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Title	An analytical framework for employment regulation: investigating the regulatory space
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Publication Date	2016-12-12
Publication Information	Cristina Inversi, Lucy Ann Buckley, Tony Dundon, (2017) "An analytical framework for employment regulation: investigating the regulatory space", Employee Relations, Vol. 39 Issue: 3, pp.291-307, <a href="https://doi.org/10.1108/ER-01-2016-0021">https://doi.org/10.1108/ER-01-2016-0021</a>
Publisher	Emerald
Link to publisher's version	<a href="http://dx.doi.org/10.1108/ER-01-2016-0021">http://dx.doi.org/10.1108/ER-01-2016-0021</a>
Item record	<a href="http://hdl.handle.net/10379/7470">http://hdl.handle.net/10379/7470</a>
DOI	<a href="http://dx.doi.org/10.1108/ER-01-2016-0021">http://dx.doi.org/10.1108/ER-01-2016-0021</a>

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# An Analytical framework for employment regulation: investigating the regulatory space

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## Abstract

**Purpose:** The purpose of the article is to advance a conceptual analytical framework to help explain employment regulation as a dynamic process shaped by institutions and actors. The article builds on and advances regulatory space theory.

**Design/methodology/approach:** The article analyses the literature on regulatory theory and engages with its theoretical development.

**Findings:** The paper advances the case for a broader and more inclusive regulatory approach to better capture the reality of employment regulation. Further, the paper engages in debates about the complexity of employment regulation by adopting a multilevel perspective.

**Research limitations/implications:** The research proposes an analytical framework and invites future empirical investigation.

**Originality/value:** The paper contends that existing literature affords too much attention to a (false) regulation versus deregulation dichotomy, with insufficient analysis of other 'spaces' in which labour policy and regulation are formed and re-formed. In particular, the proposed framework analyses four different regulatory dimensions, combining the legal aspects of regulation with self-regulatory dimensions of employment regulation.

**Article type:** Conceptual paper.

**Key words:** regulation, regulatory space, employment relations, labour law, regulatory theory, industrial relations.

## 1) Introduction

Regulation has long been a key issue in current National and European debates. For instance, the OECD has argued that better regulation could improve 'economic and social welfare prospects, underpin growth and strengthen resilience' (OECD, 2012). However, the increased attention on the improvement of regulatory techniques and the concrete experience with regulatory issues may divert attention from a conventional understanding of how employment regulation occurs.

The aim of this paper is to contribute to the debate on the specific subject of regulatory theory in the area of labour law and employment relations, to better understand the dynamic nature of employment regulation. The traditional approach that divides types of regulation between 'command and control' and self-regulatory mechanisms seems to require today a deeper investigation, able to connect labour law regulatory theory with a broader socio-political discourse. Starting by considering the sources of employment regulation, the paper contributes to discussion on regulatory theory by providing further nuances surrounding areas of 'self-regulation'. We argue that the regulatory approach in the area of employment relations cannot be exclusively focused on the technical legal perspective, but should also examine other ways in which regulation can occur, and how these combine to form the current regulatory pattern. From this, we outline an analytical framework that can enhance understanding of the more dynamic nature of the activities concerned with employment relations regulation.

The paper is structured as follows. Section II outlines the need for a broader perspective on employment regulation. Section III discusses the theory of 'regulatory space', tracing its development from the theoretical conceptualisation outlined by Hancher and Moran (1989) to recent contributions by Vibert (2014) and MacKenzie and Martinez Lucio (2005; 2014), among others. In section IV, the paper addresses current understandings of regulation,

de-regulation and, importantly, the politics of 're'-regulation. Finally, the paper presents the (multi-level) analytical framework, which helps advance knowledge beyond the singularly narrow or exclusively legal discourse on employment regulation.

## **2) Employment Regulation and the Transformation of Work**

Regulation is traditionally conceived as a governmental activity, exercised by national (or supranational) institutions or other bodies, including corporations, trade unions, self-regulators, professionals, trade bodies or voluntary organisations. The spectrum of actors intervening in the regulatory activity is broad and subject to change, according to 'when' and 'where' regulation happens (Hancher and Moran, 1989; MacKenzie and Martinez Lucio, 2014). Increasingly, state and non-state actors are involved 'in the interstices of institutional dialogues, either on their own initiative, or when solicited by other actors' (Sciarra, 2011, pp. 405-406).

Regulation is often seen as an instrument for restricting and embedding human behaviour, but also for preventing undesired outcomes; it may also have an enabling and facilitative role (Baldwin *et al.*, 2012). [1] Regulation can be explained by several methods and from multiple perspectives: the approach that this paper will explore is the institutionalist dimension of regulation and, more precisely, the institutionalist theorisation given by the metaphor of 'regulatory space' (Hancher and Moran, 1989).

Among many others purposes, the regulatory activity of a democratic society in the area of the employment relationship has - from the traditional perspective of labour law at least - the clear objective of balancing the interests of the parties to the employment contract (the employer and the employee), limiting their freedom to contract through various dispositions, concessions and constraints (Kahn Freund, 1972). Recognition of the historical imbalance between the employer and the employee has been the corner stone of several norms for the

protection of workers in many European legal systems. [2] However, the emergence of new forms of work and employment which cannot rely exclusively on the standard employment contract (i.e. 'atypical', 'flexible' jobs; growth in self-employment or dependent self-employment) calls into question the traditional assumptions of contractual subordination, and other factors such as new managerial strategies endorse employer power and control (Stone and Arthurs, 2014).

