Imagining Post "Geneva Consensus" Labour Law for Post "Washington Consensus" Development

ROUGH DRAFT

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BRIAN LANGILLE

Faculty of Law, University of Toronto

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I. INTRODUCTION: "A Picture Held us Captive"[1]

This meeting in Geneva is about "Regulating for Decent Work: Innovative Regulation as a Response to Globalization". The meeting's manifesto begins with the words "Deregulatory narratives have recently gained ground…" Using a word I borrow from Simon Deakin, this remark has now, I would suggest, a slightly "antique" quality. As familiar as that claim is to those who have sought to protect and advance the cause of labour law over the past 30 years, it now seems disconnected from the real world we see when we raise our heads from our reading of "boilerplate" labour law writing and look out of our windows at the world as it really is, financial crisis and all. It is now imaginable, in a way not possible even a year ago, that the golden age (roughly, 1978-2008) of "de-regulatory capture" is over.[2] Along with Alan Greenspan, many who had advocated non regulation are discovering a "flaw" in their "critical functioning structure that defines how the world works". (This was Greenspan's famous and dramatic explanation of what the financial crisis revealed to him.) The "critical functioning structure that defines how the world works" is, as John Lanchester recently put it, "a hell of a thing to find a flaw in"[3]. My view is that Lanchester is right - "the critical functioning that

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[1] Ludwig Wittgenstein, *Philosophical Investigations* , para 115.

[2] Or is it? The depth and hold of the set of ideas defining this era, in many areas of our regulatory life, is well known and the mode of operation of its promoters increasingly commented upon – see Simon Johnson "The Quiet Coup" The Atlantic (May 2009); Martin Wolfe "Cutting back financial capitalism is America's big test" Financial Times, April 15, 2009 p 9; David Leonhardt, "The Big Fix", New York Times Magazine, February 1, 2009. See also Mancur Olson, *The Rise and Fall of Nations* (1982). For an account of the takeover of a significant part of American (and other) legal thinking along these lines see Teles, *The Rise of the Conservative Legal Movement* (Princeton, 2008).

I borrow the "de-regulatory capture" formulation from Sanford Jacoby "Finance and Labor: Perspectives on Risk, Inequality, and Democracy" (2008), 30 Comparative Labor Law and Policy Journal 17 at 28.

[3] Lanchester, "Heroes and Zeroes" The New Yorker, February 2, 2009 at p.73.

defines how the world works" is indeed "a hell of a thing to find a flaw in". But it is also true that that is where the really important flaws are to be found, and where we should direct our energies. As counties around the world race to re think, re-discover and to re-install many of the long discarded and much discredited elements of the modern regulatory and welfare state, the obvious question is whether labour lawyers have been left out, and are to remain on the sidelines, of the important re-conceptualization of the relationship between, and point of, markets and regulation this entails. The most important contribution this conference can make will be to help answer those questions in the negative. I take it that this conference is held in this spirit.

But there is a large risk here and it is this risk to which I wish to draw attention in this paper. The risk is the following: there exists a widely shared, largely implicit, and stubborn understanding how we should go about bringing labour law - conceived of as the Decent Work Agenda if you like and as our Conference has it - to the world, now that its time has come. That is, while we need a Greenspanian moment concerning the regulation/de-regulation debate (which is not difficult for the ILO, nor most labour lawyers, nor for those attending this conference) we also need a similar moment regarding the way in which labour regulation can be "delivered" and made possible in the nations of this world, and my worry is that we will miss this fundamental point in our efforts to rehabilitate the idea of labour regulation. My way of putting this is that many are locked into, and held captive by, a picture of labour regulation - what I will call the "Geneva Consensus". The parallel to the Washington Consensus is intentional. Overcoming the Geneva Consensus requires a rethinking of Greenspanian dimensions.

If we could think clearly and from first principles then I take it that our starting point would be that the purpose of labour regulation is to improve the lives of the inhabitants of the world, insofar as work has something to do with it. And work has a lot to do with it. In recent writings I have relied upon Sen's formulation of these basic points because I believe it to be the most powerful and helpful. In Sen's terms our goal is real, substantive, human freedom – the real capacity to lead a life we have reason to value. Development in Sen's terms consists in the removal of barriers to human freedom so conceived. The reason that labour regulation has a lot to do with this enterprise is that there is an intimate connection and fundamental overlap of human freedom, on the one hand, and human capital, on the other. Human capital is here not

conceived, as is common, solely in economic or instrumental terms (indirectly contributing to productivity and GDP growth) but also as an end in itself (directly contributing to a more fulfilling and freer life). [4] Labour law is that part of our law which structures the mobilization, and deployment of human capital. Human capital is at the core of human freedom. Education is basic to human capital. But while the creation of human capital through education is vital, both to aggregate welfare and as an end in itself, so too are the rules which govern the actual deployment of human capital, ie labour law. In our globalized world getting labour regulation right is an even more vital key to the development of just, prosperous, and sustainable societies which advance, and are advanced by, the realization of human freedom.

But my main point is that the conditional phrase – "if we could think clearly and from first principles" carries a lot of freight. Such thinking is difficult. But, perhaps surprisingly, this is where some recent thinking in development theory may be of some assistance to labour lawyers in thinking about how to go about discovering what "innovative regulation as a response to globalization", as our conference title puts it, might look like. Development theory is everywhere in a Post Washington Consensus mode. Labour law theory need get beyond the Geneva Consensus.

To sum up: I am suggesting that a widely held, indeed dominant, methodological approach to the delivery of labour regulation exists and that it contains a Greenspan size flaw - one which is difficult for many to see precisely because it is so fundamental. This is, of course, in the nature of such flaws. Further the idea advanced here is that pointing out and paying attention to a parallel and more advanced debate in development theory about fundamental methodological approaches can shed some light and help labour lawyers find their way forward in their own thinking. Seeing the link between advances in development theory and current problems in labour law theory is, it is proposed, a recipe for some progress. But we should not be mistaken about what this entails. First, it is true that discovering a flaw on this scale and then acknowledging it requires a degree of intellectual openness. Second, even with that frame of

[4] See Sen, "Human Capital and Human Capability" (1997) 25 World Development 1959. See also *Development as Freedom 292-97.*

mind in place, Keynes reminds us the profound difficulty most of us have in seeing what is wrong with the received wisdom in any field – the problem is not the new ideas but the old ones which are so very hard to escape.[5] Third, seeing the flaw is just the beginning: the task which follows the discovery of a flaw of Greenspanian proportions involves re-orienting ourselves to the world. It changes, as they say, everything.[6]

This is thus a paper which is not about a particular regulatory initiative or idea – but an obstacle to how any and all such ideas may most profitably be brought to the world.

II DEVELOPMENT THEORY - "The ending of a conviction".

Development economists have made headlines recently by being rather hard on themselves, and their discipline. Dani Rodrik began a review in the Journal of Economic Literature with the following sentence "Life used to be relatively simple for the peddlers of policy advice in the tropics".[7] This way of putting things is provocatively similar to Willliam Easterly's formulation as revealed in his title **The Elusive Quest for Growth: Economists' Adventures and Misadventures in the Tropics**[8]. Even more provocative is Easterly's more recent title: **The White Man's Burden: Why the west's efforts to aid the rest have done so much ill and so little good**.[9] This is unsettling language loaded with much political and historical freight. We should note that there are actually two metaphors in Easterly's two titles – one is that of the

[5] Keynes, **General Theory**, introduction.

[6] (And here it is not clear that development economists have plumbed the true depths of their insight.)

[7] Goodbye Washington Consensus, Hello Washington Confusion?" A review of the World Bank's *Economic Growth in the 1990s: Learning from a decade of reform*" (2006) 44 Journal of Economic Literature 973.

[8] MIT, 2002.

[9] Penguin, 2006. For a thoughtful review see Sen, "The Man without a Plan", Foreign Affairs, March/April 2006.

