

The world of work is undergoing major changes that will continue, and potentially intensify, in the future. To better understand and in order to respond effectively to these new challenges, the ILO has launched a “Future of Work initiative” and proposed four “centenary conversations” for debates in the years leading up to its centenary anniversary in 2019: (i) work and society; (ii) decent work for all; (iii) the organization of work and production; and (iv) the governance of work. This Issue Note Series intends to provide an overview of key trends and issues in selected thematic areas of particular relevance to the “conversations” with a view to informing and facilitating dialogue and debates at the national, regional and global levels.

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A CHALLENGING FUTURE FOR THE EMPLOYMENT RELATIONSHIP: Time for affirmation or alternatives?*

This note discusses the evolution of the employment relationship, the stresses posed by the changing organization of work, the prognosis for fundamental alteration of the relationship, and regulatory challenges in providing adequate protection to workers in evolving employment relationships

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1. Setting the scene: Key issues and overview

The employment relationship lies at the intersection of the economic organization and the legal regulation of work. All legal systems incorporate a concept of the employment relationship. This note focuses on the continuing viability of the current employment relationship in light of changes in the organization of work.

The legal concept of the employment relationship has changed over time. In its dominant, or classical, form the employment relationship co-evolved with the economic organization of work into the Standard Employment Relationship (SER). This concept refers to work performed in the framework of full-time, formal and open-ended (non-time-bound) arrangements in a subordinate employment relationship. The central feature of the SER is its hierarchical organization: the employer has power to direct employees in their work; to control their work by monitoring their performance; and to discipline them for poor performance. The employment relationship, however defined, is the key regulatory device for allocating rights and obligations between an employee and an employer: it is the worker in an employment relationship who has access to benefits and rights established by public law. The employment relationship also allows the employee and employer to agree on working conditions above minimum legal requirements.

However, the SER is under growing strain. First, workers are increasingly engaged in Non-Standard Forms of Employment (NSFE), which affects both labour demand and supply and can pose challenges for the operation of regulatory frameworks. While there is no official definition of NSFE, it includes any work done outside a standard employment relationship.¹ The ILO has focused on four types of NSFE: (a) temporary employment; (b) temporary agency work and other work involving multiple parties; (c) ambiguous employment relationships; and (d) part-time employment

¹ *In some instances, researchers also define the standard employment relationship as occurring at a set place of work outside the home (including telework and other forms or remote work).*

(ILO 2016, forthcoming). While many forms of non-standard employment provide businesses and workers with an important means for achieving flexibility, they are often associated with significant decent-work gaps such as lower earnings, reduced social security coverage and diminished working conditions.

Second, not all work for pay or profit happens in an employment relationship. Some workers are self-employed, and their working conditions are largely – but not exclusively – regulated by civil contracts with those to whom they supply their labour. Some workers may be neither employees nor self-employed, such as unpaid trainees, interns or volunteers. Often, it can be hard to identify whether a worker is in an employment relationship. Some workers are deprived of the benefits of an employment relationship by the very fact of being involved in informal employment. They may work in the informal economy, or their employment in the formal economy may be undeclared or under declared. For decades, countries have been tackling both forms of informality. But progress has been rather slow, and the standard form of employment in many developing countries remains an elusive goal.

Given that the ongoing changes in labour markets (see FoW Issue Note Nos. 1 and 2) will continue to affect the relationship between workers and companies, this note examines whether the employment relationship can continue to serve its purposes in the future world of work. Of course, change is nothing new to the employment relationship which, historically, has adapted itself to new circumstances. This note questions, however, whether the pace and scope of the current changes have reached a tipping point, so as to challenge the very foundation of the employment relationship. It also reviews what options have been proposed to strengthen, supplement, or even replace the current regulatory regime that continues to allocate work rights and obligations based on whether or not a worker is in an employment relationship.

Section 2 of this Note reviews the historical evolution of the employment relationship; Section 3 then examines why and how it is under growing strain. To appreciate the changes in concrete terms, Section 4 looks at the case of the gig economy. Section 5 discusses what future may lay ahead for the employment relationship under three possible scenarios: resilience, adaptation, and alternatives. Section 6 concludes with key questions for debate.