Scholars direct attention to models of regulation that take account of legal, supranational and collective regulation (Collins *et al.*, 2000; Collins, 2001; Dickens, 2004; Sciarra, 2011; Stone and Arthurs, 2013). Furthermore, extant literature draws attention to the changing nature of work and the decline of the standard employment relationship (SER) (Adams and Deakin, 2014; Stone and Arthurs, 2014). Current debates address challenges beyond the SER, to the need to tackle the drifts from decent work, and to balance equity, voice, fairness and performance in the employment relationship (Budd, 2004). Transformations point to issues concerned with, for example, protecting disadvantaged workers, implications arising from the 'feminization of work' (Rubery, 2015), globalization (Standing, 1997; Bray and Murray, 2000), labour flexibility and job quality (Wood, 2016) and challenges coming from the internationalization of labour and migrant labour flows (Dundon *et al.*, 2007; Thompson *et al.*, 2013).

In the European context, employment regulation has increased its complexity through an expansion of (individualistic) legal rights in many aspects of labour relations (e.g. health and safety, hours, employee voice, equality and non-discrimination rights). At the same time, many attempts to reduce the embedding effect of hard law on the other means of regulation (such as voluntarism or unilateralism) have been fostered by changes arising from a global neo-liberal ideological and political project weakening organised labour in liberal market economies (Esping-Andersen and Regini, 2000; McDonough and Dundon, 2010). In the UK and Ireland, for instance, the favourite regulatory approach is characterised by soft law and 'light touch' regulation, rather than

'hard' statutory prescription; this approach aims to 'lighten the regulatory burden' on businesses and corporations while at the same time providing a minimum standard of rights (Dickens, 2004; Dobbins, 2010).

The increased complexity of the regulatory role of the EU and the expanded 'transnationalization' of labour has resulted in competing structural issues between opposing aims and objectives from various political and economic constitutions of Member States. However, with national differences, peculiarities and political ideologies of EU Member countries, regulation in its broader sense can cut across the national boundaries 'to match new transnational (or boundaryless) organizational forms and employment patterns', mainly because 'in the knowledge economy national boundaries can be crossed easily and speedily' (Dickens, 2004, p. 607). The context of the European and transnational regulatory frameworks is described as an 'incomplete legal order' (Sciarra, 2011, p. 408) defined by the crisis of the 'regulatory state' and the increased roles of transnational actors. Thus, the raising of the transnational dimension implicates a major challenge, which consists in formulating new ideas and perspectives to re-calibrate institutional power balances and democratic representation (Sciarra, 2011) in a multi-level dynamic context.

Hancher and Moran (1989) stress the importance of considering work and employment changes as highly dynamic under advanced capitalism, including not only rates of growth and sudden innovations in technology and market practices, but also exploitation and work degradation. From a regulatory perspective this dynamism raises two fundamental issues of competence and accountability: what is the new area to be regulated, and who is to regulate it? These questions are of fundamental importance for developing a comprehensive theory on employment regulation, because 'in regulatory politics most of the contests for authority to settle issues surround newly invented products or marketing forms, for which some regulatory arena has to be found' (Hancher and Moran, 1989, p. 170). Consequently, the paradigm of employment regulation must also deal with issues outside the traditional legal

*modus operandi* on employment regulation. To understand variable forms of regulation beyond the exclusively narrow legal focus, two overlapping points can be considered.

First, we consider those areas where employment regulation is already in place, but where, due to employment market changes, current regulations are unsuitable to their role, or no specific rule has been produced yet. Alternatively, if a work rule exists, it may not have been enforced or made effective to regulate new (transformed) work relations. Examples here may include the rise of zero hours contracts, and the issues generated by a greater participation of women in the labour market (the so-called 'feminization of labour' described by Rubery and Rafferty, 2013), involving not only the gender composition of labour market, but also what flows from that, such as the feminization of skills and certain jobs (e.g. part-time flexible work, casual work, and the increased prevalence of this type of work). Issues also include the increase of economic migration (permitted by a greater possibility of labour mobility or a strong framework of rights at the supranational level); or the effects of new technologies and managerial strategies on the organization of labour. In these cases the challenge for the regulatory actors is to understand and evaluate the possible impact of the transformations on people's behaviours and social needs, in order to provide prompt protection and a sustainable and forward-looking strategy. The 'regulatory gaps' may help to understand that, where official legal regulation has not been enacted yet, other forms of regulation might be in place anyway. This idea is proposed by means of the analytical framework outlined in section IV, which aims to highlight how regulation can be understood in formal and informal way, according to how actors make use of regulatory instruments.

Second, the argument for a broader socio-economic and politically-orientated 'regulatory framework' advances issues that go beyond the dichotomy of regulation versus deregulation. Deregulation cannot simply describe a dichotomy between the presence or absence of rules. As outlined in the next

sections, a more inclusive theory suggests that this process is rather a ceding of regulatory authority to other actors, institutions or arenas of rule-making and employment.

### **3) The Regulatory Space**

The range of regulatory theories is wide and fragmented: Morgan and Yeung (2007) have identified three main categories of regulation, which can be divided into public interest theories, private interest theories and institutionalist theories. If the first two theories describe antithetic perspectives regarding the role given to private and public actors, the third sees the public and private spheres as co-habitants of the same space, and as necessary counterparts.

