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TRANSFORMATIVE REGULATION AND A MODEL FOR UNACCEPTABLE FORMS OF WORK

A note on legal concepts and tools for the transformative regulation of work

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The idea of transformative regulation

Transformative regulation derives meaning and force from the idea of transformative constitutionalism,¹ and envisages regulatory outcomes that jettison ‘grossly unacceptable features of the past to[ward] a conspicuously contrasting “future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.”²

Transformation, while concerned with fair outcomes, should not be conceived as a means to an end; instead it is a means ‘to imagine new and better ways of being’ and a ‘way of looking at the world that creates a space in which dialogue and contestation are

truly possible, in which new ways of being are constantly explored and created, accepted and rejected and in which change is unpredictable but the idea of change is constant.’³

The idea of transformative regulation as concerned with fair outcomes (a future built on human rights) and regulatory spaces for ‘dialogue and contestation’, is congruent with the ILO’s fundamental principles and rights that are (or should be) the foundation of labour law.⁴ Furthermore, the ILO’s decent work agenda,⁵ which is integral to UN sustainable development goal 8, supports the transformative constitutionalism vision of ‘development opportunities for all’.

¹ Karl E Klare, ‘Legal Culture and Transformative Constitutionalism’ (1998) 14 *SAJHR* 146; Justice Pius Langa, ‘Transformative Constitutionalism’ (2006) 17 *Stell LR* 351, in which former Chief Justice Pius Langa identifies, among others, the following as barriers to transformative constitutionalism: access to equal justice, legal education, legal culture, responsibility for transformation and reconciliation, and creating a climate for reconciliation.

² Mohamed J in *S v Makwanyane* 1995 3 SA 391 (CC), 1995 6 BCLR 665 (CC), para [262], citing the *Postamble* to the interim Constitution, 1993.

³ Justice Pius Lange ‘Transformative Constitutionalism’ 17 *Stell LR* (2006) 351 at 354.

⁴ As articulated by the International Labour Organisation (ILO) in the Declaration on Fundamental Principles and Rights at Work, adopted in 1998 and amended in 2022

(<https://www.ilo.org/declaration/lang--en/index.htm>). The fundamental rights are (a) freedom of association and the effective recognition of the right to collective bargaining; (b) the elimination of all forms of forced or compulsory labour; (c) the effective abolition of child labour; (d) the elimination of discrimination in respect of employment and occupation; and (e) a safe and healthy working environment.

⁵ The ILO’s decent work agenda has four pillars: job creation/opportunities for work; fundamental rights at work; access to social protection; and the promotion of social dialogue - gender equality is a crosscutting objective. In the context of SDG 8:

https://www.ilo.org/wcmsp5/groups/public/---europe/---ro-geneva/---ilo-.lisbon/documents/event/wcms_667247.pdf

Conditions of work that are contrary to the fundamental principles and rights at work and that undermine the achievement of decent work are described by the ILO as *unacceptable forms of work*⁶ (UFW) and hence a central question for the ILO – and for CENTROW in the context of the transformative regulation of work – is:

'What modes of regulation can eliminate unacceptable forms of work (UFW)?'⁷

In response, and working closely with the ILO, McCann and Fudge propose a Multidimensional Model of Unacceptable Forms of Work⁸ (the 'UFW model') as a strategic approach to UFW regulation.

A Model for Unacceptable forms of Work

The UFW model, which is calibrated to apply regardless of a country's level of development, is 'directed at transforming the conditions that produce UFW' and the approach is aimed at 'support[ing] the design and implementation of regulatory interventions that are tailored to development objectives.'⁹ The UFW model integrates local actors in the processes for (a) identifying and prioritizing - and predicting¹⁰ - UFW (the UFW model as a diagnostic tool – this is the *substantive dimension* of the model, set out in Table 1 below); and (b) designing and implementing regulatory interventions ('frameworks, strategies, and tools') that target UFW. The latter is the model's *regulatory dimension*,

which responds to the mapping and prioritisation of UFW in a local context. In the design of a regulatory strategy, the UFW model foregrounds two key concepts for consideration: (1) the notion of 'points of leverage' – a site where a small action might produce significant improvements; and (2) the idea of 'institutional dynamism', recognising the dynamic effect of labour regulation in shaping norms and behaviour and the potential for broader systemic impact.

The UFW model (table 1. Below) recognises twelve substantive dimensions of working life, and categorises, within each dimension, a set of indicators (priority and supplementary indicators), which are designed to assist researchers and policy makers to construct models of UFW.

⁶ The ILO has identified the protection of workers from unacceptable forms of work as an area of critical importance. 'Unacceptable forms of work (UFW) are described as comprising conditions that deny fundamental principles and rights at work, put at risk the lives, health, freedom, human dignity and security of workers or keep households in conditions of poverty.' Areas of critical importance (ACI) 8: protection of workers from unacceptable forms of work: unacceptable forms of work: results of a Delphi survey / International Labour Office, Conditions of Work and Equality Department (WorkQuality). - Geneva: ILO, 2015, foreword.