"elusive search" .The other is the idea of "spreading the gospel". These are related but different ideas. The latter idea is: we have the answer in hand and we are here to tell you what it is. It has been common for some time to identify "The Washington Consensus" as the gospel in question and it is now also a commonplace that the Washington Consensus is dead.[10] But it took some time for this intellectual obituary to be written. There was the move to augment of the original Williamsonian list to discussion of second generation reforms ("institutions matter" – or, a move from getting prices right to getting institutions right - or as Rodrik puts it, "from market fundamentalism to institutions fundamentalism"[11]). One recalls the resignations from the Bank of Joe Stiglitz and Ravi Kanbur (in 2000) when the Financial Times was reporting, under the headline "World Bank stages intellectual battle over globalization", the internal debate at the Bank over the future of the consensus (interestingly Timothy Giethner, then International Undersecretary of the US treasury, appears as the upholder of the "orthodoxy" against the "sceptic" Stiglitz).[12] By 2002 we find the following Moses Naim opining in the Financial Times: "Washington Consensus: a damaged brand".[13] In 2003 Stiglitz and others are writing about a "Post-Washington consensus".[14] And by 2006 Rodrik is able to report "...it is fair to say that nobody really believes in the Washington consensus anymore. The question now is not whether the Washington Consensus is dead or alive: it is what will replace it."[15]

But all of this left in place Easterly's other idea – the "elusive search" (for the Holy Grail) – the logic of which is: there is an answer and we will keep searching and trying the contenders until we find it. Thus we see, as noted, articles with titles such as "The Post-Washington

[10] Williamson and Williamson 2004. Stiglitz. Sen. Ruggie etc.

[11] Supra n 7 at p

[12] FT June 30, 2000 p 8.

[13] FT October 28, 2002

[14] Stiglitz, "Post Washington Consensus"

[15] Rodrik, supra n.7 at 974.

Consensus"[16] or even the "Post, Post-Washington Consensus".[17] But there has also emerged in our post Washington Consensus world a more interesting and radical idea. This idea sees that the common denominator in Easterly's two titles, and the two metaphors, is the very idea that there is an "it". In the gospel version we know what "it" is – in the Holy Grail we are determined to find it. But what if the problem is with the very idea of an "it" to start with? That is, what if the really fundamental problem with, and the key word in, the "Washington Consensus" is not "Washington", but "Consensus"? The problem on this view is not just that the recipe for development contained in the Washington Consensus is wrong, but that the very idea of a recipe is a bad one no matter whether cooked up in Washington, or anywhere else, including Geneva. As I see it (as a professional outsider to the discipline of development economics) this is now the really interesting question and it is one which Dani Rodrik has asked most pointedly, particularly in his book **One Economics, Many Recipes**[18]. But is also is, as Rodrik has noted[19], one which the World Bank itself has come to ask and to answer in the affirmative. In **Economic Growth in the 1990's: Learning from a Decade of Reform** the Bank makes this fundamental point as follows:

> At the start of the 1990s economists thought the road ahead was clear. What for many countries had been the "lost decade" of the 1980s made it evident that government interference in the economy…wasted resources and impeded growth. Hence, the logic went, rolling back the state would lead developing countries to sustained growth. Much of this vision was reflected in the Washington Consensus…
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> This thinking guided much of the advice by the World Bank and was reflected in the conditionality associated with adjustment loans…
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> The results of these reforms were unexpected…

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18 Princeton, 2007. See also Rodrik supra n.7.

19 Supra note 7.

> Unquestionably, macroeconomic stability, domestic liberalization, and openness lie at the heart of any sustained growth process. But the options for achieving these goals vary widely. Which options should be chosen depends on initial conditions, the quality of existing institutions, the history of policies, political economy factors, the external environment, and last but not least, the art of economic policy making. The range of options puts the onus on economic analysis to guide policy making effectively. In dealing with growth processes, economists have no formula. They have broad principles and tools…
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> The central message of this volume is then that there is no unique universal set of rules. Sustained growth depends on key functions that need to be fulfilled over time: accumulation of physical and human capital, efficiency in the allocation of resources, adoption of technology, and the sharing of the benefits of growth. Which of these functions is the most critical at any given point in time, and hence which policies will need to introduced, which institutions will need to be created for these functions to be fulfilled, and in which sequence, varies depending on initial conditions and the legacy of history. Thus we need to get away from formulae and the search for elusive "best practices," and rely on deeper economic analysis to identify the binding constraints on growth. The choice of specific policy and institutional reforms should flow from these growth diagnostics. This much more targeted approach requires recognizing country specificities, and calls for more economic, institutional, and social analysis and rigor rather than a formulaic approach to policy making.[20]

The report describes, almost movingly, this transition in its thinking as "the ending of a conviction"[21]. It notes that such endings of a convictions cause "discomfort"[22] for those who

[20] P. xiii

[21] Ibid.

[22] Id.

have held them. It also notes that the central changes of attitude which flow from this ending of a belief that one's task is to deliver the truth to others are from arrogance and ignorance to "humility" and "understanding".[23]

This report is, as Rodrik notes,

> "a rather extraordinary document in that it shows far we have come from the original Washington Consensus. There are no confident assertions here of what works and what doesn't – no blueprint for policymakers to adopt. The emphasis is on the need for humility, for policy diversity, for selective and modest reforms, and for experimentation…Occasionally the reader has to remind himself that the book he is holding in his hands is not some radical manifesto but a report by the seat of orthodoxy in the universe of development theory."[24]

It is true that certain elements of this "ending of a conviction" at the Bank had been brewing for some time under the presidency of James Wolfensohn – for example, in his promotion of the ideas of Amartya Sen, the development of the idea of Poverty Reduction Strategy Programs which implied a bottom up, locally owned, specific approach disciplined and informed by local needs and conditions - and not top down imposition of a generic package of reforms, and so on. As we have seen, it took a few years for these ideas to win the day and not without much debate and much defense of the orthodoxy against the sceptics. But at the end of the day the power of the data forced a change in the theory. (Although as I know many will be quick to point out – as does Rodrik – that there is a difference between what is being said on the bridge of the might ship world bank and what is going on below decks and "there is little evidence that that operational work at the Bank has internalized these lessons to any extent"). [25]

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[23] Id.

[24] Rodrik supra n.7 at 974-5.

[25] Ibid. at p 977. Not to mention elsewhere.

What follows from the idea that the problem was not only with a particular consensus, but with the very idea of a consensus itself? This is the issue Rodrik explores in **One Economics, Many Recipes** and The World Bank in **Economic Growth in the1990s**.

Here is a way of summarizing what follows, in the view of Rodrik and the Bank, from abandoning the very idea of a consensus (and not merely abandoning a particular consensus):

A. In how we express what we stand for: A shift from detailed rules/recipes to principles.

B. In our understanding of the scope and level of reform: A shift from the universal to the local/contextual/embedded.

C. In our view of the source of change: A shift from top down to bottom up, from externally imposed to internal generated, from supply to demand.

D. Regarding the pace of change: A shift from "all at once" to "a few things at a time"

E. In the framing of the task at hand: A shift from grand solutions to removing concrete identifiable roadblocks.

This is a certainly a different world view than that which is at home with the idea of a comprehensive and universal consensus. And it avoids the fundamental problem of consensus thinking:

> In the limit, the obsession with comprehensive institutional reform leads to a policy agenda that is hopelessly ambitious and virtually impossible to fulfill. Telling poor countries in Africa or Latin America that they have to set their sights on the best-practice institutions of the United States or Sweden is like telling them that the only way to develop is to become developed—hardly useful policy advice![26]

This is a wise remark, informed by years of observation and thinking. But it is important, as we shall see, not to read this remark in the wrong way. This is a remark about comprehensive programs of reform. It is important to keep this in mind because there is a terribly important

[26] Rodrik, supra n.7 at 980.

sense in which it is true that "the only ways to become developed is to become developed". That is, even if we agree with Rodrik and the Bank, among others, that our efforts should be concentrated on discovering and removing concrete local obstacles, rather than imposing the "obvious truths" of a comprehensive global solution, there is a deeper lesson which one of Rodrik's heroes[27], Albert O. Hirschman, articulated over fifty ago.[28] I return to Hirschman's ideas after considering the current thinking about international labour standards which stands, in large part, in stark and unfortunate contrast to these innovations in development theory.