2. Historical evolution towards the employment relationship²

The employment relationship as we currently understand it is the product of a historical, evolutionary process. Particularly in developed economies, it co-evolved with developments in the broader political economy, replacing earlier systems for the organization of work. Many of the key changes occurred during the 19th century, as the shift from agricultural to industrial production radically transformed the way in which work was demanded and delivered. The rise of factory production in the larger metropolitan centres, distant from traditional places of residence where work was dominated by the agricultural cycle, epitomized this shift. Work remained a necessity for the vast majority who were property-less, and only had their labour to sell in order to make a living. But the nature and the structure of work changed as it became dislocated not only from previous forms of production, but also from traditional communities and community structures.

These changes prompted the emergence of both social reform movements and trade unions. Their efforts to improve living and working conditions helped to generate a discourse focused on the employment relationship based on rights, minimum working conditions and social protection. In the United Kingdom, the extension of the electoral franchise to all males also played a key role: it stimulated political changes which in turn led to the introduction of legal regulations to deliver improvements in living and working conditions for which trade unions advocated. Germany experienced a similar dynamic: the extension of the electoral franchise to all males in 1871 coincided with Bismarck's rise to Chancellor and during the 1880s he introduced major social protection schemes.

In time, the legal model became a mix of both private and public regulation that protected the individual's freedom to participate in an employment relationship and ensured key protective minimum working conditions. The employment relationship was gradually accepted as fundamental

² This section draws on Deakin (1986), Deakin (1998), Deakin & Wilkinson (2005, Chapter 3) and Supiot (2001).

to the concept of a liberal market economy: a freely-chosen relationship regulated by agreed terms and conditions of work. The full development of the modern employment relationship took place in the 20th century in co-evolution with a key element of the public regulatory framework of minimum conditions: social protection policies. In the United Kingdom, for example, the establishment of social protection benefits that were available to workers in an employment relationship created the space for common law judges to develop a more complete concept of the mutual rights and obligations in employment relationships. This evolution is also very closely linked to the modern Welfare State established since the Queretaro (1917) and Weimar (1919) Constitutions, and embraced by the Treaty of Versailles (1919).

As it emerged, the employment relationship was also an effective tool for employers serving to secure the ongoing cooperation of a potentially stable workforce which could in turn adapt to change and cooperate in the search for greater efficiency and improved productivity. Indeed, the SER emerged in part because of employer strategies that favoured vertical integration of production, as well as in response to the growth in collective bargaining. As a result, during the height of the Fordist era, capitalist industrialized countries were able to pursue a win-win approach between capital and labour. Productivity improved, while the gains were fairly shared between profits and improved employment relationships, characterized by long term contracts, increased wages, and social protection. Some refer to this package as the “psychological contract” (Stone, 2014). The state supported this process by the creation of labour administration systems to ensure effective implementation of the laws regulating the employment relationship and by the passage of social legislation in the areas of workers’ compensation and insurance against unemployment. During this period, the SER emerged as the focal point of labour law regulation, while also proving its economic and social value as a compromise, in which ‘subordination’ within the workplace was the condition of access to protection against labour market risks.

The evolution process is more complex in the developing world, and indeed, in the context of colonialism the employment relationship emerged in specific circumstances very frequently. Nevertheless, similar models of legal regulation of work relations were developed or introduced across the world. Under colonialism they were particularly associated with protection for the work and working conditions of selected minorities, especially the colonists themselves. More generally, however, regulation of work relations in the colonial and/or developing country context was always and continues to be conceived in terms that are fundamentally disconnected from the reality of work for significant portions of the workforce. Indeed, regardless of the model of legal regulation, the employment relationship as defined here has not become the norm in this part of the world.

3. The employment relationship under greater pressure

The employment relationship has experienced constant strain as economic, social and political conditions have continued to evolve, but in recent years, the pressure has intensified.

Dual challenges: Eroding base vs. aspirational goal

First, a large gap between developed and developing countries remains one of the main features of the global economy. Work in an employment relationship - whether an SER or work at some fraction of full time – is still an elusive goal in many developing countries. There, most of the workforce is engaged in the informal economy where, moreover, labour market institutions and public authorities (e.g., labour administrations) are often fragile or weak.