In the field of employment relations, the institutionalist approach 'is intended to capture any theory where rule-based spheres, or the relationship between different ruled-based spheres, play an important role in explaining why or how regulation emerges' (Morgan and Yeung, 2007, p. 53). The theory of 'regulatory space' is one institutionalist approach, which, it is argued, offers a particularly useful conceptual framework for the analysis of how work is regulated and how actors participate in and contribute to this progressive elaboration of formal and informal rules. Since its first theorisation, elaborated by Hancher and Moran (1989), the metaphor of regulatory space has been extended and further developed, to help explain the broader complexity of regulation by considering dominant approaches and 'colonisation' (MacKenzie and Martinez Lucio, 2014), and the 'limits' and (implicitly) 'the potential for law as one instrument of governance' (Scott, 2001, p. 330).

We argue that regulatory space can contribute to the traditional debate on employment regulation, which has generally focussed on a 'reflexive labour law' approach (Rogowski and Wilthagen, 1994) by looking at the relation between labour law and self-regulation mechanisms (see for instance Estlund, 2008). Following the arguments developed by Arthurs (2008), we consider that the



adoption a regulatory space perspective on the processes of self-regulation or unilateral imposition of rules could give greater emphasis to power relationships and actor relationship dynamics. It is argued that these important power dynamics are generally left over in the legal debate because of the preference in labour law theory towards a neutral descriptive approach, rather than a critical and prescriptive one (Arthurs, 2008). The proposed framework could thus enhance a better evaluation and critique of regulatory mechanisms.

One of the primary requirements of regulatory space is that it can be both 'occupied' and 'contested' by actors. The idea that the occupancy of regulatory space is contestable engages with Edwards' contribution regarding an inherent 'structured antagonism' between the parties to the employment relationship (Edwards, 1986). This space-occupancy can be unevenly allocated between the parties, according to the existing power relations and mobilisation of resources at different (transnational, national, sectoral or workplace) levels (Dundon *et al.*, 2014). The amount of space that an actor or group of actors occupies at a precise moment can be affected by historical, contingent and economic factors: regulation is thus not just situated in space, but also over time (Hancher and Moran, 1989). The historical context is therefore a fundamental feature for describing the regulatory space. The industrial relations approach has been criticized for not taking into account the context where regulation is shaped and re-shaped, along with the historical interactions between actors (MacKenzie and Martinez Lucio, 2014). From a multidisciplinary perspective, taking account of the historical evolution of regulation, that combines legal and institutional analysis, could help to go beyond the legal approach based on labour market considerations, which has a tendency to underemphasize conflict of interest between regulatory actors (Dukes, 2014).

In their original theorization, Hancher and Moran stressed that 'the economic regulation [3] is predominantly regulation by and through organizations' (Hancher and Moran, 1989, p. 160). The ways in which organizations are characterised can vary, and individuals may be able to access regulatory space

only 'because they have some organisational role' (e.g. employees in a firm, civil servants of a government department, or members of unions). Accordingly, the 'organisational status is the most important condition governing access to the regulatory space' (Hancher and Moran, 1989, p.161).

The role of actors is also examined from the point of view of their actions, and by their capacity for the mobilisation of resources, cooperation and by how they use and share important information. Across the regulatory space, 'parties bargain, co-operate, threaten, or act according to semi-articulated customary assumptions', hence 'the allocation of roles between rule-makers, enforcers and bearers of sectional interests constantly shift, again obeying no obvious public-private dichotomy' (Hancher and Moran, 1989, p. 152). It could therefore be suggested that the regulatory space does not necessarily follow a hierarchical and immutable structure, but that a relationship between actors and sources of influence, or institutional affiliation, generates a continuous process of adaptation and counterbalance: that is, a dynamic and fluid entity. These features underline the complexity within regulatory space and the resulting difficulties in finding a hierarchical structure within the system to help better understand regulatory transformations in the world of work and employment.

Even if the actors of regulatory space may not experience regulation in a non-hierarchical conception, as Scott (2001, p. 352) has suggested, 'the relationship between the regulating agency and the regulated parties is one of the interdependence, rather than a traditional relationship characterised by command and control' (Barry, 2009, p. 73). The analysis of employment regulation requires, therefore, a deeper focus on the forms of co-operation, exchange, interaction and interdependence among the actors within the regulatory space. As Vibert points out, regulatory space theory allows the observer to look at the regulatory activities from a closer perspective than the rigid hierarchical and networks analysis typical of political and legal science (Vibert, 2014, p. 20). In this complex system of actors and sources of regulation, the literature is correct in pointing out that 'formal and informal means of

regulation should not be seen as necessarily mutually exclusive but can exist in a symbiotic relationship, although the boundaries of this relationship can be fluid and contested, and the actors may not have had their roles and functions recognised or formally endorsed by the state or its legal framework' (MacKenzie and Martinez Lucio, 2014, p.193). Indeed, within this broader analysis, regulatory theory acknowledges implicitly the important dynamic of power mobilisation as an inherent feature in the process of regulation (Arthurs, 2008). Dundon *et al.* (2014) have demonstrated, through a multi-level analysis of regulation on information and consultation rights, that power relations influence employment regulations and attendant outcomes, shaped to a large degree by the resource mobilization capability of the respective actors, especially large multinational corporations, employer associations and state agencies.