III The Geneva Consensus: another "conviction" and the struggle to end it

The view I take is that the commonly accepted theory of labour standards, in particular international labour standards (and most critically ILO standards) is, by and large, best understood as a "Geneva Consensus" which operates in the same way and on the same principles as the "Washington consensus". Not the same content, the same methodology. That is, the methodological grundnorm is the very idea of a consensus. This consensus seems to have come into being, and reflected a natural set of assumptions in place, at the time of the ILO's creation in 1919. [29] It is not the result of anything contained in the ILO's constitutional or legal set up. Rather, it is the result of a set of beliefs about how the world works and how best to interpret and use the ILO constitutional machinery in that light. This consensus remains basically unreconstructed and carries on as it has for the last 80 and more years.[30] Further, labour lawyers have made much less progress in reconsidering and dislodging their consensus than have their

[27] Rodrik, "Hirschman-esque Thoughts on Development". (Nov5, 2007)

[28] **The Strategy of Economic Development** (Yale,1958).

[29] See, for an entertaining view of ILO history and progress through the ages, Guy Standing, "The ILO: An Agency for Globalization?" (2008) 39 Development and Change 355-384. There is much to agree and disagree with there.

[30] This is a claim about ILO law – not the ILO.

development theory companions. Labour lawyers need a parallel revolution in their thinking and, again, the radical thought is not that we have the wrong Geneva Consensus, but in the very idea of a consensus itself. Many international labour lawyers still await their Greenspanian moment.

The parallel between the Washington Consensus and the Geneva Consensus is, in my view, accurate and helpful to see. The asymmetrical levels in progress in coming to grips with it, troubling. But the argument here is that in seeing the parallel we may open up another front not only on the Geneva Consensus but, in parallel with our development colleagues, on the very idea of "consensus" it embodies.

Here is the parallel briefly outlined. The informing idea of the Geneva Consensus is one in common with the Washington Consensus - that there exists a "correct" policy package which is universal and comprehensive. It applies everywhere. It can be deployed in any context and when deployed is a package deal. States need to be disciplined to adhere to the universal and comprehensive set of policies. (These are set out in ILO labour standards and constitute a package deal which is referred to as the "Global Labour Code"). This is because states would otherwise be tempted to depart from the true path.[31] It is also understood that these standards must be what is called "hard" and detailed law compliance with which can be determined and secured through threatened or actual administration of sanctions, usually through a real or desired "conditionality". This is all to be externally visited upon states by a dedicated international agency. It is a "we know what is good for you" system and one can call it a "constraining self interest" - CSI - model of law. This consensus about what is at stake, and about the scope and kind of law of labour standards required to deal with the problem, also dictates the kind of processes needed to administer and apply that law – legal processes backed up ("enforced") by some form of "sanction". Discussions of shortcomings of the system will centre on how it is not comprehensive enough and thus the need for a continual production and ratification process making the consensus even more comprehensive. Discussions of reform of the system will be dominated by allegations that the system is not "hard" enough, how it is equipped with insufficiently strong sanctions to coerce the required behavior across the

[31] Because as we shall see of the threat of regulatory arbitrage – ie a race to the bottom. This is why the consensus must be uniform and global. See infra p. .

comprehensive agenda of the consensus, and how the ILO needs to obtain some real "teeth" in the form of, for example, economic clout (conditionality of some sort – usually trade) which those agencies advancing the economic agencies advancing the Washington Consensus can bring to bear, and so on. (In this sense the Geneva Consensus is a "wannabe" Washington Consensus.)

The ideas inherent in the very idea of a consensus of a Washington variety are evident and dominant in this way of thinking. This standard and entrenched view sees labour standards as detailed, universal, comprehensive, top- down, one size fits all, all at once, a-contextual, imposed, centrally enforced, and backed up with clout. They are not[32] viewed as general principles which member states actually determine to be in their self interest. The process is exactly not seen as one in which obstacles to their realization need to be identified and prioritized locally and contextually, informed by local feedback, and then helpfully worked on in light of local circumstances and resources, and with called upon outside assistance, and so on.

There has been, to be sure, a growing internal resistance to the Geneva consensus for some time, but it has had limited success. It is not hard to see why. All successful attempts to rethink dominant modes of thinking to take on entrenched interests have to be "inside jobs" and such efforts are fraught with difficulties. First, such thinking is hard to so. Second, even if possible to imagine, any suggestion to move off the Consensus and its hard law system, in order to find alternative strategies, will be seen as threats to undermine the very fabric of the system and as totally inconsistent with the Consensus. They also threaten the entrenched interests of those who run the system as it is. They will be strongly resisted. Third, as a result of this resistance to change, initial efforts, and any initial success, in developing new approaches will have to be "packaged" and "sold" as nonthreatening to, outside, and parallel to the processes mandated by the Consensus and must never be seen to threaten to replace it. Even then they will, rightly in one sense in my view, be attacked as an alien transplant grafted on the system and likely to insidiously damage it. This is in my view the best – indeed the only – way to understand the purpose, method of creation, and history of the 1998 Declaration on Fundamental Rights, as well as the vigorous and negative response to it in certain quarters, within and without the ILO.[33] It

[32] I am aware of the idea that ILO standards are said to be "flexible".

[33] Alston et al. Standing too.

will in time come to be seen as, again, the underlying logic and method of the less well understood[34] 2008 Declaration – now beginning to be known as the "2008 Declaration on Social Justice"[35] - and which, in essence, seeks to extend the logic of the 1998 Declaration beyond the fundamental rights to the other pillars of the Decent Work Agenda. And, it can be predicted that when this becomes more apparent, the rear guard movement against that Declaration will open for business as it did against the 1998 Declaration. Again, probably, with much success.

Meanwhile we can also predict much else that will happen. First, if it is the case that the very idea of a "consensus", which underlies all else, is really unhelpful in the real world, then member states will seek to avoid it. The consensus, and the machinery used to enforce it, will begin to be less comprehensive in theory and less used in practice.[36] More and more the member states will use it less and less. The system will not only lose steam, but also relevance to the basic goals the ILO seeks to achieve and the principles it stands for. Second, it is a recipe for internal institutional conflict. This will manifest itself in a number of ways. Those dissatisfied with the results of continuing with the status quo will, as we have mentioned, undertake parallel reform

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[34] For enlightenment, see Maupain "Re-foundation or Lost (And Last) Opportunity? The New ILO Declaration on Social Justice for a Fair Globalization"

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[36] In earlier writings I have drawn attention to this phenomenon. See, for example, Langille, "Core Labour Standards – The True Story", (2005) 16 EJIL 409 at 425-26:

> As Breen Creighton, a former ILO official put it 'the traditional system is in a state of crisis of such magnitude as to raise serious questions about its future role and relevance'.[44] Very recently, another very distinguished ILO hand, William Simpson, made the same point, perhaps more diplomatically, entitling his essay 'Standard Setting and Supervision – A System in Difficulty'. Pick your language – the system is broken. A few of Creighton's statistics make this point dramatically. First, the existing Geneva-based standards creation industry looks like it is gradually going out of business. In the post-war 'golden era' the average rate of standard production was 3.15 conventions and 2.94 recommendations per year. For the last 10 years this yearly average has dropped to 1.1 and 1.3 respectively. Even more startling is the ratification crisis. For all the conventions adopted in Geneva over the last 25 years the average number of ratifications is 20.1. And if the widely ratified Worst Forms of Child Labour Convention is taken out of the calculation the average is 16.05. Readers will recall that this is out of a possible 178. Yet, there is more. Even if conventions are produced and are ratified, we have the problem of compliance with reporting obligations in order to fuel the supervisory procedures. Under the two reporting articles of the Constitution the reporting rates are 55 and 65%. As Simpson and others note, the current state of affairs is not the product of an imagined neo-liberal conspiracy but of real problems with the standards and the supervisory machinery. As Simpson has it, this is about conventions which are 'too detailed, too complex' and 'unratifiable', adding 'There can be little doubt that, over the past twenty years, with a few exceptions, Conventions, rather than spelling out general principles, have become extremely detailed or concern specific sectors of workers', resulting in a situation in 'which most member states, in particular the developing countries, are simply unable to ratify'.

efforts in the form of the 1998 and 2008 Declarations, leaving the consensus system in place. This results in contradiction and disagreement as well as duplication.