Second, the standard employment relationship may no longer reflect the dominant way of organizing the work relationship. Indeed, the nature and dominance of the SER have begun to shift with the continued growth of NSFE in the context of significant changes in labour demand and supply (see FoW Issue Notes Nos. 1 and 2). Archetypically, major economic shifts occurring as nations have developed have in turn driven changes in the nature of employment and of employment relationships. This can be seen in the broad moves from agricultural to industrial production, and then to economies focused on providing services. Technological developments have frequently been a major factor in driving change in the nature of employment and the number of people

working in employment relationships. Recent developments in information and communications technology have facilitated new forms of employment, including employment that spreads across national boundaries, in the so-called “gig economy” (see below). To date, jurisdictions have dealt in different ways with some of the challenges that are posed by these developments. In some cases, regulatory protection associated with more traditional concepts of the employment relationship has been extended to workers in these emerging industries. This has occurred in some instances as a result of legal challenges, rather than of action taken by states. Furthermore, technological developments may pose yet greater challenges for workers and for states as they seek to regulate employment effectively. Moreover, where protection has been extended formally, ensuring compliance still remains a challenge.

At the same time, the way in which work is structured remains stubbornly unchanged in many parts of the world. Regions, and indeed whole countries, remain focused on agricultural production, particularly subsistence agriculture. Hence, migration from rural areas to escape poverty continues apace across Africa and Asia. Many countries and regions face an ever-present need to create jobs, particularly for some demographic groups such as younger and older workers and women. This too often translates into jobs being created outside of the framework of employment relationships, standard or otherwise. Insufficient resources for labour administration make the already difficult situation even more challenging.

Today, with important variations across regions and countries, working arrangements that diverge from the SER are on the rise worldwide, including NSFE or self-employment (genuine or ambiguous). Each in their own way, these alternative arrangements offer greater flexibility to enterprises and to a certain extent to workers as well. However, they often lead to increased worker insecurity, lack of adequate or regulated working conditions, and reduced or suppressed social protection entitlements. In addition, workers not engaged in a standard form of employment face challenges in exercising their right to unionize and to engage in collective bargaining (ILO, 2015).

Taken together, these global developments in the organization of work call into question the dominance of the SER, both in terms of the number of workers engaged in this way, and in terms of the protections that are extended to workers engaged in such a relationship. While other forms of employment lack some of the basic protections that are now embedded in the SER, there may be limited avenues to broaden the reach of the SER model.

Globalization, human resource management, and private regulation

A key development that has taken place together with the current, decades-long wave of globalization is the evolution of national, regional and global supply chains. Developments in human resource management (HRM) techniques and concepts such as “just-in-time management” have played an important role. New forms of work organization in which work is ever more atomized has been the result of these developments. Even in the countries where the work is performed it is far from always true that such work is undertaken in the framework of standard employment relationships. Industries in which relatively low-skilled work is typically performed within the lower tiers of global supply chains frequently include many workers with limited legal protection due to their lack of formal employment relationships, lack of union membership, and migrant status. The drive to source products through supply chains can too often lead to workers being effectively removed from the protection of an employment relationship: states compete for investment by reducing legal protection, while enterprises take measures to limit their direct connections with workers. The difficulties of ensuring effective protection for workers engaged in some parts of supply chains have stimulated a significant degree of private action to address these challenges. These corporate social responsibility initiatives can in some cases be considered private regulation of working conditions. These developments have taken hold in all parts of the world, provoking debate about the respective roles of private and public regulation. A small but growing literature suggests that there is strong potential for them to complement each other.

Political economy of regulation

Changes in the numerical and conceptual significance of the employment relationship in many countries have resulted not only from economic and technological changes as policy choices made over decades have also played a significant role. Major changes in the political economy have led to shifts in how work and the employment relationship are structured. Especially since the early 1970s, elements of the regulatory model have been questioned, and systems have been modified as a result. Especially in neo-classical or neo-liberal economic discourse, regulation of labour was subject to scrutiny given its potential adverse economic effects. During the 1980s in particular, a number of major developed economies embarked on explicit strategies of de-collectivization and individualization of work relations. Since the early 1990s globalization has increasingly driven changes in work and in employment relationships. Greater competition between states has triggered increased willingness to change established regulatory models, in the hope of improving economic performance. Recently, this trend has been influential across Europe following the Financial Crisis of 2007-2008. At the same time, these changes have led to the displacement of workers as they seek opportunities, as well as to an increase in downward pressure on wages, especially for relatively low-skilled industries. Hence, globalization has also provoked an increased need for worker protection, both through social protection and labour market activation policies. Interestingly, recent years have witnessed the emergence of a broad consensus among international organizations, which recognizes the positive role that labour regulation can play, provided that it is appropriately tailored to the labour market conditions in question (ILO, 2015).