The theory of regulatory space fosters comparative studies and comparisons between national systems of employment relations: the place, as well as the time, of regulation matters. Hancher and Moran (1989) explain that the most important way to analyse regulation and its space dimension is to consider the boundaries of the nation-state. Because each nation produces its rules by following different political and constitutional settings and conceives different relations between public and private, allowing various actors to participate in the regulatory arena, an analytical framework that takes account of regulatory sources and processes could be useful to explain the existing varieties and complexities within regulatory spaces. However, as previously pointed out, in the current European context, the regulatory boundaries of the nation state are becoming increasingly contested at transnational level. Accordingly, it is considered that an actor-centred approach to regulation, which investigates roles, competences and accountability of the 'players' in the regulatory arena, can add understanding in a comparative context. Indeed, comparisons between the different space allocations within different institutional settings could give valuable insights on regulatory studies. For instance, looking at how much space different countries cede to voluntary or unilateralist mechanisms of regulation (at national, sectoral or workplace level) could add a further level of

understanding of convergence or divergence between institutional systems. Comparisons referencing the boundaries of a specific nation state that is part of some international organisation/institution are of particular interest in this regard. In such circumstances, a regulatory space approach can be useful to understand how regulatory outcomes are influenced by relationships and regulatory responses that occur between nation states and the international institution. An example could be found in the analysis of how power dimensions between state and non-state actors are able to influence the transposition of international obligations such European directives, as illustrated by Dundon *et al.* (2014).

In sum, relations between actors are naturally influenced by historical and cultural traditions, as well as by current economic and political frameworks. Regulatory influences are also affected across levels and between nation-states, in terms of variable transnational convergence and/or divergence of regulatory patterns and sources of influence among actors (Martinez Lucio and MacKenzie, 2004). To this end a multi-level approach applicable across different spaces (e.g. transnational, national, sectoral or workplace) is considered.

#### **4) Regulation, de-regulation, re-regulation**

The concepts of regulation, de-regulation and re-regulation are crucial for understanding the functioning of the analytical framework we propose.

Regulatory space is constantly changing, as it is subject to a continuous process of innovation from the point of view of its actors and instruments. The process of change is the outcome of multiple sets of decisions and transfers (Martinez Lucio and MacKenzie, 2004). Neo-liberal market changes are often defined as 'deregulation', while coordinated market regimes are seen as more rule-bound and 'regulated' (Esping-Andersen and Regini, 2000). However, the perceived dichotomy between 'regulation' and 'deregulation' is deeply flawed.

As Esping-Andersen and Regini (2000, p. 24) outline, the real meaning of 'deregulation' of the labour market is 'multi-dimensional and basically ambiguous'. Deregulation can therefore be described from three different perspectives.

First, it can be conceived as an 'attempt for minimizing all rules on individual behaviour and all the functions performed by state and associational institutions, in order to increase the individual autonomy of individual firms and workers'. Second, it may be seen as an instrument for removing rules and institutions that are able to impose 'excessive rigidities on labour market activity' (such as trade union recognition or mandatory collective negotiation, among other provisions). Finally, it can be posited as 'processes which scale down the role of some instruments of economic regulation – such as the law, or tripartite concertation – to the advantage of others – decentralized collective bargaining, or informal agreements' (Esping-Andersen and Regini, 2000, p. 24).

These conceptualisations are inherently problematic. Although 'deregulation' is arguably best regarded as a process of redefining and rebalancing allocation within the regulatory arena, the first two conceptualisations essentially focus on outcome. The implied narrative of 'deregulation' in this regard includes a strong value-laden judgement because, while describing a simple mechanism for regulation, it implies the idea of lower protections.

The concept of deregulation is crucial as it is commonly viewed as a means for minimizing labour rules and protections and enhancing labour market flexibility. As Hepple (2011, p. 33) reports, the deregulatory process has often been described 'as an absence of regulation (...) in fact, it meant leaving regulation to ordinary market rules, to the private law of property and contract'. In some European countries (e.g. Greece, Spain and Portugal), recent labour reforms have been presented as an instrument to rebalance labour market regulations between standard and non-standard workers, and weakening collective bargaining (Koukiadaki *et al.*, 2016). They have a distinct ideological intent, which has been criticized from a socio-political perspective (De Stefano, 2014).

In reality, 'deregulation, ironically, often involves the development of systematic regulation over state bodies which develop and administer regulation' Scott (2001, p. 337). In practice, the regulatory authority is dispersed between the actors within the regulatory space: Scott reported that in the absence of State regulation, a privatised company could become the *de facto* regulator of the market. This demonstrates that 'even policies of de-regulation cannot completely displace regulation' (Scott, 2001, p. 337). In short, neo-liberal free market ideologues have to impose extensive regulation in order to de-regulate.

The above example leads to an important consideration about the nature of deregulation as a continuous process of **re**-regulation, rather than the simple removal or minimization of rules: as Majone (1990) argues, de-regulation nearly always entails some **re**-regulation. Furthermore, MacKenzie and Martinez Lucio (2005, p. 501) argue that the term deregulation 'tends to reduce the conceptualization of regulation to a dichotomy viewed in terms of the quantitative absence or presence of regulation, which is inappropriate as it is insensitive to the variety of ways in which the functions of regulation can be performed'. They subsequently suggest, echoing Standing (1997), that 'there is no such a thing as the 'deregulation' of labour markets as no society could exist without modes of regulation' (Martinez Lucio and MacKenzie, 2004, p. 82). This understanding underlines both the need to go beyond a purely labour law perspective on regulation and the importance of avoiding the trap of the 'deregulatory' narrative. It also emphasises the ideological aspect of 'deregulation' discourse. The mainstream conceptualization of deregulation as a mechanism for 'removing rules' and lowering protections can disguise the use of regulation to actually advance an agenda of minimal and weaker employment right across the labour market, favouring employers, Trans-National Corporations and State agencies. Deregulation is, in effect, a more complex process that often requires on-going **re**-regulation, even if it is coming from different political agencies and regulatory institutions.

