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Single solution = no solution
The international 'problem' of labour regulation

Why sole reliance on the term 'employment' to achieve all labour-related regulatory objectives is doomed to failure

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A Discussion Paper for people interested in global, labour regulation systems
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A. Overview: The dilemma

In June 2006, the International Labour Organisation passed a Recommendation that accepts that employment law should not intrude into commercial law. The ILO accepts that independent contractors are not employees. The 2006 Recommendation came after a decade of global debate in which labour regulators sought to reclassify self-employed, independent contractors as employees. They sought to do this in the belief that independent contractors were threatening the integrity and stability of the global labour regulation system. The 2006 Recommendation finalises this decade-long debate by correctly recognising that labour regulation is limited to employment and only employment.

But, the 2006 ILO Recommendation does not resolve a dilemma for the global labour regulation community. The dilemma exists because of an underlying belief that a number of social welfare, tax and social justice objectives cannot be met where 'employment' does not exist. This dilemma is real because many social, tax and labour regulations created since World War 2 are legislatively grounded on the term 'employment'. Without 'employment', these regulations have no legal effect.

Because of this wide-ranging dependency on ‘employment’ and because independent contractors are not employees, independent contractors have often been seen as ‘the enemy’ of labour regulation systems. And the increasing numbers of independent contractors across the globe have allegedly created a crisis for labour regulations. But independent contractors simply reflect an approach to work that is different from, and no less legitimate than, employment.

The truth is, however, that labour regulation has found itself weighed down with conceptual baggage that is ill-suited to the new terrain of independent contracting. It has thus far struggled to adjust to new realities.

The 2006 ILO Recommendation represents an important first step towards breaking out of this historically created problem. Accepting new realities is the first requirement for resolving the dilemma posed by these new circumstances. But more needs to be done.

B. The way forward

This discussion paper proposes that the dilemma can and should be fixed.

- The approach in the past has been to deny the legitimacy of independent contractors and to ‘reclassify’ them as ‘employees’ to create technical conformity with regulations.
- The ILO 2006 Recommendation accepts that this is not a legitimate approach.
- The solution is to:
  - a) Accept, respect and embrace the fact that both employment and independent contracting are proper forms of work—as per the ILO Recommendation.
  - b) Ensure that regulations are designed to embrace both employment and independent contracting where required to achieve the specific policy objectives sought by each nation.
  - c) Approach the task of legislative design so that the different policy outcomes required by tax, equal opportunity, anti-discrimination, work safety, social welfare and all other work regulation objectives are met appropriately.

  This is not a difficult exercise. In fact, many labour regulations across the globe already take this approach.

- Where this alternative approach is taken:
  1) Laws and regulations are normally clearer and less confusing than the ‘employment dependency’ approach.
  2) Voluntary community compliance with laws is maximised.
  3) Enforcement, where required, is better targeted and more effective.

1. **Understanding the historic approach**

Since 1996, the International Labour Organisation has attempted to redefine the term 'employment'. It has attempted this because employment is no longer the sole or dominant legal working relationship through which individuals earn their incomes. Many individuals around the world now earn their incomes as self-employed independent contractors. Independent contractors earn their livings through the commercial contract instead of the employment contract.

It is true that the legal structures and forms of work are now many and varied. This is well recognised. It has always been the case to an extent, but its incidence seems to have grown substantially over the last few decades. Independent contractors are the starkest example of these varied work forms because the employment contract is not the contract through which they work. Consequently, independent contractors appear to pose the greatest challenge for labour regulations because they appear to be outside the reach of employment law.

It is understandable that people whose profession is the regulation of labour could believe that if individuals were not 'employees', then this would reduce the legal capacity of regulators to apply their laws. Typically, the associated claim is that, as a consequence, 'workers' are denied 'protections' provided by labour laws. In addition, there is often a view expressed that labour regulation—as developed since the Second World War—is the only process through which 'worker protections' are possible.

These arguments find their ultimate expression in the deliberations of the International Labour Organisation. The ILO is the peak global institution for labour regulators. Its deliberations are a synthesis of the thoughts and ideas of labour academics, unions, some management thinkers, government labour regulators and (often) tax administrators from across the globe. Its decisions are used as benchmarks for the design of labour law world-wide. What the ILO says is important.