4. The case of the gig economy: Employment, protection, and voice

In order to appreciate these profound changes in more concrete terms, let us look at a “new type of work” which has attracted huge media attention: the “gig”, or “on-demand” economy. The issue of how to provide protections for those engaged in this kind of work can help to illustrate the difficulties for workers facing similar challenges, even though the future of the gig economy remains unclear.

The expansion of work organized through online platforms and mobile device applications (apps) has provoked a debate over whether there is a need for a new, third category of workers, somewhere between traditional employee and independent contractor (self-employed). The debate has crystallized in a number of legal challenges alleging the misclassification of gig workers as independent contractors and from which a legal consensus has yet to emerge (Cherry, forthcoming). The debate has important implications for conditions of work, depending on whether such workers enjoy protections typically associated with traditional employment relationships. The outcome is all the more pressing given the rapid growth and growth potential of work in the gig economy, as well as in non-regular work arrangements more broadly (Popma, 2013; Smith and Leberstein, 2015; Dwyer, 2016; Katz and Krueger, 2016).

Advocacy for the need for a legal category of “independent workers” (Harris and Krueger, 2015) often draws on the example of Uber and Lyft drivers. This view holds that they are like traditional taxi cab or truck owner-drivers, except that their communication with clients is mediated via mobile device apps. Workers in this category would not be entitled to the full range of rights and benefits accorded to those in the SER. However, there are contrary views that Uber and Lyft drivers and other workers in comparable circumstances are de facto employees under well-established legal frameworks (e.g., working hours are measurable and a guaranteed minimum wage is effectively paid) and should be categorized as such and provided with the associated legal protections and benefits (Eisenbrey and Mishel, 2016).

So-called “portable benefits,” which were developed for “mobile workers” (who frequently move from one job to another) have been proposed as another means of providing protections for workers in the gig economy (Hill, 2015; Kamdar, 2016; Strom and Schmitt, 2016). Rather than being tied to an employer (as is typically the case in the employment relationship), portable benefits would be tied to the worker. Proposals on how to finance these benefits vary, including deductions from gig workers’ pay, pro-rated contributions from companies that engage these workers, or a

combination of both. The advantage of portable benefits would be their availability to workers in all categories, whether employees or independent contractors. Rather than creating a new category of worker, “with portable benefits, the traditional lines between employees and independent contractors get blurred” (Kamdar, 2016). Another potential advantage is that they can be used to finance skills training. This is of particular concern because of companies’ weakened incentive to invest in training as workers have more tenuous relationships with a given employer in the gig economy. This also applies to casual and informal workers more generally (Strom and Schmitt, 2016). However, a key problem for many crowd-workers is insufficient income, and insofar as benefits are tied to incomes (whether paid for by workers, companies or both), portable benefits may provide greater flexibility without providing basic income security (Berg, 2016). In this sense, the discussion about portable benefits does not necessarily address key working conditions such as payment of minimum wages and overtime compensation and could be considered a diversion from the more fundamental issue of whether workers in the gig economy are misclassified as independent contractors.

The decentralized nature of work in the gig economy combined with concerns over the low pay and the quality of work more generally have resulted in a number of initiatives to strengthen worker voice and representation. In Seattle, for instance, ride service workers with independent contractor status are organizing through the App-Based Drivers Association (Strom and Schmitt, 2016, on examples of organizations of gig workers in the US). Yet another approach has evolved out of the Uber Drivers Network, with ex-Uber drivers creating their own app called Swift, operated as a profit-sharing cooperative (“platform cooperativism”; Dellinger, 2016). Some of the most significant initiatives come from Germany. The German Service Workers Union has created a branch of self-employed workers, while IG Metal has initiated a Faircrowdwork campaign for workers in the gig economy (Knaebel, 2016; See Degryse (2016) on other European examples). The outcome of a number of these union initiatives is currently uncertain, as they bring up the issues of whether gig workers are categorized as employees or independent contractors and, correspondingly, of legal restrictions to the rights of independent contractors to form unions.

5. What future for the employment relationship? Resilience, adaptation and alternatives

Given these complex challenges, what future lies ahead for the employment relationship? For the sake of discussion, three scenarios can be considered.