From the point of view of regulatory space theory, re-regulation can therefore underpin informal processes of regulation as well as formal channels for regulation: when there is an empty space, left by the absence or the removal of law provisions, other actors might intervene in order to influence or impose their rules in that specific area. In these cases, voluntarism and unilateralism might play a major role, shifting the power of decision from the centre (the supranational or national authority) to the periphery. [4] For instance, MacKenzie and Martinez Lucio (2014) have recently analysed British industrial relations as a progressive movement from ‘negotiation’ to ‘colonisation’. For this reason, we consider it important to outline a framework that could enhance the understanding of the nature of the different regulatory dimensions (the legal, the negotiated and the unilateral) and their combinations.

## **5) Analysing regulatory space: incorporating the broader socio-economic and political dimension**

This section takes account of the variety regulatory sources and processes, to present a broader analytical framework of employment regulation. The four dimensions outlined in the framework represent mechanisms of regulation in the area of employment. The framework expands previous work by including, alongside traditional mechanisms of regulation such as the law and collective bargaining, the important dimension of ‘unilateralism’, which embodies processes generally not considered within traditional frameworks.

The key point is that behind each source of regulation, actors mediate the enactment of the regulatory instrument, through specific pathways and in specific places. Because of international, national, sectoral and workplace contexts, a multi-level analysis offers greater specificity about where and how actors operate, which in turn facilitates the investigation of each regulatory level. The proposed analytical framework offers a picture of the sources and actors found in the regulatory arena, and identifies the dimension and level in which

they intervene. The framework does not claim to explain the advocated dynamic nature of regulation or the natural overlaps between sources and levels. However, it constitutes both an analytical and methodological instrument to conceptualize employment regulation in a broader and more holistic manner than the existing legal framework.

The analytical framework in *Table 1* builds on the work of Berg *et al.* (2014), and improves the understanding of how employment is influenced and established in the regulatory arena through a broader theorization and analysis. Berg *et al.* (2014) enhanced the understanding of the role of key actors interests in employment regulation, specifically in the area of working time and employee voice, by representing three 'ideal models' that correspond to different national regulatory configurations. They identify three regulatory configurations: the unilateral configuration (which is attributed mainly to the US regulatory framework), the negotiated configuration (exemplified by the Swedish model) and the mandated configuration (belonging to the French tradition).

As Berg *et al.* (2014) pointed out, the description of the ideal types is developed for explanatory purposes only, because, in reality, ideal models premised on just one regulatory dimension do not exist. Following this elaboration, the framework in *Table 1* offers an analytical instrument to explain those 'mixed types' of regulatory spaces, which are defined but not developed by Berg *et al.* (2014).

The proposed analytical framework also offers useful tool for comparative studies, because of its broader emphasis on the institutional and comprehensive dimensions of regulation. Following the elaboration by Berg *et al.* (2014), a similar framework has been adopted by Cabrita and Bohemer (2016) in a study of working time regulatory mechanisms within the 28 countries members of the EU and Norway. This study compares different regulatory approaches to working time duration standards and explores the spaces for pure mandate regulation, adjusted mandated regulation, negotiation and unilateralism by looking at the different role that the law plays in each



configuration. Here the importance of looking at the constraining, enabling or facilitative role of labour law in each national setting is pointed out. This approach is particularly relevant to our framework, as it points out that the legal national setting is often able to shape and prescribe other regulatory mechanisms. However, the study conducted by Cabrita and Bohemer (2016) mainly follows the approach of Berg *et al.* (2014) in analysing nation states by looking at the predominant regulatory dimension and not at the combination of dimensions (for instance, it identifies the UK as having a 'unilateral' regulatory configuration). As a result, this approach neglects to consider diversity, variation or the interplay of regulatory sources within a regime. With a further elaboration we aim to develop the debate both between and within labour regulatory frameworks.

The proposed framework is not presenting a static or specific hierarchy within the system, nor does it represents an exhaustive pattern of regulatory sources. Rather, the four dimensions are regarded as complementary and fluid elements of the regulatory activity. The model is inspired by the broader European context of employment regulation, and aims to be both generalizable and responsive to context (including time and space). It therefore takes account of institutions, such as co-determination, that are or have been found in some European national settings, though not necessarily all of them.

Table 1.

Table 1	Law	Mandated Negotiation - Codetermination	Voluntarist Negotiation	Unilateralism
<b>International Level</b>	International Law: ILO Conventions  EU Law: EU Human Rights Regulations Directives Recommendations Policies Soft Law	European Works Councils	Collective Bargaining at EU level (Agreements between Employers and Employee representatives at EU level)	Regulation by Transnational Agents (ECB, IMF)
<b>National Level</b>	Constitution Acts Case Law	'Statutory' Collective Bargaining, <i>erga omnes</i> effect	Social Partnership  Collective Bargaining	Corporatist Regulation  Regulation by Managerial, Employers or Unions Associations
<b>Workplace Level</b>	Codes of Practice*  Customs	Board Level Representation  Company Law, Provision for Workers' Participation (German Case)  Worker's buy-out	Decentralized Collective Bargaining (workplace)  Non-Union Voice  Codes of conduct  Employment contract	Managerial Prerogative  Human Resource Management  Conflict

## 5.1) Law

According to Kahn-Freund (1972, p. 5), 'the principal purpose of labour law is to regulate, to support and to restrain the power of management and the power of organised labour'. From this perspective, labour law is inherently political matter: as Hepple states (2011, p. 30), 'labour law is the outcome of struggles between different social actors and ideologies, of power relationships'. This paper contends that labour law is one of the main sources of contemporary employment regulation, but not the only one: areas of regulation may overlap with other legal spheres; for example, company law, fiscal law or administrative law have to be taken in consideration (Mitchell and Arup, 2006). For instance, the utilisation of specific type of employment contracts can be explained by fiscal advantages rather than labour law's facilitative regulation, or a combination of the two (Adams and Deakin, 2014b).