2. 'Fixing' the 'problem' has meant only one solution

The approach of the ILO toward fixing this apparent 'problem' created by non-employees has generally been to attempt to redefine non-employees as employees by legislative means. This is an understandable response. The professional requirement of labour regulators is to ensure that the laws they administer are enforced. And from that perspective, the 'problem' of a diminished regulatory reach is not a creation of existing labour laws but of the new forms of work. The natural and most immediate reaction is, and has been, to seek to redefine the new forms of work as 'employment'. Changing a few words in law to declare something to be what it is not, would seem the easiest way of creating a solution. That is, if definitions are changed, non-employees can be caught within the regulatory net and a new discipline can be applied to societies and peoples to ensure that existing approaches to achieving social justice and order through labour regulations prevail.

This had been the general direction taken by the ILO. It was understandable. But this approach raises a difficulty that leads this 'solution' to fail.

3. Why the 'one fix' is no fix

What the ILO and labour regulators have had difficulty in understanding in the past is that there is a vast difference, both in law and in human behaviour, between employment and non-employment. The behavioural difference finds its legal expression in the distinct divide between the employment contract and the commercial contract.

What has made this difference more difficult to grasp within the ILO is that the ILO itself has an institutional structure that operates on the presumption that labour and capital are always opposed. This is the presumption of employment. This has determined the institutional structure of the ILO, which only formally represents unions, employers and governments. Persons outside of this traditional framework are unrepresented. This has produced an ILO culture that struggles to grasp work concepts outside of the idea of employment.

But the essence of understanding people who work through the commercial contract is that they do not see a 'class' difference between labour and capital. For them, capital and labour are the same. It may seem strange to some, but there is no systemic class consciousness when working through the commercial contract. Consequently, the mental approach to work by independent contractors is vastly different from that of employees.

And there are several important, simple concepts that follow from this understanding:

(a) *Individuals can and do earn a living by not being employees:* For some observers this appears as a startling and even radical idea.

(b) *Individuals working as independent contractors are businesses of one*: But many labour regulators have huge difficulty accepting that single individuals are businesses in their own right. Tax administrators, for example, often have significant difficulty with this idea.

(c) *Labour law is not the only form of 'protection' available to workers:* This is a concept that seems to be totally alien to labour regulators and to the ILO.

(d) *Non-employees, being businesses of one, are a backbone to entrepreneurship, innovative business activity and a significant driver of economic growth and global job creation*: Labour regulators seem to concede this as an intellectual point, but it is often not within their frameworks of experience to understand it. Being something they do not understand, they are often suspicious of it.

(e) *The law of contract has two distinct forms. The employment contract is a contract of inequality. The commercial contract is a contract of equality.* This is considered a highly radical statement in most quarters—both from within and without the labour regulation professions.

As a consequence of an inability to fully grasp these simple truths, the 'one fix' approach—that is, always defining non-employment as employment—runs headlong into the true realities of work, law and human approaches to work. The fact is that there is a long-term global movement toward non-employment. It is a broad social movement that shows no signs of slowing or stopping.

Worse still, when a ‘one employment fix’ approach is applied to social regulations, this can become counter-productive, potentially destructive of work creation and even social justice objectives.

The consequences of declaring individuals who are self-employed to be ‘employees’ are as follows:

- *It creates damaging legal and commercial uncertainty*. It suppresses the capacity for self-employment to exist. It suppresses economic activity, constrains entrepreneurship, and stops nations and peoples achieving their potential. It hinders job growth.
- *It marginalises the law*. People will push the margins of the law to exploit inconsistencies in the law. They will find legally creative ways of avoiding laws when those laws run counter to reality. This is already a complaint voiced by labour regulators. However, where the ‘one fix’ solution is applied, it expands the problem rather than reducing it.
- *It encourages law-breaking*. When laws defy logic and declare things to be what they are not, people will defy the laws. If people feel a law is unjust or stupid, they will simply break it. If large enough numbers of people defy the law, enforcement becomes a near-impossible task. Enforcement of labour laws is already recognised as being difficult. The ‘one fix’ approach intensifies the difficulty.

Many of these problems need not occur. There is a simpler way to create solutions, solutions which are based around maximising voluntary community compliance.

4. The real solution—an overview

To achieve maxim voluntary compliance, laws must:

- Start with the realities of human behaviour.
- Accept and embrace the positive behaviours.
- Be designed around those behaviours.
- Be simple, clear and easily understood.

When voluntary compliance is maximised, illegality is minimised, and the task of enforcement is clarified with the use of fewer resources.