Under the first scenario, the employment relationship will be resilient in the face of profound challenges. However, this scenario depends on two critical assumptions: 1) the standard employment relationship maintains its status as the dominant model, especially in developing countries; and 2) NSFE are managed in ways that ensure mutual benefits for both business and labour and thereby contribute to improving the stability of the labour market. Both assumptions, especially the latter one, may not be particularly realistic.

A second scenario is the adaptation of the employment relationship to the new reality, following its historical evolutionary path. Adaptation would require a series of policy interventions along two main complementary axes: (a) strengthening working conditions in non-standard jobs; and (b) ensuring that all workers have access to minimum working conditions, regardless of their contractual status (ILO 2016, forthcoming). The first set of policy measures would “plug regulatory gaps”, especially by removing key differences in working conditions according to the type of work engagement, and by strengthening workers’ voices and the role of collective bargaining. These latter policies would aim at empowering workers by providing: social protection; smooth labour market transitions (e.g., unemployment to employment); job opportunities (e.g., fiscal and investment policies); and care support.

Third, a variety of ideas have been put forward as ways of altering the current (standard) employment relationship in a significant way, which include:

- **New employment contract: Single employment contract** which would abolish the distinction between permanent and temporary contracts, and increase the degree of job protection with seniority (Casale and Perulli, 2014). This approach aims at addressing the phenomenon of labour market segmentation along with permanent workers (“insiders”) and temporary workers (“outsiders”).
- **New income security:** Introducing or strengthening non-contributory, redistributive components of social protection in order to protect primarily vulnerable groups of people (including NSFE, particularly self-employed). In its most radical form, this approach would provide minimum income for all citizens, irrespective of employment, age, and gender and is known as basic income (see FoW Issue Note Nos. 1, 2, and 4).
- **New ways of organizing:** Effective and transformative organizing strategies through cooperative enterprises and other social and solidarity economy enterprises are being developed, especially in the shift toward freelancing and independent contract work. In developed economies, self-employed workers – freelancers – have started coming together to form cooperatives in order to share costs and services. This form of organization enables them to enjoy rights and benefits that are supposed to accrue to employees in a traditional business, while giving them an equal say over how the business is run. In developing economies, the ambiguity of employment relationships in the informal economy has led to the emergence of cooperative enterprises established by informal economy workers, such as domestic workers.

6. Summary and key issues for debates

The reality of the employment relationship, and especially its use as a means to determine the allocation of rights and protections to workers, varies enormously. Many workers in an employment relationship do not enjoy full protection, and many workers are unable to secure work within an employment relationship. Both types of exclusions will continue in the future in the absence of effective policy action. In addition, the standard employment relationship is being eroded in developed countries, with more workers finding themselves outside the employment relationship itself. Thus, it is important to discuss further:

- Will the employment relationship evolve and continue as a means of balancing the interests of business and labour as current economic and social conditions continue to change?
- What conditions and policies will be needed to ensure the relevance and effectiveness of the employment relationship?
- What adaptations will be critically needed?

In both developed and developing economies, many features of employment and of employment relationships are increasingly influenced by a range of actors beyond the binary relationship of employee and employer. Work arranged through private employment agencies and work that is done in the context of supply chains are two examples of this trend.

- How will public and private regulation of employment relationships evolve to account for the range of actors that influence them? What will be the role and evolution of public and private regulation? How will legal regulation reach those who work outside of employment relationships?
- How will workers’ fundamental human rights and other essential protections be secured in the future, if they are not protected by regulation that is connected to employment relationships? How will changes in the employment relationship affect organizations of employers and workers, and how will they respond?
- What role will international labour standards play in shaping the regulation of work and of employment relationships? Conversely, what will be the implications of the changes occurring in employment relationships for the international labour standards system?

The characteristics of labour markets in developing and transitional economies differ significantly from those in developed economies. Nevertheless, the conceptual and regulatory framework for economic and social policy in these countries continues to focus on the employment relationship.

- How will developing and transitional economies promote the creation of work that will be carried out in the framework of employment relationships? How will developing and transitional economies promote the formalization of informal enterprises?
- Can or must developing and transitional economies create new policy frameworks that are adapted to the characteristics of their labour markets, rather than continuing to try to adapt policy frameworks based on the employment relationship dominant in developed economies? Or is it necessary for them to do both?



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