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A Quest for Equity: Labour Standards on the Transnational Move

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1 The Historicity of Equality Norms

The complex relationship to equality, of the law regulating labour has been a subject of permanent conflict and development, nationally and worldwide. Constitutions and solemn declarations promise equality for all, as a human right and a property of any human being. By guaranteeing private property, managerial prerogative and freedom of contract, however, law simultaneously systematically leads to inequality. Inequality affects dependent labour as such, and stigmatised groups of workers (gender, ethnicity etc.) in particular, nationally and, though differently in kind, worldwide. This complexity, in recent decades, tends towards greater emphasis on legal equality, particularly gender equality. Whether the new emphasis leads to more equality in practical terms, is an open question.

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Inequality- and equality-driving regulations follow different logics, face different actors and actor constellations, hence show different speeds and historical timetables. Inequality-producing law provides the framework for national, regional and global capital accumulation and expansion via guaranteeing private property, ensures enforcement of freely concluded contracts, provides regional and global rules for trade and investment—rules including, or not, those concerning labour affected. This framework is set up in the day-to-day work of actors like states and international organisations (IOs), entrepreneurs and multinational companies (MNC), and their respective partners. Their activity is relatively invisible and speedy—norm-building follows customs and practices of the economic stakeholders.

Equality-producing law regulating labour provides rules for national and global economic interaction between employers and workers limiting managerial prerogative and freedom of contract. Rules either substantively provide mandatory standards of fairness for worse-off stakeholders, workers, customers, dependent suppliers and so on or procedurally include the collective voice of these stakeholders in associations, shop stewards, works councils, unions, non-governmental organisations (NGOs) and international non-governmental organisations (INGOs), or IOs like International Labour Organization (ILO) or United Nations Conference on Trade and Development (UNCTAD). Equality-oriented actors are more numerous and diverse. Transnational associations of stakeholders, epistemic networks and communities, and tripartite (ILO) or multilateral (United Nations [UN]) IOs have to come to terms with one another. They strive for social rights but often require political rights (rights to freedom association, to articulation and assembly, to free press and media etc.), in order to achieve them.

Gender-equality-producing law demands more. It has to overcome inequalities not only inherent to domination structures of the capitalist market system, but also those due to patriarchal structures in work-life and society. Central parameters of traditional labour law—like the Standard Employment Relationship (SER)—are built around the male-breadwinner family model. Central parameters of traditional workers' voice—like works councils, trade unions, employers' associations,

IOs—in the outset, were male-dominated, sometimes male-monopolistic (Louis 2018, 224). Feminism had—and still has—to fight both capitalist and patriarchal obstacles against egalitarian work–life regulation. Women challenging patriarchal legal constructs like the SER encountered men defending it and coalitions of employers and male workers against their equality claim—with the appeasing excuse, by male socialist militants, first solve the class question, then turn to gender.

Civil rights (property, freedom of contract), says Marshall (1950), are challenges of the eighteenth century, social rights (education, social protection, workers' rights) of the twentieth century. Political rights (freedom of the press, of association, of constitutional and democratic endeavours) shaped the nineteenth century. Civil rights framed the inequality-producing capitalist development, social rights tamed inequality. Political rights were prerequisites of social rights—no social policy and progress without public articulation and association. Taking into account gender equality we may add one historical lag within social rights. We hence identify a historical sequence applicable to the analysis of equality: first civil rights (inequality producing), then social rights (inequality taming, based on political ones), however, first in a patriarchally restricted, later on in a gender-equality enlarged form.

In the following, by presenting and discussing some data from our current research, I want to show that we are in the midst of a worldwide labour regulation development in transition from patriarchal to gender-egalitarian rules. I add a glance at equal rights' drivers in the gender field. They encompass actors representing states/IOs setting equalising rules and social actors raising voice for equal rights. To the latter belong, nationally and globally, workers and workers' organisations and actors not directly involved as social partners, trying to intervene into employment affairs in order to trigger equality. Epistemic communities, transnational advocacy and norm-building networks (Finnemore and Sikkink 1998; Mückenberger 2010; Risse 2013), INGOs and the like collaborate with norm-building states (Hepple 2006) and IOs (Finke 2005; Boris et al. 2018) propagating egalitarian rules. This multiplicity of example setters and emulators (Gilardi 2013) helped equality values gain momentum, worldwide.

