed arguments in favour of labour law in economic terms do not pose the risk of labour law being captured by the economic project (von Broembsen and Godfrey, this volume, p. 137; compare Dukes, 2014). Fenwick raises the question whether it is feasible, in purely practical terms, ever to take the lessons of economic and legal institutional evolution in some contexts, and attempt to draw on them in other, institutionally weak contexts.

But there are also broad and significant areas of agreement. All authors here make arguments in favour of labour regulation as a positive contribution to the economic and human development project. In particular, we see a common emphasis on the need to integrate the economic and the human. There is a strong theme of the need for and the value of using labour regulation to empower the disempowered, through voice and other mechanisms. There is a strong theme of using labour regulation to address fundamental inequality – but in this case not only because it is a human right, because it is fair, but also because it will have positive effects for the economic development project. Here, many of the contributions draw, explicitly and otherwise, on conceptions of development that emphasise the enhancement of human capabilities. Another common theme is the need to broaden the conceptual scope of labour regulation. In the immediate sense, the authors argue that labour law should be revamped to reach beyond the formal employment relationship so far as possible. But beyond this, they argue that the labour regulation project should also be re-conceived as having essential interconnections with other major areas of policy: social protection, industry and trade policy, urban and rural development and planning policy (compare Arup et al., 2006).

The chapters in this volume present a variety of socio-legal perspectives on development, and on the role of labour regulation in that project. In other words, while the authors in different ways engage with ‘orthodox’ or ‘traditional’ conceptions of development, for the most part they work explicitly in different – if sometimes related – scholarly
traditions. But at the same time, this is not a volume that takes issue with the underlying imperative of the human development project. For so long as huge numbers of the world’s population live in poverty, for so long as so many have insufficient work, or insufficiently safe or insufficiently paid work, human development will and must remain a key goal of policy makers the world over. Given that imperative, it is to be hoped that the perspectives presented in this volume may make a positive – if small – contribution to our understanding of how to work towards this pressing goal.

REFERENCES

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