In relation to the objectives of labour regulation, this means:

- Accepting that redefining independent contractors as employees is not a solution.
- Accepting and fully embracing both the status of employee and that of independent contractor as wholly legitimate and acceptable.
- *Looking to each specific labour regulation objective and designing the regulations to embrace employment and independent contracting in ways that are appropriate to each status and the regulatory objective in question.*

The ILO has made the first step in this direction by accepting that redefining independent contractors as employees is *not* a solution.

5. How the 2006 ILO Recommendation gives a new start

In June 2006, the ILO adopted an historically important 'Recommendation' establishing a new international labour standard.

The key statement in the Recommendation is *clause 8* which reads:

> *National policy for protection of workers in an employment relationship should not interfere with true civil and commercial relationships, while at the same time ensuring that individuals in an employment relationship have the protection they are due.*

This statement is extremely important because it finalises the most difficult part of the ILO decade-long debate.
In effect, the Recommendation accepts that

- The employment contract and commercial contract are different and that each is legitimate.
- That labour regulation should not seek to redefine independent contractors as employees or the commercial contract as an employment contract.

This is a clear acceptance of the new realities of work. It provides a new starting point for resolving labour regulation issues. It represents a rejection of using 'employment' as the sole legislative process for achieving an array of regulatory objectives.

But this is only the first step.

The next phase is to address the design of the many work regulations already in place to ensure that they achieve their national objectives. If this is not done, regulators will still find that their laws not only suffer from non-compliance but remain out of step with the realities of work.

Fortunately, solutions are available, are often already in operation and can be utilised. There is a general approach to policy development that nations can take which maximises the capacity of nations to achieve regulation design that suits each nation's specific needs and circumstances.

6. The specifics

The solutions may be found by adopting a practical policy development approach:

To be specific, each of the following public policy areas has clear and distinct objectives which frequently cannot be tied together through the one approach.

- *Tax:* There are many different tax systems globally. But primarily tax administrators have two major tasks: to (a) collect tax, (b) ensure that tax rates are applied as intended.

This is totally different from

- *Equal opportunity:* This seeks to ensure that people from different backgrounds all have equal access to work opportunities, for example.

This is marginally different from

- *Anti-discrimination:* This relates to equal opportunity and seeks to ensure that people from different backgrounds do not suffer discrimination.

Which is completely different from

- *Work safety:* The objective here is to ensure that people at work are safe.

This relates to but is quite different from

- *Injury insurance:* This attempts to ensure that if people are injured at work, there is adequate money available to cover medical costs and compensate injured people for lost earnings.

This is completely different from

- *Social welfare systems*: These are targeted to ensure that where people are jobless and do not have income from work, they are not financially destitute.

This is totally different from

- *Collective organisation of employees*: This aims to give employees who are in a weaker bargaining position than employers the capacity to achieve countervailing strength to create equality of bargaining power.

This is closely related to

- *Laws governing working standards—for example, pay rates and hours etc*: These are targeted to limit some elements of the bargaining process between employers and employees and to have the State impose minimum standards—for example, on hours of work, minimum pay rates and so on.

These are the traditional areas in which labour and related regulation have operated and which have been the focus of the ILO.

It is clear that each of these social and economic objectives is quite distinct. Further, the capacity of nations to achieve each objective varies considerably depending on each nation's economic wealth, institutional infrastructure, moral and social attitudes and history. This affects equal opportunity, anti-discrimination, work safety and injury insurance in particular.

In addition, the extent or ways in which nations may choose to apply these objectives may be important for defining national cultures and economic outcomes and competitiveness. This means that policies will differ in relation to tax, social welfare systems, collective organisation of employees and working standards.

What one nation may see as good for them may be seen as impossible or bad by another.

What is clear, however, is that nations need legislative frameworks within which the decisions they make can be accurately and adequately achieved.

As discussed earlier in this paper, up until now, the framework for designing each of these regulatory areas has been to use 'employees' as the central design feature—indeed it has often been the starting point of design. But, for the reasons given earlier, it is a defective approach which creates flawed regulations.

The only approach that can work is one which

- starts with the recognition that each separate policy objective is distinct;

and

- incorporates employees and independent contractors into each policy area where appropriate to the needs and circumstances of each nation.