2 Quest for Equality Under Scrutiny¹

Within the research project “Worlds of Labour” (Dingeldey et al. 2021) we document and explain how employment rights expand worldwide over time thereby distinguishing between their status-difference-producing and their egalitarian roles. We intend to identify how countries and regions of the world deal with the socio-political tension between exclusive status-protection and inclusive egalitarian social norm-building. By establishing a methodology to quantify norms for comparative purposes, we identified three functions of employment norms-building on the critical analysis of the SER (Mückenberger 1989; Mückenberger and Deakin 1989), but going one step further. We distinguish between a “standard-setting” function (employment rights concerning working time and dismissal protection), a “privileging” function (protective norms restricting their coverage according to criteria of seniority or other selectivity), and an “equalising” function (anti-discrimination rights and flexibilisation control). The thirty-six indicators for these three functions allow us to measure to what extent, *de jure*, norms cover working people in a given geographical and historical context, to typify their in- or exclusiveness according to the functions and to cluster the countries of the world, according to their similar/different inclusiveness and mutual interdependencies, into “Worlds of Labour”. Eventually, we shall be able to compare, in numerical terms, 151 countries of the world (all countries with more than 500,000 inhabitants) over time, back to 1880. So far, a dataset for 115 countries has been constructed, eighty-four of them for the period from 1970 until 2013.

Novel to this research is that the analysis of segmenting and status-protecting labour law is confronted with the one of egalitarian law, worldwide over time. Since its very beginning, the SER-debate (see the historical accounts by Deakin 2013 and by Boris et al. 2018) has dealt with inequality, particularly gender inequality. There was legal-theoretical and empirical evidence that SER-oriented regulation produced segmentative impacts, due to gender-based division of gainful work and care

¹I thank Jean-Yves Gerlitz for providing the categorised results and the tables for the F- and G-aspects, which the chapter is based upon.

work. At present, however, we observe a gender-egalitarian counter-movement against the SER-type normalisation. This counter-movement was demanded from the outset of the ILO (Cobble 2018). However, it remained hidden and suppressed within male-dominated norm-generating institutions and procedures. It gained momentum, belatedly but continuously, in the period after the 1970s (Boris et al. 2018).

3 1970: At a Turning Point

The early 1970s mark the change, both in Europe and in many parts of the world, from the “Golden Era” of industrialism to a mode of work shaped by restructuring, tertiarisation, flexibilisation, feminisation, and globalisation (Eichengreen 2007; Boris et al. 2018). Along with the results of the worldwide protest movements of the late 1960s, they led to significantly new cultural patterns with respect to gender and work and with respect to the “third world” (Sjöberg and Tuckner 2013; Bonner et al. 2018). They led to an unprecedented thrust of expansion of labour standards (Veneziani 2010; Finkin and Mundlak 2015). They marked a watershed between patriarchal and egalitarian worldwide employment laws. Equalising labour law did not replace segmenting labour law—it rather began to go alongside with it as a competitor and counterpart, within the legal sphere. The year 1970 hence is adequate to start the analysis of the worldwide expansion of equality-oriented employment regulation.

In 1970, twenty-seven of the eighty-four evaluated countries (nearly one-third) had high numerical values in the standards-setting function. Only five countries had high privileging, no more than two countries high equalising values. A considerable number of countries, only a minority of them European, had high working time and/or employment protection values. The two other functions, most clearly the equalising one, were quasi-absent.

In order not to remain generic, I select four of our variables concretising labour law-setting that allow to contextualise law changes in terms of historical phases, movements and networks.² In order to give evidence for

² My selection of variables bears the risk of arbitrariness. I leave out all technical details—they can be found in our working paper (Dingeldey et al. 2021).

the increase in gender-equality law, I compare values for fair employment regulation (“F”) with those for equalising gender-equality norms (“G”). For F, I select two variables: “The law, as opposed to the contracting parties, determines the legal status of the worker” and “Law imposes substantive constraints on dismissal”. These variables test a historical turning away, or not, of the labour regulation framework from the market-liberal employment-at-will doctrine: whether the employment parties may evade the applicability of labour law by labelling the contract differently; whether, or not, the continuation of employment is purely at the employer’s will. For G I look at the two variables: “Equal pay for work of equal value is legally provided for” and “The law provides for equal opportunities for men and women in terms of access to employment”. These variables test the turning away of labour law from a purely formal concept of gender equality: whether allegedly typical female work may lawfully remain undervalued; whether gender equality supersedes employer’s freedom of arbitrary hiring decisions. Values of F and G are cumulated; capital letters signal high values (Table 36.1).

The picture for 1970 is as simple for the F- and G-variables as the general picture mentioned above. Whereas nearly half of the countries have high fairness regulation values, less than 5 percent have high gender-equality values. Numerically, the gender-equality issue is not yet on the agenda. Labour law is rather, though not yet in the majority of cases, concentrated on “general” issues affecting workers—such as applicability of labour law or reasonableness of dismissals.

