Scrutinizing the Standardized Worker: International and Comparative Perspectives

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The erosion of the standard employment relationship, the proliferation of diverse work arrangements, and the resulting gaps in legal coverage and protection are topics that have dominated debates within labour law scholarship for at least three decades. The notion of a 'standardized worker' has been similarly scrutinized, with challenges to its subjectivity coming from a range of vantage points. To feminist legal scholarship, for example, we owe our now mainstream understanding of the gendered nature of the subject of the labour law model, who has historically been presumed to be unencumbered, always available, and male. The exclusionary effects of this particular legal subjectivity underpinning standard norms, and the consequences of these norms for access and opportunities for women in labour markets, have been demonstrated time and again. Both within and beyond feminist scholarship, critical work has been done in relation to a plethora of non-standard workers, recognizing that the model worker has historically also been marked by race and other social relations. As these critiques have made apparent, the pool of workers has never been as homogenous as the standard norms presumed. These critiques have sought to problematize and expose the consequences that narrowly drawn standard norms carry for those who do not fit them. They have ultimately been driven, though, by a desire to develop better norms, so as to extend legal protection to those falling outside the narrow scope that the law drew around its privileged subject.

Building on and seeking to contribute to this well-established scholarship, the articles in this special issue address the concept of the standardized worker in a range of ways, with attention to various national or comparative case studies. The special issue brings together papers delivered at or inspired by a two-day workshop held at Maastricht University in the Netherlands in December 2016. The workshop aimed to encourage critical and interdisciplinary perspectives on the theory of labour law, and to promote an inter-generational dialogue by featuring papers from established and emerging scholars. We gratefully acknowledge the financial support of the International Collaboration Fund at Melbourne Law School, Maastricht

Zbyszewska, Ania, Blackham, Alysia & Kullmann, Miriam. 'Scrutinizing the Standardized Worker: International and Comparative Perspectives'. *International Journal of Comparative Labour Law and Industrial Relations* 34, no. 4 (2018): 345–350.

University Faculty of Law, Warwick Law School and Hart Publishing for making the workshop possible.

Despite the diversity of the papers, several common themes emerge. Most of the contributions note the enduring influence, or ever-present shadow, of the traditional labour law model, despite the enormous changes that the world of work, processes of production, and the composition of labour markets have undergone, or indeed, the fact that in some contexts, this model was always out of tune with the reality of people's work lives. This is made apparent not only by the constant struggles that people (women and men) experience in combining work and family obligations, despite legal and policy reforms seeking to make that balance easier to strike, but also, and perhaps even more forcefully, by informality, which is the condition that characterizes the vast majority of work arrangements in developing countries and emerging economies. Similarly, while technological and organizational change has always posed problems for the ability of legal regimes to adapt, the rapidly growing influence of digitization and information technologies is making apparent that adaption of traditional norms will only get us so far, and that novel and creative solutions may be necessary to secure decent work conditions for everyone. A number of contributions to this special issue address the new, digital world of work as they reflect on the ways in which the law might need to be adapted to meet the challenges this context poses. Interestingly, as some of the contributions note, not all of the viable alternatives are actually that novel – collective action, for example, still appears to hold much promise to secure better conditions of work for precarious workers, including those working on digital platforms.

The special issue opens with the contribution from Anna Chapman. As she points out with reference to Australia, legal reforms undertaken since the 1980s have displaced many markers of the breadwinner model on which standard employment norms have been based and which they have helped to reinforce. Namely, and in large part due to feminist critiques and reform efforts, the last three decades have seen the introduction and refinement of various mechanisms designed to assist women workers and others with care responsibilities to engage with the labour market and better balance work with family obligations. However, Chapman shows that these reforms have only partly challenged and displaced the 'unnoticed' and 'often unconscious' normative assumptions regarding gender and sexuality, particularly those related to the care of children. Taking the Australian legal framework as her case study, Chapman considers the extent to which this framework supports 'mothers as workers', 'fathers as carers' and 'families of LGBT workers'. What her analysis reveals is that despite their stated objectives of fostering more inclusive labour markets and, indeed, managing to move beyond the original articulations of the breadwinner tradition, the current Australian legal regime

continues to retain vestiges of those traditional norms. Particularly enduring, she notes, is the heteronormative bias in relation to the way in which families are constituted. As she shows, this bias renders invisible, or leaves disadvantaged, same-sex families or other families where responsibilities for paid work and unpaid care are shared more equally than they still tend to be in heterosexual ones.