Third, there will be an increasing isolation of the labour standards system within ILO operations. The law and lawyers who run the system will come to be viewed as wedded to an increasingly unrealistic set of processes unconnected to any real progress in the real world. Labour standards will increasingly be seen as purely formal in a legalistic sense and the whole methodology one which increasingly looks like Easterly's white missionaries spreading the gospel "in the tropics". There will be, within the ILO itself, increasing use of eerily similar language to describe the labour standards consensus and its methodology. It is a common view that the "standards" are isolated from the rest of "the house", and that the "supervisory system" is a formal (law on the books) legal exercise that has no traction, and no ability to get traction, in the real world. On the other side of the same coin there is a desire, on the part of those not involved in the running of the legal machinery, to avoid standards: for example, they play little or no role in Decent Work country Programs. And so on. The legal and non-legal ILO worlds exist, for many in the ILO, as two solitudes.[37]

Fourth, this in turn has not only operational and financial consequences as resources are required to run and respond to two parallel and conceptually contradictory systems but also

[37] Many distinguished ILO officials have been making this point for years – sometimes in restrained and diplomatic language (see, for example, the 1987 circular from Blanchard, or the 1994 DG's Report at p87) and sometimes not. I recently has occasion to hear this point of view articulated, often in the latter mode, by many officials of all rank and discipline as part of an "EVALUATION OF THE ILO STRATEGY TO IMPROVE THE IMPACT OF INTERNATIONAL LABOUR STANDARDS" in 2007. Many of these remarks of are contained, unattributed, in Interim Draft and Draft Reports submitted to the ILO in May and September 2007. I was retained but ultimately resigned as external evaluator in September 2007 when I came to see that I would not be able to write a report which actually was an evaluation of the ILO strategy, and that there was an appetite only for taking the existing (formal, supervisory) strategy as a "given" and commenting on its internal workings. (This is not to say this was the view of everyone.) My own view is that this was also real, and apparently effective, resistance in parts of the organization to the larger questions being asked at all. In resigning my assignment, on September 19, 2007, I wrote: "…I must remove myself from any further association with this evaluation. …Very briefly, I have real doubts about my freedom to conduct a truly independent analysis of the real issues involved. This may be the result of a real and reasonable disagreement between us about the scope of the evaluation or it may be the result of other, not so transparent, causes. It does not matter…. I said in my draft that the only advantage an outside evaluator has is the ability, free from external or internal influence, to 'call them as you see them'. Once that is gone, all is lost."

generates deeper problems of legitimacy as the ILO action in the world loses its moorings in legitimate constitutional decision making processes.

I think this accurately reflects the real world as we now know it. The Consensus is, in a word, a barrier to the effectiveness ILO standards, as the Washington Consensus was for the Bank.

It does not have to be this way. It should not be this way. This consensus is not written in stone. This is one of the most puzzling and interesting aspects of the Geneva Consensus – people behave as if it were written in stone. But the whole apparatus is an interpretive construction which the ILO constitution in no way makes inevitable. It is the result of policy choice and administrative innovations which can and should be altered. The ideas that Conventions have to look the way they do (detailed, non-declaration like, etc), or that the legal machinery (the Committee of Experts, the Conference Committee, and so on) is part of the fabric of the universe, or that it all should be formally legalistic and so on, are all false.[38]

Let me explain this point, at least briefly. A quick reading of the ILO constitution would take one to the conclusion that it is all about law – the creation and implementation of law on what looks, on its face, like the CSI model of law which I have criticized. But the key to the ILO constitution, everyone agrees, lies not in the processes leading to Commissions of Inquiry, legal adjudication by the International Court of Justice, and "sanctions" or "remedies" under Article 33. That never happens. Except in the case of Burma. (And even that one exception proves the point that this is not what the ILO law is, can, and should be about in general.) Rather, as everyone again agrees, rightly, the key to ILO law lies in what is called the "supervisory system" – a system of reporting, monitoring, commenting, and so on, run by committees ("of Experts", and "on the Application of Standards"). (Or, by the Committee on Freedom of Association.) Most lawyers who know something of the ILO know that this is where all of the action is. They know this is the key to ILO law and procedure and these are the central legal bodies. The legal centre of the ILO is found in Articles 19 and 22.[39] It is not in Articles 24-33

[39] (And in the case of the CFA in the preamble, the Declaration of Philadelphia, and Article 1.)

which are, in the daily practice of ILO law, irrelevancies. But it comes as a surprise to many that these institutions, these committees, which are the "pillars"[40] of the ILO legal world, are nowhere mentioned in the ILO Constitution. They are all, rather, purely the results of internal administrative innovation undertaken largely in the 1920s and 1950s. This looks extremely promising at first blush. The ILO looks like it has a constitution which embodies the CSI model of law. The ILO then, by dint of organizational and administrative creativity, and using opportunities made available by the sparse wording of articles 19 and 22, created a useful administrative alternative and supplement to that model which on its face seems quite different - rather than adjudication by judges of alleged wrongdoing, findings of guilt, and administration of real sanctions under Article 33 - an administrative system of reporting, monitoring, and "feedback" from the field. We could even imagine this not a detailed duty imposing system of legal enforcement (the CSI model) but an alternative and facilitative approach to law. It could be a system which aims at assisting member states achieve their goals. It is not about adjudicating wrongdoing and administering sanctions. It is not about command and control. It is about dialogue and feedback and useful assistance. It is about empowering member states to achieve their own ends. It is the opposite of the CSI model – it is a PSI – a promoting self interest model.

Now, to cut the story very short, here is the big question - how did this possible alternative administrative system become, over the years, to not be an **alternative** system of law but rather a **replication** of the CSI model of law – of detailed law, of adjudication by judges, of findings of legal wrongdoing, of "sanctions" even if only that of public shaming. This **is** what happened. The result is that what could and should have been an alternative, positive, "learning", monitoring, and feedback system, geared to assistance (technical, financial, and other) has become just a cheaper, faster system of allocating legal blame for legal violations – ie an administrative version of the CSI model of law. Another way of putting this point is that the possible alternative supervisory system became, in effect, a "small claims court" version of the Commission of Inquiry/ICJ/Article 33 full bore legal system explicitly set out in the constitution.

[40] Report of the Committee of Experts 2007, Report III(Part 1A) at p.2.

The answer to the question – how did this come about? – is, as always, complex. It is long story about institutional stasis in the face of real world change, expansion and change in the characteristics of ILO member states, of fateful internal administrative restructuring decisions, of budgetary constraints, of the enormous growth in the workload of the Committee of Experts, of the decision to allocate the experts work not on country lines but by legal category, of the decision to concentrate servicing of the committees in the standards department, of the separation of a growing technical assistance component of the ILO (which really did not exist when the committee structure was formed) from "standards", of a resulting growth in the space (intellectual and other wise) between the legal side of the "house" and the "development" side, of staffing decisions and personalities, of the basic instinct to resist change, of babies and bathwaters, of the unfortunate articulation of the Decent Work Agenda in which "standards' appears as **one** of four "**objectives**" and not as a **means** to **all** ILO objectives, and so on. Much of this sounds familiar. And familiar to many in the ILO who see all of this, and the resulting fundamental challenge to meaningful ILO law, clearly.[41]

But, as I read it, while we can see an understandable story, waiting to be told at length, about how we got where we are, this does not explain why we and the ILO are not robustly involved in efforts to reform it all – to let an alternative and positive administrative structure be what it could be. And here, as with most important things in life, the answer lies, at least in large part, in the human mind. The dominance of the Geneva Consensus is a fundamental stumbling block. Resistance to reform is not simply emotional – it is not a fear of the unknown. It is a fear of losing the known and a view that the proposed reform will undermine existing achievements and put in place a less desirable alternative.[42] That is, it is based on reasons. But these reasons need to be brought into the open and contested. When we do so we see that they are, in my view, not sustainable. The status quo is not a good one and it is not necessary. It is not true that displacing it will threaten something we (should) value. What we clearly know is an exclusively CSI model is not dictated by the ILO constitution. The capture of the "supervisory system" by this particular

[41] See fn 41 above.

[42] Hirschman, **The Rhetoric of Reaction**.

picture was neither desirable nor necessary. Further, the insistence that it is that it is the only way for ILO law to proceed is profoundly unhelpful.