However, it is important to stress that, in agreement with Deakin (2007), the expansion of the research interest beyond labour law represents a commitment to 'legal pluralism' rather than a claim towards the 'discover' of a new paradigm for labour law.

Within the regulatory space, law assumes facilitative functions; it also has a procedural dimension (Morgan and Yeung, 2007), precisely for its attitude to generating hierarchies and organised systems. Adams and Deakin (2014, p. 802) further argue that 'a legal system is needed to make the labour markets work, and the techniques used to actualize this process, encapsulated in the discipline and methodology of labour law, involve a role for fairness norms as well as mechanisms for co-ordination of exchange'. Therefore, law is not just an instrument for co-ordinating society but is also a channel through which policies are realized and provided with effectiveness (Adams and Deakin, 2014). Howe (2011) highlights the need to take account of the present challenges coming from labour market changes and describes the variety of regulatory approaches that might operate within the institutional setting, such as 'soft laws' and

financial incentives. Howe's perspective aims to highlight the importance of state policies over labour market and gives interesting inputs for expanding the regulatory interest beyond the traditional labour law approach.

Consistent with Dickens (2004, p. 602), the proposed framework posits that the significance of law as the main or only influence shaping employment decisions may be over-estimated, especially when analysed at the employment level. It has long been established in employment relations literature that a complex web of formal and informal rule-making processes and groups of actors are able to mediate and moderate the influence of legal regulation (Fox, 1974; Dundon and Rollinson, 2001; Farnham, 2014). The legal instruments of derogation and delegation of regulatory authority are able to create space of intervention for other actors. In this way, it is possible to see how the legal instrument can be responsible for the 'ceding' of regulatory space. Thus, the investigation of the other spaces and the interrelation between them become particularly important for the understanding of the regulatory process.

However, greater attention must be directed to the limits of the legal approach. It is necessary to take account of the so-called 'design failures' that, for instance, might be caused by 'vague standards and rules creating legal uncertainty, lack of coordination and consistency between different measures and incentives, or the structural inability to adjust rules according to changing environments' (Esping-Andersen and Regini, 2000, p. 31). For this reason, the analysis of legal regulation must go beyond the standard-setting process, and examine the institutional shaping of competence and accountability issues by the broader range of regulatory actors. Accordingly, the proposed framework outlines the following additional dimensions capable of capturing other aspects of employment regulation.

## 5.2) Negotiated Regulation

Following Berg *et al.* (2014), 'negotiated regulation' refers to variants between mandated (or statutory) processes of negotiations at one extreme, and 'voluntary' forms of agreement making between employers and worker representatives at the other. These variations differ in respect of the role that the law assumes in supporting them, but are prominent within institutional environments that support them (Berg *et al.*, 2014).

In this section different types of negotiated regulation are considered, namely mandated and voluntary patterns of negotiated regulation.

One example of a 'mandatory' form of negotiation is co-determination, a mechanism for making decisions within a company, which directly involves the employees and gives them participatory rights. The main example in practice is the German model of industrial relations, where the law specifically provides space for co-determination procedures (Rubery and Grimshaw, 2002, p. 22). Here, law does not directly regulate all aspects of the employment relationship; instead, the legal framework explicitly allows, and even requires, employees to participate in a democratic decision-making process. Through specific institutions, such as works councils or supervisory management boards, companies must consult and include worker representatives in decision-making. The particularity of co-determination is that its requirement is strongly supported and shaped by the legal framework to support actors in making employment rules and policies.

Jackson (2005, p. 237) has described co-determination as a 'highly ambitious, but remarkably adaptable institution'. In Germany, co-determination has changed over time: 'politically, codetermination was a compromise, resulting from particular state strategies to repress organized labour, employer strategies to maintain a paternalistic authority, and employee strategies to democratize the workplace and establish rights of industrial citizenship. Works councils emerged

having a 'dual' mandate to represent the interests of employees and cooperate in the interests of the firm' (Jackson, 2005, p. 245).

The importance of this institution has been widely recognized and has generated some attempts to introduce this model among the EU member states through legislation. From the 1970s the European Commission fostered three main initiatives in order to propose a European model of co-determination within the workplace. In particular, in 1972 and 1983 the Commission sponsored the Fifth Company Law Directive with the aim of introducing board-level employee representation. All the initiatives were opposed by employers, US corporate lobbying, national governments and problems with the harmonization of different national practices (Hyman, 2010).

The final result of the attempt of introducing a model of codetermination in Europe, and thereby promoting participative rights, has been the European Directive on the European Work Councils (EWC Directive 94/45/EC of 22 September 1994, recently revised in January 2012). This aimed to introduce structures to ensure information and consultation for employees of multinational companies with sites in more than one EU Member State and employing a certain number of workers. However, as a form of co-determination, EWC mechanisms are not without critics. For example, Streeck argues that EWCs are 'neither European nor works councils' (Streeck, 1997), and the aim of harmonizing the different national industrial relations backgrounds through the mean of Multinational Corporations has not brought the awaited results (Marginson *et al.*, 2004). In short, co-determination may be another form of employment regulation, yet it also remains as contestable as other regulatory spaces. It is therefore important to analyse the further development of this area of regulation, as it contains great potential for expansion in the context of a greater 'transnationalization' of work and businesses within the EU.