The interface between work and family, or lives outside of the workplace, is also addressed by Emily Rose, whose contribution examines 'the new politics of time', which is ushered in by the growing use of information and communication technologies (ICTs). ICTs are often hailed for their promise of making work more adaptable to people's lives, enabling completion of tasks anywhere and anytime, which, in turn, could assist people with reconciliation of work and other responsibilities, including care. Rose notes, however, that ICTs have also ushered in opportunities for employers to secure new forms of temporal flexibility, with workers increasingly being expected to be available and responsive to work on an 'as and when needed' basis. Indeed, Rose suggests that ICT-enabled forms of work-time management represent, for employers, a new technique of extracting value from labour. Managers actively assert their power over workers to shape their working time 'preferences' through both tacit, indirect biopolitical forms of (self) control and ones that are more coercive, as they exploit economic vulnerabilities and utilize market discipline to exert control over workers' choices. Taking the United Kingdom (UK) as her example, Rose shows how different ways of time management operate, highlighting the unique challenges they pose to workers within the UK's bifurcated labour market. While the level of skill (both real and perceived) is one of the key factors shaping how workers might experience these new temporalities of work, Rose also attends to their gendered dynamics. Against this backdrop, she then considers the current UK regime of working-time regulation, asking whether it is adequately equipped to protect workers against the exploitation that these new temporal trends engender. As her analysis shows, definitional and conceptual problems abound, as the current legal regime struggles to capture the qualitative aspects of time and the (new) spatial dimension of work. Among other reforms, she suggests 'rights to disconnect' and legislation that eliminates or significantly limits the unpredictability and insecurity inherent in 'zero hours contracts' and similar forms of work, as ways in which the law might respond to protect workers against the risks and insecurities that come with the blurred boundaries between work and rest, workplace and home, and the new expectations of availability.

Technological change, particularly digitization and the rise of online labour markets (OLMs), is also the key impetus for scrutiny of existing legal frameworks and responses in the contributions by Miriam Kullmann and Alysia Blackham. For Kullmann, these trends represent another stage in the longer-term pursuit of work

flexibilization and the parallel erosion of the standard employment relationship. She uses them to reflect on the broader question of what approach labour law might adopt to protect workers against inherent vulnerabilities and insecurities. Until recently, she notes, the contract of employment has been the 'ticket' to legal protection and access to a range of benefits and social drawing rights, and the predominant strategy among labour lawyers for safeguarding rights of those workers who fall outside its scope has been to liken non-standard work relations to those of standard employment. Kullmann questions, however, whether this approach is still appropriate given the realities of post-industrial labour markets, and the fact that the pursuit of flexibility through, for example, crowdworking and on-demand work, is unlikely to abate. Indeed, she points out that these forms of flexibility have developed precisely because employers have sought to evade various obligations imposed on them in the context of standard employment. As an alternative, she considers whether the conception of work-related securities could provide a possible and relevant approach to address insecurities, albeit varied ones, that all workers ultimately face regardless of whether the work they perform fits the definition of employment or not. Such an approach, she urges, enables us to more effectively extend protection without stymieing the diversity of work forms that are already present and those that might yet come about.