But it has been thus for some time. For example, as we have noted, when reformers in 1998 brought about the Declaration – which was overtly built on an alternative, facilitative, promotional, soft approach – the condition of this moving forward was that the old system could not be tinkered with.[43] And this was true again in 2008. The point of the new 2008 Declaration, in my view, is to take the logic of the 1998 Declaration and apply it to the whole of the Decent Work Agenda (and not merely the core labour rights part of it). It was promoted by the same people who advanced the cause of the 1998 declaration. But again this reform was slow and halting. It did not have the active support of, for example, Canada. Canada has spent most of its time addressing the rather unhelpful but obvious point that that the new system should not add to already existing universal reporting requirements which are viewed as tiresome and onerous (This for a prosperous nation, note.) That is Canada saw this reform of a threat of "more of the same". This is because, again, as with the 1998 reform, those wedded to the CSI model have insisted that any reform cannot have any impact on the current legal way of doing business – the administrative version of the CSI model of law – must not be touched.[44] This ensures that we will have, again, a parallel system. Support from nations like Canada, which should be anxious for real reform, was undermined. What should be seen as real opportunity for change became a threat of an additional burden. But if the reform is successful it will further isolate and "silo" the existing legal machinery. The new system should be demand driven, positive, not command and control form the centre, not one size fits all, and it should be owned by the members, tied to positive assistance with local needs, and so on. The old system will remain in place and take the opposite approach. As a result it will continue to misdirect limited resources. It will go on giving

[43] As the Declaration's Follow-up states: It "is not a substitute for the established supervisory mechanisms, nor shall it impede their functioning; consequently, specific situations within the purview of those mechanisms shall not be examined or re-examined within the framework of this follow-up."

[44] "In no case should the proposed reforms weaken the ILO's existing procedures, including those relating to standard setting and to the supervisory mechanisms." Conclusions of the Committee on Strengthening the ILO's Capacity (ILC 2007) para.4. See ILC 97th Session (2008) report VI at p. 38. See also Declaration follow-up.

law a bad name in the view of many. It will reinforce the division between law and development, with law being an obstacle to, rather than a driver of, the progress of ILO members.

There is more. There are several surprising side effects of the dominance of the Geneva Consensus. One of the most startling of these is the impact on other possible avenues for the advancement of ILO norms. The "supervisory system" is the "internal" system. It is constitutionally and administratively under ILO control. The ILO "owns" the internal system. There is however an "external" system, or a large potential for such a system, for ensuring that ILO law actually has an effect in the real world. This potential exists because ILO norms are "public goods". ILO standards demonstrate the two characteristics of classic public goods. First, they are non-excludable. This means that unlike ordinary "private goods", once they are produced no one can be excluded from using or taking the benefit of them. Second, they are "non-rivalrous" in this use, meaning that, for example, one State's use of an ILO standards does not diminish another's opportunity to use it. (In fact in the case of ILO law the common view is that the more users there are the better for all.) The "non excludability" aspect of standrads also means that other classes of actors, including corporations, trade unions, civil society groups, domestic courts, international organizations (whether financial, human rights, or other), global agencies such as ISO, NGOs of many stripes, investment advisors, pools of private capital, supply chain monitors, risk analysts, and others may all make use of, or rely upon, ILO law, or some subset thereof, in connection with their own pursuits. In fact there is a large external interest in, and use of, ILO standards by all of these groups. This fact of life means constitutes a large "exogenous" or external demand, and opportunity, for the ILO. But on the currrent model of law this potential is seen as a threat to "real" law "enforced" by the real "experts" and so on. Rather than seeing this external dimension as a further opportunity for ILO law to have an impact in the real world, it is seen as undermining the authority of ILO norms and legal processes by non-experts, and so on. The disconnect between ILO legal machinery and the real world is profound. That this is possible reveals how entrenched the old view really is for many, but not all, at the ILO.[45]

[45] There exists a domestic fallout from the Geneva Consensus view as well as domestic courts, often constitutional courts, over rely upon ILO jurisprudence to determine what domestic law means. For an example see the decision of the Supreme Court of Canada in BC Health (2007) and Langille, "Can We Rely on the ILO?" (2009), 13 Canadian

IV. **Labour Law's Even Larger (Identity) Crisis – "They say that breaking up is hard to do."**[46]

But labour law's problems run deeper - much deeper. While it is important to see the parallel between the Washington and Geneva consensuses, and while we can see that labour law is still struggling to see the flaw in "the critical functioning structure that defines" how things work in the way and to the degree that development economists have, this must be seen against a larger backdrop. Labour law faces a more profound problem – it not only needs to rethink how "things" work – but what its "thing" is in the first place. Labour law faces an identity crisis – a crisis in understanding what its world is. Resolving this crisis goes hand in hand with dissolving the Geneva Consensus. This is because ILO's understanding of its purpose in life is tied to its understanding of what its subject matter is. And it the traditional understanding of this which make the Geneva Consensus a natural one. The Geneva Consensus coming under the scrutiny and strain is in part a result of a larger set of strains upon the ILO's conception if its world and its reason for being.

The title of our conference is "Regulating for Decent Work". But what is the relationship between "labour law" and "work"? There are real problems lurking here. We can say, and sometimes do, that labour law is the "law of work". But this is very misleading. Our labour law is, in fact, largely conceived of the "law of employment". This is evident in the fact that the leading roles in labour law's version of events are played by characters called "employees" and "employers" who are parties to something called a "contract of employment". These are, we might say, the basic conceptual building blocks of the discipline. Employment is, as we know, only one way of organizing, and legally framing, work. And as Karl Polanyi[47], and now Simon

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Labour and Employment Law Journal 363-390.and Langille, "The Freedom of Association Mess: How we got into it and how we can get out" (2009) 54 McGill Law Journal.

[46] Neil Sedaka.

[47] **The Great Transformation**

Deakin[48] remind us, it is a fairly recent invention. But our law seems wedded to it in a way which makes a relationship with any other real world method of organizing work, or productive human activity, problematic. As labour lawyers have been much noting, there are, in both the developed and developing world, in fact many other ways, extraneous to the employment relationship, in and through which human beings engage in productive activity. Think of 'informality" in developing countries and "atypical work" in developed ones.[49]

For the purposes of this be paper the following brief explanation of the link between this larger identity crisis and the idea of a Geneva Consensus must do. The idea that makes employment, employment is that of subordinate or exploited workers who are in need of protective labour law (either procedural or substantive). This limits the field to certain kinds of workers and employees and provides a rationale for labour law. Also a rationale for international labour law – we need international coercive standards to prevent a "race to the bottom" between states which they will otherwise enter in order to attract and retain capital investment which will seek to avoid the regulatory burden of labour law. On this view ILO member states are analogous to domestic firms who need to be disciplined by a comprehensive package of domestic hard labour law except that now, obviously, we need international labour standards to do the trick. But the result is that we are limited to a certain subset of work – employment – in the name of a certain purpose domestically and internationally – which drives us to a certain, dominant model of law – which, given all of this, must be comprehensive, top down, imposed, legally enforced, universal etc – ie a (Geneva) Consensus. This is a package deal view of the world which is indeed hard to give up on. Breaking up is hard to do. This is the problem – this story is too good to give up on.

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[48] "The comparative evolution of the employment relationship" in Davidov and Langille, **The Boundaries and Frontiers of Labour Law** (Hart, 2006),

[49] Here is another way of pointing to our constant problem with "work" and employment". The International **Labour** Organization advances a Decent **Work** Agenda. The word **employment** does not appear here – the words are labour and work. Note though that the labour delegates to the ILO are called "workers", but are in fact almost all "employees". And ILO law is largely about employees and employers.

We can now see an important part of the difficulty, for labour law, with a transition from "employment" to any wider category such as "work". It involves a breaking with this particular morality tale. An expansion of our concerns to a wider set of circumstances – to other circumstances in which work is performed is to look beyond the morality tale based upon unfairness in the negotiation and content of a certain kind of contract. Non employees can sell labour and labour may be performed and not bought and sold at all – only the resulting products. Yet we may believe that human rights protections, pensions, or health and safety regulation are important for all workers regardless of the legal framework under which they labour. But, obviously, such beliefs or concerns can no longer flow from, or find their source in, a story of unequal bargaining power, subordination to, or domination by, an employer under a certain kind of contract which needs, therefore, and is available to be, "regulated". And what are the limits of our new area of concern if not parties to a certain sort of contract? This too is a problem. Once we take on a new reality and break with our current morality tale, we also lose our ability, generated by that very important orientation to the world, to delineate the subject matter of our concerns and thus the limits of the field itself. This is why breaking up, it turns out, is hard to do.