These figures render my thesis of equality’s late entry into social norm-building plausible. They mirror the labour policy outcome of the early and the consolidating phases of employment regulation, in the early 1900s, 1920s, 1950s and 1960s, interrupted by the catastrophes of two world wars and totalitarian regimes. The early phase in employment law

Table 36.1 Levels of fair employment (=f/F) and of gender equality (=g/G) regulation, 1970: shares in percent (%) of countries ($n = 84$); normalised; low/high threshold = 0.5

f	F	g	G
53.57	46.43	95.24	4.76

consisted of legal measures allowing work on the basis of freely negotiable employment contracts and providing public law protection for children and youths as well as mothers and all women; the consolidating phase included working time and procedural collective representation regulation (Veneziani 2010). Gender-related rules, in these early periods, were restricted to female workers' protection (maternity rights, night work, hazardous substances). Equality rights, though articulated by activists (Cobble 2018), remained banned from the agenda (Zimmermann 2018).

Equality-oriented law owed its belatedness to a very trivial fact: The early periods of social policy were dominated by male ruling-class members of the global North. Just a flashlight instead of a scholarly historical account. The International Worker Protection Conference of 15–29 March 1890 drafting important regulations on mine work, Sunday work, children's and youth's work, and women's work was composed of ca. sixty-five male state or public officials, from fourteen European countries. The famous *Verein für Sozialpolitik* (1873–1936, refounded 1948)—an academic association with eminent members like Gustav Schmoller, Werner Sombart, Lujo Brentano, Max Weber—was so male-dominated that Schmoller, in his inaugurating speech of 1872, just addressed the audience as “*Meine Herren!*” (“Gentlemen!”). The [International Association for Labour Legislation](#) (*Internationale Vereinigung für gesetzlichen Arbeiterschutz*) expanding before WW 1 and paving the way for the first International Labour Exchange, 1901, and the International Labour Office were composed of male intellectuals. The inaugural ILO conference in Washington in 1919 saw thirty-nine states, nearly four to five European, represented. All delegates with voting rights were male, twenty-three women were advisors only (Louis 2018—on the simultaneously conducted Women's Labour Congress Washington 1919, see Cobble 2018). Years later the International Labour Conferences (ILCs) covered the continents to a more equilibrated if nearly exclusively male amount. The Offices—Director-General and Governing Body—powerful doorkeepers of international labour and social policy, remained Europe-dominated and a male domain (Thomas 1948; Louis 2018). They undertook pedagogic efforts (Thomas 1948) to provide worldwide acceptance for Europe-generated labour policy concepts.

Of course, labour standards so created bore the mark of their origin. The institutional context guaranteed patriarchal SER norm-building properties (not excluding paternalist protection of working women) rather than the determined pursuit of the principle of gender equality.

4 Gender-Equality Rights Going Their Own Way

The picture changes drastically after 1970. I first discuss the general picture of how the three functions change over time, then proceed to discuss the aforementioned four indicators allowing a gender-oriented evaluation (Table 36.2).

In absolute figures, S is the winner over time, and P remains moderate. E, however, makes the biggest leap over the forty-three years' development. Due to my focus on equality, I discuss the changes within E only, and its relative weight vis-à-vis the two other functions. The absolute E-figures rise particularly in the years after 1995—while the sample size remains nearly constant, the absolute figure of E more than doubles. In the same time span, S shows a much slower increase than E. In 2013, E had clearly overtaken P and had a strong weight on the norm-building agenda, alongside S.

Taking a closer view on the F- and G-values, I now include combined FG-values (Table 36.4). They are to test whether the rise in gender-equality legislation goes along with a rise in fair employment legislation or competes with it. Is there a win-win game between the two or a trade-off? (Table 36.3).

Table 36.2 Changing frequencies of Standard-Setting (s/S), Privileging (p/P) and Equalising (e/E) employment regulation by year, 1970–1995–2013 (different sample sizes): normalised; low/high threshold = 0.5

Year	s	S	p	P	e	E	Total
1970	57	27	79	5	82	3	84
1995	30	84	102	12	84	30	114
2013	17	98	101	14	45	70	115

Table 36.3 Changing levels of Fair Employment (=f/F) and of Gender Equality (=g/G) regulation, 1970–1995–2013: shares in percent (%) of countries ($n = 84$); normalised; low/high threshold = 0.5

Year	f	F	g	G
1970	53.57	46.43	95.24	4.76
1995	39.29	60.71	70.24	29.76
2013	29.76	70.24	50	50

Table 36.4 Changing fg-Fg-/fG-FG-constellations, 1970–1995–2013: shares in % of countries ($n = 84$); normalised; low/high threshold = 0.5

Year	fg	Fg	fG	FG
1970	50	45.24	3.57	1.19
1995	30.95	39.29	8.33	21.43
2013	13.1	36.9	16.67	33.33

G rises significantly. G-countries start out in 1970 (already in Table 36.1) as a tiny minority under 5 percent. The share, by 1995, rises to nearly 30 percent and, by 2013, gains 50 percent parity. F, starting near 47 percent by 1995 rises to 60 percent, by 2013 to 70 percent of countries. In both aspects, the major push takes place before 1995, the more moderate one by 2013.