Similarly, Blackham's contribution questions whether extending existing legal concepts and forms of protection to meet the jurisdictional, definitional, and spatial challenges inherent in digitization is a sufficient strategy. In her case, the focus is on equality law, which, historically, has been an important element of employment law's protective apparatus, yet which has not been considered extensively in the growing literature on work and digitization. As Blackham urges, equality law is of particular relevance in the context of OLMs and the 'gig economy': while they foster possibilities of overcoming inequalities, they also carry significant risks of reproducing and perhaps even exacerbating patterns of discrimination and disadvantage that already exist. In light of this, and given equality law's traditional framing of discrimination as acts perpetrated by 'employers' on 'employees' – categories which are 'increasingly remote from the lived experience of work' – Blackham considers whether the current structuring of equality law is actually capable of securing employment (and equality) rights for those engaged in new forms and platforms of work. Taking the broadly comparable examples of Australia and the UK, she probes how these two legal systems have addressed and responded to the problem of regulating work and enforcing equality norms in the context of a 'gig economy' and OLMs. Her doctrinal analysis reveals that the familiar definitional problems – 'who is an employee?' and 'who is an employer?' – plague this area as well. It also suggests that extending equality law's protection to platform and task workers is challenged precisely by the fact that these workers usually do

not fit traditional categorizations, and even if they do, locating the 'duty holder' or the employer as the perpetrator of discrimination is also a challenge in these new conditions. Blackham then explores a range of options and alternatives that might be more promising than attempts at stretching existing frameworks have been, although she also proposes some ways in which the scope of equality law might be expanded.

While collective action is one of the alternatives that Blackham proposes, Aelim Yun's contribution explores this theme more fully; indeed, Yun argues that expansion of collective rights is key to improving the situation of non-standard precarious workers, especially in the context of a fissured workplace. Focusing on the case of South Korea, Yun recounts first the progressive decline of standard employment and the parallel rise of precarious work arrangements in that country, deeming them to be a result of deliberate employer action, actively aided by governmental policy and legal reform. For readers unfamiliar with the South Korean jurisdiction, many of the 'new' work arrangements described by Yun – different forms of contract, triangulation, and disguised employment – will be quite familiar. A particularly fascinating aspect of her contribution, however, is the two case studies of solidaristic collective action undertaken by (and on behalf of) non-standard workers – that of the Samsung Electronics engineer subcontractors and that of owner-operators or 'independent contractors' within the Korean construction industry. Yun describes how through a combination of their own organizing, support of mainstream unions, and coalition building, non-standard workers in both these cases were able to negotiate improvements in work conditions for themselves and other non-standard workers in the industry, and in the case of Samsung Electronics subcontracted engineers, to conclude the first collective agreement for this union-hostile company. Fascinating in themselves, the case studies are ultimately the basis for Yun's broader reflections on the importance of collective rights for securing decent work for precarious workers, and for a series of suggestions on how to rebalance power relations within geographically dispersed production chains and fissured workplaces. As she observes, these sorts of contexts challenge us to rethink how we define and where we locate power, control, and dependency; the case studies she recounts point to some ways in which we might begin to do so.

Last but not least, Abigail Osiki brings a perspective from Nigeria, a country with one of the largest informal economies in the world, where 90% of all workers are engaged in informal economic activities. In such a context, the notions of standard employment or the standardized worker never reflected the way in which the majority of people make a living, rendering labour law measures incapable of protecting the vast majority of people in practice. In her contribution, Osiki focuses on Nigeria's street vendors, who comprise a large proportion of retail

sector workers within the country's informal economy. While, as Osiki notes, street vending provides a viable livelihood option for a large portion of urban informal workers, in Nigeria, this activity is actively criminalized. This, in part, stems from contestations around access to and appropriate use of public space, which in turn relates to preferred notions of what constitutes desirable forms of development. As Osiki points out, the criminalization of street vendors sits rather uneasily with Nigeria's recent ratification of ILO Recommendation 204, the objective of which is to support transitions from informal to formal work. Osiki's contribution urges that, rather than labour law reform, it is reforms to Nigeria's property regime that are necessary for the country to effectively implement the Recommendation. Specifically, she suggests that the extension of a right to use public spaces as a common-pool resource for the purpose of, among others, street vending, could provide a framework for the collective property rights of street vendors in this public domain. This move, she argues, can facilitate the recognition of street trading as a legitimate form of work to which labour laws are applicable.

Overall, the contributions in this special issue reflect the endurance and challenges of traditional conceptions of the standardized worker, which echo across national boundaries and within both the global north and global south. These articles are part of an ongoing conversation regarding how we can move beyond traditional models of the standardized worker, and offer both new challenges to its subjectivity and ideas for legal change and renewal.