This is exactly the "anxiety" which Mark Freedland, a pre-eminent thinker about such matters, has commented upon recently:

> The anxiety … is one which has attended, in some degree, much of the recent debate about the personal scope of employment law. It is a fear that, as one extends the frontiers of labour law to include contracts or relationships formerly regarded as outside the territory, because they are more in the nature of business contracts or relationships with independent contractors, so one risks foregoing the normative claim for labour law to constitute an autonomous legal domain within which inequality of bargaining power between worker and employer may be taken for granted, and where protection of the worker against unfair exploitation is therefore a paramount and systemic rationale for law-making and for adjudication. This fear has, however, generally been a rather muted one, if only because the discussion has mainly concentrated upon modest or intermediate extensions of the personal scope of employment law, which can be envisaged as reaching

> out to working people who, although deemed independent, are, in reality, at least semi-dependent upon employing enterprises, and as vulnerable to exploitation as workers in the 'employee' category.
>
> This muted anxiety becomes the more strident as we further extend the personal scope of employment law. … It becomes hard to see how the normative edge of labour law can fail to be blunted…. Two alternative particular dangers present themselves, Scylla and Charybdis or a rock and a hard place, between which it is hard to discern a path which can be steered. Either the worker-protective envelope of labour law will fail to 'stick' at the entrepreneurial margins … or, on the other hand, the inclusionary category will prevail but at the cost of a normatively crippling compromise with the economic and social neutrality of general private contract and commercial law. [50]

As usual in labour law matters, Freedland has hit the nerve and there are important questions which flow from these important observations. But this poses the question: is it possible that a therapy exists for the normative "anxiety" thrust upon us by changes in our familiar world (of long term contracts of employment between employers and vulnerable workers which need to be regulated to avoid exploitation)? As we draw back our camera from its close-up on our familiar protagonists (employee-employer) performing their familiar drama (negotiating and living with contracts of employment) in order to take account of other and perhaps new actors playing different roles on our stage of the world of work, is it possible to draw back our normative lens as well? Is it possible that we could write a new script that would show these other actors to be part of a a larger and more important drama, and thus a new subject matter for something called labour law, and, as a result a good explanation for the demise of the Geneva consensus?

I believe that such a narrative is necessary and available, at least in a rough form suitable for this stage of its development. It took some time for our current narrative to emerge and become dominant and orthodox. (It was coalescing at the time of the formation of the ILO and during its glory years.) It will be the same for our new account. This is worth reflecting upon. But the

[50] Mark Freedland, "From the Contract of Employment to the Personal Work Nexus" (2006), 35 Ind. L. J. 1 at 28-29. Note the use of "paramount and systemic rationale" – see Greenspan and Lanchester on Greenspan supra n.2.

basic idea is that because labour law must makes sense of the real world, and not simply engage in an internal analysis of legal concepts, it falls to those in the field to reconfigure it from time to time. Our current configuration to which Freedland is able to appeal without any strain upon our thinking - it is the "received wisdom" now - did not exist 100 years ago and had to be invented by the early creators of the discipline of labour law. The problem then was, just as it is now, to make clear that current narrative, its dramatic underpinnings, along with its leading actors, were past their "best before" date. The players who had to exit to create our current view were "master" and "servant". The morality they enacted had come to be seen, as Rideout once put it, "the relics of a dead social order".[51] They exited to make way for "employee" and "employer". But that transition was not an easy one and forces of reaction fought a long rear guard movement. It was decades before lawyers finally abandoned the language of "master and servant" (it was still in use when I was in law school) and before, for example, the Supreme Court of Canada would embrace the received wisdom as expressed by Freedland above (indeed quoting him[52]). Such transitions are never easy. This is because, as Keynes pointed out, the problem is always getting rid of the old ideas. They are stubborn precisely because they did give coherent structure and normative meaning to the law and the world. Breaking up is hard to do. It causes "anxiety". So it was when modern labour law emerged to challenge master and servant law. So it is now. The question is whether the labour lawyers of our time are up to the task as we take our shift at the labour law workbench.

If we take on this assignment - and we must - then several starting points are clear. First, we need an account of labour law which is not limited to employment contracts and not motivated by the thought of rescuing employees from the results of inequality of bargaining power in negotiating them. Second, such an account could make sense of the difficulties facing the Geneva Consensus. (And the demise of the Washington Consensus as well.)

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[51] **Principles of Labour Law** (1979) 3.

[52] Hoj, Slaight, etc.

V. Post Consensus Labour Standards and Post Consensus Development – Methodological Implications ("The ruler itself… is dead.")[53]

Is such an account available? This raises the question of whether there is a connection between our insight that we must cut labour law loose from "employment", with its attendant requirement of a new normative account of what labour law is for, and the demise of the very idea of an externally imposed consensus. I believe there is a close connection and it lies in the closely related ideas of human capital and human freedom. Pursuing this line of thought also permits us to see the sense in Hirschman's apparently tautological remarks.

We are perhaps now in a position to draw these thoughts together. We see that there have been parallel battles in the ILO and the Bank over the very idea of a consensus. In the case of the ILO we have more. The ILO example takes us further. In this case see explicitly the type of thinking which made the idea of a consensus so plausible – the focus on rescuing workers in need of protection living within employment relationships. This provided a very powerful way of delineating the limits of the ILO's and labour law's world, a justification for its engagement with that world (to prevent races to the bottom), which in turn dictated a certain methodology for that engagement – the "consensus" model. The pressure on the ILO is, in part, caused by the fact it is clear that its world cannot be and is no longer cabined by the idea of employment. Also that the data fails to reveal a race-to-the-bottom. At the same time, and partly as a result of these empirical realities, it is becoming clearer that the normative justification for labour law needs to be rethought. Simultaneously, the methodology of the Geneva consensus in under a lot of stress. Not only the Geneva consensus, but the Washington consensus, and the very idea of a consensus. These are not unlinked phenomena. The usual explanation[54] for the troubles at the ILO – that the forces of neo-liberalism are ascendant – cannot explain the simultaneous demise of the Washington and the Geneva consensus. What can explain this new world? In the World Bank's, and Rodrik's, account the reason seems to be merely the lesson of history - we tried the idea of consensus and it failed us. We tried arrogance, now we will try humility. But is there nothing

[53] Wittgenstein, supra n.1 at para. 430.

[54] Alston, Standing.

more that can be said about the ending of the conviction that a consensus is needed beyond this (which seems merely a large application of the logic of the elusive quest).

There is more to be said and it seems to me that the idea that a top down consensus of any type will not work is not merely a matter of being more modest about, and scaling down and contextualizing, concrete reform. All of that is surely necessary – but why? That is the question. There is something more basic here and on this point it is the labour law example which is instructive. It will be recalled that the Bank's account of the end of the idea of a consensus was put as follows:

> Unquestionably, macroeconomic stability, domestic liberalization, and openness lie at the heart of any sustained growth process. But the options for achieving these goals vary widely. Which options should be chosen depends on initial conditions, the quality of existing institutions, the history of policies, political economy factors, the external environment, and last but not least, the art of economic policy making.[55]

Or, in Rodrik's simpler formulation **One Economics, Many Recipes**.

The lessons which flow from this set of ideas can be listed are, as we have noted, as follows:

A. In how we express what we stand for: A shift from detailed rules/recipes to principles.

B. In our understanding of the scope and level of reform: A shift from the universal to the local/contextual/embedded.

C. In our view of the source of change: A shift from top down to bottom up, from externally imposed to internal generated.