⁷ McCann, Deirdre and Fudge, Judy (2019) *Journal of Law and Society* Vol. 46, No. 2 pp. 271 – 301, p. 272.

⁸ See Fudge, Judy and McCann, Deirdre (2015) *Unacceptable Forms of Work: Study prepared for*

the Governing Body of the International Labour Organization. Technical report. International Labour Organization; McCann, Deirdre and Fudge, Judy (2017) 'Unacceptable forms of work: A multidimensional model' *International Labour Review*, Vol. 156 (2017), No. 2. 147 - 184; and McCann, Deirdre and Fudge, Judy (2019) *Journal of Law and Society* Vol. 46, No. 2 pp. 271 – 301.

⁹ McCann and Fudge (2019) at 273.

¹⁰ The UFW model is informed by a predictive methodology that considers (1) the demographic characteristics of workers (for example, gender, national origin, social class, and so forth) (the 'social location'), and (2) the labour market and broader institutional features and political economy (the 'social context') that create risks for UFW. The predictive methodology is illustrated in table form in McCann and Fudge (2019) at 280.

Table 1. Twelve Substantive Dimensions of UFW

Indicators in each dimension signal unacceptable forms of work:

- * signals a *fundamental indicator* (priority areas for regulatory interventions)
- signals a *supplementary indicator*

<p>Dimension 1. Forced labour</p> <ul style="list-style-type: none"> * Worker subject to forced labour (including slavery, debt bondage, trafficking in persons, forced prostitution, forced overtime) 	<p>Dimension 7. Child labour</p> <ul style="list-style-type: none"> * Child labour
<p>Dimension 2. Health and safety</p> <ul style="list-style-type: none"> * Risk to health and wellbeing (physical and mental) 	<p>Dimension 8. Social protection (<i>health care, pension coverage, paid sick leave, unemployment insurance</i>)</p> <ul style="list-style-type: none"> * Social protection inadequate to satisfy basic needs
<p>Dimension 3. Income</p> <ul style="list-style-type: none"> * Inadequate payment (too low to satisfy basic needs); * Insecure payments (for example, wage arrears, irregular payments, unjustified deductions, performance of unpaid work, illegitimate/excessive recruitment fees) 	<p>Dimension 9. Equality, human rights and dignity (<i>irrespective of gender, ethnicity, race, nationality, caste, family status, age, disability, religion, sexual orientation, indigenous identity, HIV-status, trade union affiliation and activities, political opinion, contractual status/working arrangements</i>)</p> <ul style="list-style-type: none"> * Discrimination in working life (including access to education and vocational training); * Unequal pay for work of equal value; * Abuse, violence, and harassment; * Lack of respect for human rights, including the lack of respect for privacy (for example, restrictions on transfer of earnings, privacy violated in employer-provided housing, confiscation of possessions); • Lack of respect for national, ethnic, and social identities and cultures
<p>Dimension 4. Security</p> <ul style="list-style-type: none"> * Day-labour (casual contracts, zero-hours contracts); • Insecure employment (no certainty of continuing employment, termination is possible without a valid reason or without procedural or other protections); • No prospects for promotion; • No opportunities for skill development or training 	<p>Dimension 10. Legal protection</p> <ul style="list-style-type: none"> * Exclusion from legal protections; * Inadequate implementation/enforcement of legal protections (ineffective inspection systems, unspecified allocation of responsibilities in multilateral relationships); * Inadequate regulation of the recruitment or placement of workers by employment agencies, labour providers, and so on; • Lack of information on legal rights; • No express contract
<p>Dimension 5. Working time</p> <ul style="list-style-type: none"> * Excessive weekly hours; * Weekly rest of less than 24 hours; * Insufficient daily rest/family/community time; * Forced overtime; * Insufficient hours (too few to satisfy basic needs); * Unprotected night work (no health assessments, no capacity to transfer in essential circumstances, no additional compensation); * Paid annual vacation of less than 3 working weeks; <ul style="list-style-type: none"> • Unpredictable schedules; • Lack of influence over working hours (including the flexibility to deal with family and community obligations); • Insufficient rest breaks during the working day 	<p>Dimension 11. Family and community life</p> <ul style="list-style-type: none"> * No entitlement to paid maternity leave of at least 14 weeks; * No maternity protection; • No parental leave; • Work inhibits family or community life (for example, engagements terminated because a worker has family responsibilities, no flexibility to deal with family or community obligations)
<p>Dimension 6. Representation and voice mechanisms</p> <ul style="list-style-type: none"> * The right to freedom of association, the right to organize, and the right to collective bargaining are not respected; • Lack of consultation, denial of participation, or failure to provide voice mechanisms 	<p>Dimension 12. Work organization</p> <ul style="list-style-type: none"> • Lack of control over the work process (task, decision, timing, method); • Excessive workload; • Intense physical and mental demands.

The UFW model is a significant development in the field of labour law and labour market regulation, and provides a useful framework and tools for the transformative regulation of work, which is at the heart of CENTROW's proposed activities.