Alongside or separate to mandatory forms of negotiated regulation can be voluntary rule-making between employment relations actors; for example, when

the law encourages the parties to negotiate but does not prescribe or set-down the detailed mechanisms or issues about which to negotiate. Voluntarism is typically most prevalent as a form of rule-making regulation in liberal market economies like the UK, US, Ireland or Australia. However, the proposed analytical framework goes beyond the simplified distinction between liberal and coordinate market economies. Arguably, the reality of employment regulation is much more complex and fragmented, and needs to be explained by multiple dimensions and levels of analysis even within a particular country type.

With voluntary negotiated regulation, the law 'encourages' and 'facilitates' the parties to voluntarily arrive at their own rule-making agreement, often with a minimum floor of rights for workers (such as health and safety or unfair dismissal protections). This form of agreement-making can theoretically occur through relationships at supranational, national, local, sectoral, plant or individual level. The outcome of the voluntary collective (or individual) bargaining process might assume (depending on the specific institutional design of the state) the force of law, or an *erga omnes* effect. [5] For example, the UK and Ireland provide for a minimum legal wage, but under voluntary bargaining, the parties can negotiate a wage above the minimum rate. Such a negotiated outcome has no statutory force or broader application, but is incorporated into the legal contract of employment for the individual concerned.

Historically, voluntarism (in the context of the Weimar Republic) has been explained as a system of governing norms: 'In bargaining collectively, employers and trade unions did not enter into contractual relations but rather engaged in the autonomous creation of norms governing the relations of third parties' (Dukes, 2014, p. 12). However, voluntarism does not include just collective bargaining but also encompasses other ways of achieving regulation through a workplace rule or corporate procedure. Hence, other processes may be viewed as instruments of voluntarism; for instance, the Social Dialogue at supranational European level, and the voluntary Social Partnership system at national level (as in Ireland, although this collapsed following the economic

crisis in 2010. Importantly, voluntary regulation might also be represented at workplace level through newer forms of employee-management dialogue; for example, decentralized collective bargaining; non-union employee voice channels; or individualised voluntary negotiation of the employment contract as found in many large multinational corporations (Gollan, 2007; Gunnigle *et al.*, 2009).

The example of working time regulation and the 'opt-out' clause in the UK is useful for understanding the dynamic between legal and voluntary negotiated regulation, where the law purposely cedes regulatory power to the voluntary agreement between the employer and the individual employee. In this way, what appears to constitute space for voluntary regulation and respect for personal choice can disguise the *de facto* ceding of space to unilateral regulation, if the parties do not have equal bargaining power. This case has been illustrated by Smith and Baker (2013) in their analysis of the regulation of maximum weekly working time in the UK.

It can be further argued that the so-called rise in regulation (typified through more and more European legislation) may be a chimera, rather than a fact. In the last decade, voluntary regulation has become more permissive, despite the wave of European legislation. This paradox requires explanation. For example, legal interventions tend to be weak in reality when it comes to protecting employee rights or advancing collective bargaining supports, with a generally minimalist or 'light-touch' approach that favours voluntary regulation over direct legal intervention (Dobbins, 2010). The politicised nature of weak regulation, state institutions and the promotion of voluntary self-regulation by business leaders, are also highly significant here. For instance, institutions like the Troika and EU have fostered the decentralization of industrial relations with the explicit aim of favouring individual employee rights rather than extending or widening collective bargaining (Hickland and Dundon, 2016). In this sense, free market voluntarism has been left relatively intact, to the advantage of capital over labour. A further example can be found in the workplace dimension, where, as Arthurs argued (2008, p. 30), voluntary systems of regulation and corporate



self-regulation mechanisms, (such as codes of conducts) can mask the decline of state labour law; therefore, 'they help to facilitate and normalise the shift of power from unions and workers to employers'.

Further, the weakening of trade union power in the last decade has narrowed the space for these actors to influence their regulatory spaces (McDonough and Dundon, 2010). O'Sullivan *et al.* (2015) note that, owing to the decline in unionisation and increased individual rights, opportunities have opened for alternative actors, like citizen advice organizations, civil society organizations and solicitors, to speak-up for workers who lack collective bargaining protections. It can be argued, therefore, that statutory rights for workers have abated in favour of forms of voluntary rule-making sympathetic to a free market ideological narrative. The shift in power is shown in case-studies in the UK and Ireland, where Information and Consultation regulations for employees are now influenced more by individual managers and employers, including the State, who all reinforce their preferences for voluntary rule-making among parties (workers and employers) of unequal bargaining strength (Dundon *et al.*, 2014).

### **5.3) Unilateralism**

Unilateralism is the provision of regulation by a single authority, typically imposed without bargaining or consultation. The dimension presented here is not easy to evaluate and assess: unilateralism has a strong sociological and political characterisation. The managerial prerogative and literature about union avoidance highlights employer strategies and tactics to make decisions based on the notion of the property rights argument; that is, labour effort is seen as a source of property to be hired and fired at will by managers without the external interference of an outside trade union or other employee representative body. As a particular means of regulating employment conditions, unilateralism therefore has a considerable potential role in the analytical framework to assess regulatory spaces.

At the supranational level it can be described as the imposition through coerced compliance of some regulation from a superior authority that stands above the national democratic regulatory process. An example of such unilateralism could be found in the role endorsed by the European Commission, the International Monetary Fund and the European Central Bank, such as imposing austerity measures on those EU Member States and workers most affected by the economic crisis (see Koukiadaki *et al.*, 2016).