D. Regarding the pace of change: A shift from "all at once" to "a few things at a time"

[55] Supra n. 22

E. In the framing of the task at hand: A shift from grand solutions to removing concrete identifiable roadblocks.

But this list is impoverished because it does not offer an explanation of why the idea of consensus might be deeply incompatible with development in general and labour policy in particular. There is no doubt that there is a lot of common ground between Rodrik and Hirschman – that, as Hirschman puts it, "there is no given set of 'prerequisites' for economic development" that "what is a hindrance to progress in one setting and at one stage may be helpful under different circumstances"[56], and so on. But, again, is it enough for Rodrik to celebrate humility and restraint as the key to a new understanding of development? Does he not need an explanation? The answer to this question is affirmative and requires that Rodrik and the Bank go beyond their basic economic principles – "one economics" via "many recipes" to something more basic. It is the something which Hirschman has pointed to, which others such have Stiglitz have also articulated, and which Sen has explained. It starts with the idea that the approach summarizes above does not sort out and identify our ends as opposed to the means for achieving them. "Macroeconomic stability, domestic liberalization, and openness" are not ends in themselves. We need a reason to think they are important. We need to go deeper.[57]

This is a radical line of thought- but it is the key to the idea that the very idea of an imposed consensus will not work. Recall Rodrik's criticism of the Washington consensus – that it told developing nations that "the only way to develop is to become developed – hardly useful advice!"[58] This is useless advice if taken merely as an invitation to do everything all at once. But there is a very useful sense in which it is a very deep remark containing much truth as a reading of Hirschman reveals.

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[56] Id a p 9 (using the example of the extended family.) Rodrik himself uses the idea of communal ownership to make the same point – supra n 5 at 984.

[57] (letter to FT?).

[58] Supra n 25.

Hirschman wrote: "as long as one thinks [of development] in terms of a missing component, be it capital, entrepreneurship, or technical knowledge, [one] is likely to believe that the problem can be solved by injecting that component…"[59] But Hirschman's view was that this was not how development occurred or was made possible. The trick was to see that there is a very deep assumption in this approach to development and it is one which guarantees that, in the nature of things, the search for development will be an endless and elusive task. Expressing what I regard as a profound philosophical insight, Hirschman suggested that we resist the impulse which this picture of development visits inevitably upon us - to continue the search for the elusive "missing component" to "be injected". Rather, he saw that development occurs "provided economic development itself first raises its head".[60] He believed that an attitude, which he called a "growth perspective", was necessary for development. He then pointed out, in typically direct form, the seemingly tautological nature of this claim. He asked "are we not simply saying that development depends upon the ability and determination of a nation and its citizens to organize themselves for development?"[61] and noting that "if a growth perspective is needed for growth…this perspective can only be acquired in the course of growth. So it would seem that all we have achieved is to saddle ourselves with… a vicious circle". Hirschman responds to his questions as follows, making a deep conceptual point: "...the circle to which our analysis has lead may perhaps lay claim to a privileged place in the hierarchy of these circles inasmuch as it alone places the difficulties of development back where all the difficulties of human action begin and belong: in the mind."[62]. (Or, to paraphrase Wittgenstein, the "injected component" itself "is dead.") That is a deep remark.

[59] Albert O. Hirschman, **The Strategy of Economic Development,** supra n. 29 at p.7.

[60] Id p 5.

[61] Id p 8.

[62] Id pp 10-11.

Hirschman claims that the true problems of development lie where 'all difficulties of human action begin and belong: in the mind.'[63] Stiglitz, picking up on this idea 40 years later in his writings about the comprehensive development theory (which owes, in turn, a lot to Sen), wrote:

> Development represents a transformation of society, a movement from traditional relations, traditional ways of thinking, traditional ways of dealing with health and education, traditional methods of production, to more 'modern' ways. For instance, a characteristic of traditional societies is the acceptance of the world as it is; the modern perspective recognizes change, it recognizes that we, as individuals and societies, can take actions …[64]

He sums this up by noting that this 'change in mindset is at the centre of development'.[65] This is ultimately a change in self conception from one of passivity to one of human agency, an idea which is the idea at the core of Sen's human development approach. In Sen's view human freedom, conceived of as the real capacity to lead a life we have reason to value, is both the end and the most important means to that end. Development consists of removing obstacles to human freedom. But human freedom is not only the goal but the way there. Only this type of account can explain both why, limited as they are, the conclusions both Rodrik and the Bank have come to as a matter of reality are true – and why, as a matter of morality they are intrinsically important. Without free exercise of choice, of agreement, of what people now call "buy-in" we do not know what will work or why it should work. Without this all "injected elements" are "dead", both pragmatically and normatively.

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[63] A11.

[64] Joseph E. Stiglitz, 'Participation and Development: Perspectives from the Comprehensive Development Paradigm' (2002) 6 *Review of Development Economics* 163, at 164. This may strike some as blunt and "politically" insensitive. It is, though, a reaffirmation of the values of the enlightenment. This is not an invitation to see a war between culture/society/tradition, on the one hand, and development on the other. It is an invitation to see a distinction between cultural conservatism and cultural liberty. (See Sen "Cultural Liberty and human development" 1994 *Human Development Report* ch1.) On this view it is true that you cannot impose cultural traditions – but it is also true that they you cannot interfere with those who freely choose (as many do) to follow traditions.

[65] *Ibid*. at 165.

Following Hirschman, Stiglitz, and Sen we see now that our list of principles which follow from the rejection of the very idea of a consensus (and not just any particular consensus) needs to be supplemented with the addition of other principles:

F. In how we think about what we stand for: A shift from beginning with and focusing on means, to ends. (A shift from beginning with detailed recipes to basic goals or, a shift from a blue print/detailed map to a compass.)

G. In our understanding the rationale for all of this: A shift from imposing what is not wanted to helping to identify and implement what people can, and wish to implement in their self interest.

H. In what kind of law we understand to be required: A shift from hard to soft law.

I. In how we interact with those with whom we interact: A shift from "dictating to" to "dialogue with". (A shift from arrogance to humility, a shift from ignorance to understanding, a shift from teaching to learning.)

J. In our understanding of the role of the "beneficiaries" of reform: A shift from being objects to acting as subjects (authors).

And finally we need:

K. In our understanding of why all of this is so: a shift from an "external" instrumental perspective to a "human freedom" perspective, which explains both our true ends and the way there.

The core idea is that development is, at bottom, not a function not of one recipe, nor many recipes. The key is not a recipe, nor a thing, nor a process. It is in the human mind - it is a point of view, an attitude, a value. Or as Hirschman put it, "a perspective". Without this a recipe is pointless; it is "dead". [66]

[66] Woods**, How Fiction Works** (2008) "There is only one recipe; it is the love of the cooking."(Henry James, quoted in the frontispiece.)

This has very large methodological implications for ILO legal processes – ie for the Geneva Consensus.

First, for the content of ILO conventions. To make the point in the shortest form possible, Conventions should look more like the Declarations. (From rules to principles.)

Second, for the supervisory machinery. It should be overhauled to provide a real and effective alternative to the explicit CSI model of law (which is appropriate in cases of last resort – such as Burma/Myanmar) set out in the constitution. This would mean very fundamental change and would require internal structural reorganization at a basic level. We should not forget that the ILO did invent the current system out of whole cloth and in moments of administrative and constitutional inspiration. The problem is that is no longer adequate to the world in which we now live, and, we seem to believe that we are or should be stuck with what we have. A picture still holds the ILO captive. This basic reform would include a fundamental change in the relationship of law and development. It would require doing work by country, not legal category. Lawyers would not dominate the process. The supervisory system would drive the Budgetary Planning process. And much else would follow as well.

Third, the non consensus model places great pressure on the structure of representation at the ILO. As has been noted by many others, these need to be altered and updated to reflect new labour market structures and participants.

But these very general remarks only scratch at the surface of the thinking which the ending of the consensus conviction entails for ILO legal methodologies.

V Labour Standards and Development: Substantive Implications - Human Capital and Human Freedom

If we did take the idea of human freedom as both the goal and the necessary way there, and adopt the principles set out above, what are the substantive, as opposed to methodological, consequences for the theme of our meeting – "Regulating for Decent Work- Innovative Regulation as a response to Globalization?"