Table 36.4 does not suggest a trade-off between fairness and gender-equality regulation, rather a mutually reinforcing relationship. In 1970, fg-countries had a share of 50 percent, by 1995 declining to 30 percent, by 2013 to 13 percent of the countries. FG-countries' share rose from 1970's quasi-zero to over more than one-fifth by 1995, and to over one-third of countries by 2013. Countries with an Fg-constellation are still more numerous than those with an FG-constellation, but they are near to each other and show an inverse development tendency (Fg downward, FG upward).

5 A Structural Reshaping of Work Regulation

Some of the described national legal changes can be correlated with the promulgation dates of international or supranational normative acts. The rise of the F-values went along with the 1982 ILO Termination of

Employment Convention No. 158 and the 2006 ILO Employment Relationship Recommendation No. 198. The rise in G-values coincide with the anti-discrimination directives of the European Economic Community (EEC) in the years after 1975 (Hepple 2009), the coming into force of the UN International Covenant on Economic, Social and Cultural Rights (ICESCR), in 1976, and the adoption of CEDAW—Convention on the Elimination of All Forms of Discrimination against Women—in 1979. But legal acts alone do not explain the worldwide numerical diffusion of equality-oriented norms. Let us look at the two G-variables only, the principles of which were already present in legal documents as early as 1919 (ILO Constitution), 1944 (Declaration of Philadelphia), and in the 1951 and 1958 ILO Conventions No. 100 and 111. But they were neither effectively diffused nor broadly statutorily implemented. Only in the mid-1970s were legal enactments accompanied by movements for change in gender roles, in Europe as well as around the UN and the ILO. Recent research on this period documents the emergence of working women's transnational networks (see the list in Boris et al. 2018, x–xxvi) and equally those of informal women workers (Bonner et al. 2018, 197–201).

The enormous rise by 2013 of gender-equality regulation was mainly due to the increase in both the female workforce all over the world (Sjoberg and Tuckner 2013) and the growing transnational feminist movements. World Women Conferences from Mexico 1975 to Beijing 1995 served as hubs for transnational women and experts' networks and spread-out spokes all over the world. Again, a flash: The 1995 Beijing Conference proclaimed Gender Mainstreaming as a principle of gender equity in all spheres of regulation (Finke 2005; Boris et al. 2018; Louis 2018). This principle spread globally, and became both enacted in Art. 3 para. 2 of the 1997 European Community (EC)-Treaty (Mückenberger 2010a) and the 1998 ILO Core Labour Standards Declaration—examples of the emulative function of transnational networks.

Women's representation in worldwide norm-building networks and agencies grew along with these outcomes—numerically and with respect to the strategic options they stood for. Marieke Louis, studying female representation in the ILCs, found that the number of women, still minoritarian, more than doubled in the 1970s and then continuously

rose (Louis 2018, 206). This certainly enhanced female voice. One problem, however, remained. Within global feminism, there were cleavages between the Global North and Global South. Whether gendered labour law should primarily provide protection or rights of equality; whether it should provide fair conditions for commodified labour or de-commodify labour via universal guarantees; whether Gender Mainstreaming should primarily be a fight against worldwide poverty or for women's emancipation—these were issues sometimes splitting these movements and weakening their voice in the effort to enforce gender equality.

Nevertheless, gender-equality-oriented labour standards have gained momentum since the 1970s and particularly around the turn of the twenty-first century. There is no reason to idealise these findings, as positive in their implications for social policy dynamics as they are. Our evidence so far is numerical—not taking into account the concrete countries concerned—and normative, only—not weighing obstacles to implementation, state failure, weakness of social partners or INGOs, autocratic and/or lacking national bureaucracies and so on. What the material confirms is the increasing tension between growing worldwide inequalities and an evidently growing quest for both legal and factual equity—no less and no more.

This tension underlines that we are now in the midst of a worldwide labour regulation transition from patriarchal to gender-egalitarian rules. This bears the potential to culminate in a step towards humanising the regulation of labour. That there is no trade-off between fairness and gender-equality regulation, but a mutually reinforcing relationship may express a significant *legitimacy* change. Probably female gender-equality claims are no longer regarded as articulating just a *particular* interest of a “feminist lobby”. There is a *common* interest in gender equity as a condition for better gender and generation relationships and for reconciliation of gainful work and life, for men and women alike.

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