At the national level, unilateralism can be seen in the forms of corporatism and in the stronger forms of lobbying and the idea of corporate 'self-regulation'. As an example, Crouch (2011) has particularly stressed the role of large firms and Transnational Corporations (TNCs) on national regulations: he contends that firms, by the means of political power and lobbying, are able to have a place in the 'room of decision-making'. TNCs are able to 'set standards, establish private regulatory systems, act as consultants to government, even have staff seconded to ministers' offices' (Crouch, 2011). For example, the American Chamber of Commerce (AmCham) based in Ireland actively lobbied European government officials and Irish civil servants to weaken collective aspects of the Employee Information and Consultation Directive (Dir. 2002/14/EC) (Dundon *et al.*, 2014). These strong forms of lobbying activity are considered to be source of unilateral regulation in the employment regulatory space when they appear not to be effectively counterbalanced by other actors' authority.

Further processes of influence among corporate capital in relation to the governmental regulatory activity can be found in the analysis of the economic role of the State. Stiglitz (1989) suggested that, although a government cannot be sure that its regulation would not be modified by subsequent governments, it can try to develop strategies to make this difficult. At this point, the '*status quo*' may assume a particularly significant role.

Finally, at workplace level, the role of Human Resource Management offers evidence of unilateral imposition of the conditions of workers. In this regard, Sisson (1993, p. 207) notes that there is a lack of 'serious legal regulation' that could provide employees with basic standards and guide the work of HR Managers. In liberal market economies (e.g. UK, Ireland or US) as well as countries in the global South (e.g. Columbia, South Korea) it has been reported that employers often conceive managerial strategies in order to avoid the collectivization of workers and thereby deny legitimate union recognition and representation (Gall and Dundon, 2013). For instance, as an example of the unilateral power of management, Moore (2014, p. 412) has described as 'appropriative discretion' the managerial prerogative in respect of employees that gives management the power 'to determine (and subsequently vary) unilaterally the on-going rate of return on human capital in real terms', either by altering the level and/or rigour of work expected in return for the same level of money compensation, or else by maintaining employees' prevailing contractual rate of money compensation notwithstanding the existence of price inflation of other forms of material increase in the cost of living. Furthermore, the study conducted by Wood (2016), shows how the lack of structural economic powers and institutional supports to workers and unions can result in employer domination of the negotiations, represented in our framework by the unilateral regulatory dimension.

The above four dimensions – law, negotiated regulation (mandatory and voluntary) and unilateralism – together offer a more inclusive analytical framework concerning the transformation of employment regulation. It is not suggested they are discrete or independent dimensions, but in reality are likely to overlap and be inter-connected. In this way the proposed framework may offer a more dynamic approach to the limitations of a static debate about 'regulation versus de-regulation'.

## 6) Conclusion

To advance the understanding of employment regulation, it is important to investigate how regulation occurs and changes over time and space. The lens of regulatory space opens up new avenues and possibilities to examine how work rules and laws are contested and reconsidered. The proposed framework offers a multi-level pathway across supranational, national and workplace levels. It goes beyond a traditional understanding of regulation as a legal matter and encompasses other means of regulation such as mandated negotiated regulation, voluntarism and unilateralism.

The regulatory space perspective allows a consideration of the process of regulatory change as a mechanism of re-distributing power among actors, rather than the simple absence or removal of legal rules. As Hepple stated (2011, p.30), 'any theory is sterile unless we first try to understand why real employers, workers, politicians and judges act as they do in practice'. Accordingly, the analysis of the responses of actors to changes within regulatory processes is of vital importance in achieving better understanding of the complexities of employment regulation. It is, however, a future goal and a challenge for others to test, analyse and examine the utility of the proposed framework empirically.

## Notes:

[1] The idea of balance between security and flexibility (the so called 'flexicurity'), for instance, is an example of view of the approach of legal regulation which is enabling rather than constraining (Dickens, 2004, p. 603).

[2] There is an ancient 'tension in the system' as Lord Wedderburn (1965, p. 5) reports in his book, learning from the scholarship of Otto Kahn-Freund: 'For the common law assumes it is dealing with a contract made by equals, but in reality, save in exceptional circumstances, the individual worker brings no equality of bargaining power to the labour market and to this transaction central to his life whereby the employer buys his labour power. This individual relationship, in its inception, is an act of submission, in its operation it is a condition of subordination, however much the submission and the subordination may be concealed by the indispensable figment of the legal mind known as the 'contract of employment'.

[3] The authors refer, more broadly, to 'economic regulation': for the purposes of this analysis, employment regulation will be considered as just one of the aspects of economic regulation.

[4] Gino Giugni describes this process as a process of 'devolution of regulatory power' to other regulatory authorities. In his discourse he distinguishes the different kind of policy of labour in three fundamental directions: 'de-regulation', 're-regulation' and 'devolution or re-formalization'. His analysis is oriented on a labour law perspective; hence, in the *passage* about de-regulation he also mentions that this term is often (mis)used, without solid and scientific basics, to imply the restoration of the principle of the market balance. He therefore accepts the term 'de-regulation' when it is implied to point out the removal of useless or inadequate rules (Giugni, 1986, p. 331; translation made by the author).

[5] Controversial issues about the effectiveness and the regularity of these procedures have been analysed by the European Court of Justice (i.e. in *Laval*, C-341/05 [2008] IRLR 160) in order to avoid conflicts with other EU regulatory sources (i.e.. legislations on economics competition).

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