There are limits to the degree which the ideas discussed here can dictate concrete outcomes (or any detailed institutional reform.) These ideas do not dictate or lead to any specific practical ways of proceeding – what they do is remind us what it is we are trying to be practical about and how to go about it.[67] We have noted that these ideas drive us to a methodological insight – an anti-consensus insight. But what else does this approach mean in terms of the substantive agenda of labour standards? It could mean a lot if we play our cards right. This is because there is an obvious and intimate link and overlap between the idea of human capital and human freedom. Labour law is, as we have seen, at its root no longer best conceived as law aimed at protecting employees against superior employer bargaining power in the negotiation of contracts of employment. That is a now a limited and thin account of the discipline. Rather, we can say that labour law is now best conceived of as that part of our law which structures (and thus either constrains or liberates) human capital creation and deployment. Education ("Education is the key to all the human capabilities"[68]) and, especially, early childhood development strategies, are also critical to human capital creation. But so is the set of policies which govern the lives of human beings when they enter the workforce – whether as employees, independent producers, or under any other legal rubric or economic arrangement or relation of production. Human capital must not only be created, it must be utilized, effectively deployed: that is, in the best sense of the word, exploited.[69] The law which governs these critical dimensions of our common life is labour law. That is a large category. It would include much that we now exclude. But although we have burst the bounds and the comforts of the old way of thinking, we also have the answer to, or perhaps relief from, Freedland's "anxiety" (and the World Bank's "discomfort") that follow from the "ending of a conviction": we have not cast off and become adrift from our normative moorings - we have found deeper ones in the positive idea of human freedom.

The link between this conception of labour law and development, understood in Sen's terms as removing obstacles to human freedom, is deep and has yet to be fully explored. The agenda of the ILO and labour standards is not the complete agenda of human development – there will still

[67] See Nussbaum, **Frontiers of Justice** (Harvard, 2006) at 313 et seq.

[68] Ibid. at p 322.

[69] Joan Robinson.

be laws and agencies and agendas concerning health, trade, the environment, macroeconomic stability, and so on, at domestic, regional, inter and supra national levels. But in the development agenda, a combination of the account of labour law just outlined, with Sen's account of development, results in a clear and central role.

Sen has addressed the issue of the connection between human capital and his foundational idea of human freedom which he views as "closely related but distinct"[70]. His insight is that in recent times economic theory and public policy discussions have shifted from seeing capital accumulation in primarily physical terms and come to recognize "human capital" as integrally involved.[71] He notes that there is no necessity to limit the idea of human capital to instrumental justifications, in practice that is how it is discussed. As a result, that idea has to be supplemented by the idea of human freedom which brings to bear intrinsic justifications. So, as Sen writes, "if education makes a person more efficient in commodity production then this is clearly an enhancement of human capital. This can add to the value of production in the economy and also to the income of the person who has been educated. But even at the same level of income a person may benefit from education, in reading, communicating, arguing, in being able to choose in a more informed way, in being taken seriously by other, and so on."[72] Thus the two concepts are closely related. As Sen puts it in Development as Freedom: "If a person can become more productive through better education, better health, and so on, it is not unnatural to think expect that she can, through these means, also directly achieve more – and have the freedom to achieve more – in leading her life."[73] The relationship between the two ideas is not, however, simply cumulative but integrative because it is really a distinction between ends and means. This is because even though human capital is important for productivity and economic growth it tells us nothing about why economic growth "is sought in the first place".[74] We need the idea of "human

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[70] Sen, "Human Capital and Human Capability" (1997) 25 World Development 1959. See also **Development as Freedom** *292-97.*

[71] In large and good company.

[72] p 1959

[73] At p 294.

[74] p 295.

freedom to lead lives that people have reason to value and to enhance the choices they have" to do that. Or, more simply, "human beings are not merely the means of production, but also the end of the exercise".[75] So, to supplement our new thinking about the category of labour law we can say: it subject matter is the regulation of human capital deployment; its motivation is both the instrumental and intermediate end of productivity and the intrinsic and ultimate end of the maximizing of human freedom. Labour law has long been dogged, as has development theory, with a confusion of debates at cross purposes because sometimes based on means and instrumental outcomes, on the one hand, and sometimes on discussions of intrinsic ends on the other. On this account they go hand in hand, and in the right order, with human freedom being both the end and the way there. Without human freedom development both won't work, and we would have no account of the worth of any outcomes of reform in any event.

But what substantive conclusions about regulation fall from the methodological point which this paper presses upon?

First, from the human freedom perspective, the freedom to participate in the labour market is an important aspect of freedom in itself. The 1998 Declaration is foundational for this reason. It is best understood not simply in beneficial instrumental terms (including women doubles the size of the workforce) but intrinsically as securing the freedom to participate itself (not to be excluded by discrimination, included by force or as a child, and to participate meaningfully via collective voice). That is the foundation albeit, as Sen reminds us, a vital foundation, both intrinsically and instrumentally.

As we would expect the core ILO value of freedom of association and freedom of collective bargaining finds a natural home in this approach – again for intrinsic and instrumental reasons. It also turns out to be empirically true that exercise of freedom of association rights are critical to the actual delivery of other substantive aspects of labour standards (whether health and safety, hours of work laws, or much more)[76]. Again another, in this case instrumental, reason to advance the cause of core labour rights.

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[75] p

[76] See Langille, Core Labour Rights…

Employment per se, on the other hand, on the view sketched here is more problematic. Employment is not the natural category it once was. There are many ways in which productive activity can be carried on. We can address "disguised employment". But it seems unlikely that labour law can or should act as a barrier to new forms of production. What it can do is be intelligent about how it deals with them primarily by considering whether tying aspects of social security – pensions for example – to individual employers makes sense in a world in which that might act as significant barrier to the deployment of human capital with real intrinsic and instrumental costs. And at the same time we can remove the perverse incentives that are structured from insisting that we tie benefits and rights to employment thus encouraging its avoidance though disguised employment and other techniques.

This list of concrete aspects of labour standards as a site of development could go on and on. This is not the sort of exercise we need at the level of theory, although it is undoubtedly helpful if we can show some concrete pay offs for our thinking. The points which are central to this paper are larger.

First, that adopting the human freedom perspective entails the ending of a certain conviction – a certain methodological stance – the approach inherent in the Washington consensus and the Geneva Consensus. As such it is at home with the opposite of such "top down imposition of a universally applicable package deal" approach. Indeed it helps explain the demise of such approaches (or, in the case of the ILO, why such demise is on the way and should be welcomed).

Second, escaping the old picture which held us captive has large implications for ILO legal reform.

Third, there are real and positive implications. They are fundamental. The human freedom approach articulates our goal – advancing the cause of and removing obstacles to real human freedom. It also defines human freedom as our basic means. Because of the inherent link between human capital regulation and the perspective of human freedom labour reform is a critical policy instrument in the cause of creating just and durable societies.

Fourth, this approach aligns with our need to expand both our conception of what the subject matter of labour standards could be and our basic normative account of why we have such

standards. The human freedom approach fits hand in glove with our new understanding of the point and scope of labour law – it gives us a way of knowing what labour law is and why it is important.

Fifth, this is not the argument that all the labour law now on the books is now to be regarded as sacred. Far from it. We now have in fact a rationale principle to inform a useful critique of existing labour laws as well as the platforms used to deliver that law. And a principle for the design and delivery of new ones. The agenda for reform is large. But so is the idea that we have a larger and better set of reasons for what we have been struggling to do. And as the world economy, we hope, recovers from its recent economic trouble we have at least a set of basic reasons for hope and some guidance as to how to proceed.

We could go on. But let us end with a reminder. There is much else we do in the name of human freedom for all its instrumental effects and intrinsic worth. It is clear that a lot of the subject matter of the Geneva Consensus remains relevant to smart and valuable human capital policy – from non-discrimination, hiring, to health and safety at work, to pensions. But we now see limits to the consensus. It is limited to a rational of protecting employees who are parties to contracts under which they are exploited. But labour law is not limited to employees - labour law is much bigger than that. It is not also limited to the rational of avoiding exploitation – it is much more important than that. Because we now see that human freedom is both the end and the path, the methodology of the Geneva Consensus, its perspective, and its values – are antithetical to development. The human freedom perspective lets us understand why Hirschman was right – and the value in that insight for the future of the relationship of labour standards and development. But most important of the future of both sustainable development and labour standards is that we see that they stand together on common ground and use the same compass.

The perception of flaws on a Greenspanian scale is not something that happens every day. The happy result is that there appears to be more intellectual openness now than there has been in some time. We are living in a fluid moment in which ideas are in play and we are in with a chance for real changes in our thinking and our practices. There are no guarantees. But ideas matter. This is not a matter of “thinking makes it so”. Rather it is that without thinking it, it never will be so. The “ending of all convictions” **is** anxiety inducing, but also liberating.