7. How this is achieved

7.1 Tax: Tax administrators have two major tasks: to (a) collect tax, (b) ensure that tax rates are applied as intended.

Tax collection systems have often relied on minimising the number of entities from whom tax should be collected. This has allegedly made the auditing and compliance of tax simpler. It has been easier to collect employee income tax from employers, rather than collecting tax directly from employees. The rise of independent contractors has changed this administrative equation and diminished the effectiveness of the old system. Fortunately, some nations have found solutions by creating straightforward, integrated tax collection systems that focus withholding compliance on 'income earners'. This has vastly diminished the dependence of tax administration on employment. Tax rate issues are addressed through a similar integrated approach.

The Australian tax collection system, for example, was redesigned in 2000 to achieve this objective. Now the legislative and administrative systems enable 'withholding' of tax to be applied to employees, independent contractors and through labour hire by using one integrated approach. The Australian tax system has released itself from dependency on 'employment' and realigned itself to operate in the new world of work.

7.2 Equal opportunity & anti-discrimination: Most laws in these areas have already avoided the problems of legislative dependency on employment. Legislation is generally already written to require 'people' (rather than employers or employees) to behave in appropriate ways. This results in employers, employees and independent contractors having responsibilities to one another. The only area of difficulty is that when these laws are applied to employees, a transfer of liability from employee to employer can occur. In other words, employers become liable for the illegal behaviour of employees. Such a transfer of liability distorts the law and thereby diminishes attempts to achieve the laws' intended objectives.

7.3 Work safety: Generally, laws in this area already ensure that independent contractors have responsibilities. Some problems do occur with some laws when employees' only responsibility is to follow the instructions of their employers. Once again, where this occurs, liability for actions can be transferred and again this can work against the objective of safe work practices. All employees, together with employers and independent contractors, should have responsibilities and liabilities for safe work practices within the realm of what they can practically control.

7.4 Work injury insurance: Nations vary in their capacity to offer and/or require injury insurance. Also, where insurance is required by law, the schemes can vary enormously. Some nations provide monopoly state schemes, others require private

schemes, some leave the decisions entirely to individual choice and so on. The extent to which employers, independent contractors and employees are required to contribute to insurance schemes and/or benefit from schemes, varies significantly. Each nation has significant decisions to make within this area. If dependency on 'employment' is thought appropriate for the required legislative framework, this should be done only if a conscious policy decision is made to exclude independent contractors. All too often these schemes legislatively exclude independent contractors, but then try to 'deem' independent contractors back in to the fold.

***7.5 Social welfare systems*:** The variety and complexity of welfare schemes across the globe is enormous. This is influenced heavily by the capacity of nations to afford schemes, and the social and economic objectives thought appropriate. Historically, many schemes have only been made available to 'employees' where 'employers' have made contributions. Alternatively, where schemes have been funded from general tax revenue, benefits have often been restricted to ex-employees. In recent times, there has been a recognition that self-employed independent contractors have often suffered from discrimination under state schemes and adjustments have been made. Each nation needs to ensure that conscious policy decisions are made as to who is to access benefits and who is to make contributions.

***7.6 Collective organisation of employees*:** This is one area where independent contractors have no interest and should have no interest. Collective activity by employees is socially accepted as a necessity to counterbalance the power of employers in order to achieve improved wages and conditions. Collective activity, however, is a form of collusion for the purposes of price manipulation which has the effect of limiting or damaging free-market activity in economies. In most nations this is considered acceptable under the employment contract. However, to apply this same thinking to independent contractors is to apply contorted concepts to the commercial contract. To sanction this is effectively to agree to collusion and a form of price-fixing in free market activity. For nations wanting free markets as the basis of economic activity, this cannot be accepted. For nations that decide free markets are to be restricted and constrained, then applying collective, collusive price-fixing activity to independent contractors would be one way of damaging them.

***7.7 Laws governing working standards—for example, pay rates and hours etc*:** Generally these are only applied to employees as part of a State-imposed process to limit the scope of bargaining between employers and employees. This should generally not be applied to independent contractors as they choose to subject themselves to the protections and obligations applying under free markets.

8. Summary

There is significant variety and complexity among the regulatory, welfare, social and tax regimes which apply across the world in relation to workers. Attempting to use the legal terms of ‘employment’ to act as the single and total catch-all to tie all of those systems together is doomed to failure. Nations need to design their chosen system to achieve the specific policy outcomes they want in the different regulatory areas. The extent to which employees and independent contractors are incorporated into each and every scheme requires that further specific policy decisions need to be made that are appropriate for employees on the one hand, and independent contractors on the other.

On first appearance this may look like a long way to fix labour regulation issues. In practice however it proves to be the shorter and more successful approach.

Discussion

This paper has been prepared for the purposes of initiating discussion.

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