

Global Workplace Law & Policy

Subordination in Solidarity? The Labour Law of Workers' Cooperatives

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It cannot be disputed that labour law has served and still serves as the institution that protects the dependent workforce. Yet labour law has also served the purpose to codify the authority of the employers over their employees while, in return, recognising them the entitlement to certain rights they can invoke against the employer itself. As flexible forms of work are on the rise, whereas many businesses strategically classify the 'recent entrants', ie platform workers, mostly as independent workers, the discussion on whether or not this concerns 'bogus self-employment' looms large. The debate in labour law scholarship fostered by the questions posed by what is alternatively defined as 'platform capitalism' and 'gig economy' revolves around the dichotomy between the statuses of 'employed' and 'self-employed'. Starting from the observation that those forms of employment pushes labour law out of focus, new perspectives can be envisioned. Assuming that labour law, in principle, has not lost its value to give rights and disperse obligations, there is reason to explore the possibilities of envisioning a labour law that would be supportive of more democratic and egalitarian forms of organising production. This can be achieved by addressing the issues of workers' cooperatives and what labour law regulation they need.

Putting workers' cooperatives on the agenda

While workers' cooperatives have not received much attention among labour law scholars, disciplines like [sociology](#), [anthropology](#), [labour studies](#), [critical economic theory](#) and [critical management studies](#) have explored these forms of organisations, especially since the onset of the [global recession](#) in 2007/08 as well as the [Occupy Wall Street movement](#). Workers' cooperatives are a form of work organisation informed by theories and practices of [workers' self-management](#). Self-management, so far at least, is not a central concern of labour law, for the [basic elements thereof](#) consists of the workers being owner of the means of productions, the absence of wage labour in the traditional sense, and democratic and horizontal decision-making processes. All these aspects are conceived differently by labour law. Nicola Yeates notes that, for instance, workers' ownership of means of production is mostly understood in terms of self-employment as well as non-waged labour is not always recognised as work, as is the case with [domestic and reproductive work](#). Further,

workers' control over production is conceived by labour law only in terms of [employees' participation in company boards](#), while collective negotiations, with trade unions or works councils alike, are the forms of democratic decision-making that labour law proposes. These are not horizontal, since they are pursued between the employees and the employer.

As the world of work has changed, also the dynamics of flexibilisation of the labour market, including 'gig work' and 'platform economy', have already revolutionised how production and work are organised. From the triangular scheme of temporary agency work to the emergence of so-called [umbrella companies](#), which allows 'gig workers' to be fictionally employed for labour law and social security law purposes, the organisation of work does not any longer appear as grounded only on the employment contract only. One recent and interesting example is the case of [SMart in Belgium](#), an umbrella company set up under the form of a cooperative that, in return of a fee, provides for 'fictitious' employment contracts to precarious gig-workers or freelancers for work they will perform for their client (thus not for SMart) as to make them fall [within the scope of employment protection](#). The 'concept' of SMart is to provide basic employment protection (and social security coverage) to those workers, in particular 'gig-workers' or freelancers, who are outside the scope of labour law due to their work arrangement. In other words, the workers enter into a fictitious relationship of subordination to 'fool' the employment regime. The consequence: workers receive protection they otherwise would lack. This clearly shows a mismatch between the socio-economic reality of work and the currently applicable legal system.

What about the current system of industrial relations?

Where worker cooperatives are initiated as an alternative legal form of corporation with traditional employers, the question is, what design would the current industrial relations have and in particular what role would trade unions fulfil, if there is no 'employer' in the traditional sense anymore. Establishing workers' cooperatives results in replacing the vertical and 'authoritarian' organisation of the company with a self-organised collectivity of workers which manages and directs the production and which [shares decision-making power](#) over everything that needs to be decided within the cooperation.

Traditionally, collective bargaining takes place between employers or their representatives and workers' representatives, ie trade unions. Where workers themselves can possibly be considered as their own 'employers', the question thus is whether workers or their representatives in a cooperative are going to bargain with trade unions of which workers can also be members. One of the tasks trade unions have is to bargain for fair wages and working conditions; [granting workers control](#) seems, so far at least, not to be part of their job.

Nevertheless, trade unions and cooperatives share similar values of solidarity and methods of collective and democratic decision-making. Traditionally, the promotion of labour-related issues and the protection of labour rights belongs to the role of the trade unions. However, a 'concern for people' lies also within the heart of cooperative associations, particularly with a view to protecting and improving rights and foster decent work. These values provide a useful common ground for trade unions and

cooperatives to collaborate and ensuring the [general well-being](#), based upon the democratisation of the economy and fairness and equality in governance processes and the distribution of resources.

Albeit trade unions and worker cooperatives, at least in theory, could work well together, certain tensions are likely to emerge between the two. In the case of the Mondragon Cooperatives, for instance, workers are, in principle, allowed to join a trade union, but as supervising compliance with the applicable working conditions is delegated to the democratically chosen *consejo social*, there is no point of having trade union delegations in the cooperatives. Moreover, there is this perception that workers' cooperatives could provide lower salaries and working conditions than traditional corporations would do, which might be [contrary to trade union values](#). Nevertheless, also the (past and future) role of trade unions needs to be explored. Rebecca Zahn's research on the [representation of female workers](#) by trade unions has shown, that trade unions have been challenged by non-standard work in which also a large number of women are employed, which to some extent at least has become mainstream, since their inception.

Viewing the role and position of trade unions in a traditional way, the question is, what role they as institutions and collective bargaining could have in the context of workers' cooperatives. One suggestion would be to assign trade unions, on a macro scale, the socio-economic organisation, while, on a micro scale, managing the economic production at company level (in collaboration [with trade unions](#)) could be left to [cooperatives](#). Thus, the two could [work alongside each other](#), both aiming at improving the workers' employment (and living) conditions. Moreover, if trade unions are seen as organisations of workers (regardless of whether they are wage earners) and if cooperatives are seen as organizations of working people improving their economic position in the market, there is a great deal of [potential synergy](#) in the two approaches.

Legal questions to be addressed

It is not always clear how cooperatives should be treated in various areas of law (competition, environmental, etc.) and how 'control' and 'integration' for the purpose of finding enterprise liability and agency authority for wrongful harm to others. Even though the legal system in many countries, including [EU law](#), acknowledges the importance of cooperatives, to what extent does law contribute to creating or facilitating a ['shared entrepreneurial' culture](#) within cooperatives? Cooperative members have a complex quadruple membership consisting of workers, co-owners, users, and shareholders, which makes [governance of cooperatives challenging](#), as the International Labour Organisation emphasises.

Current labour law aims at granting protection to those having an employment contract (or employment relationship), the latter constituting subordination as the most important, but not only, distinguishing feature of the work relationship protected under labour law. But the question is, whether and, if so, to what extent does the concept or criterion of subordination change when working in worker cooperatives, ie when the employer is the collectivity of peer workers? Who is the 'other' in the employment relationship? Do definitions of an employment contract or relationship

apply if we assume the worker has two identities or rather it does not apply because the worker cannot be at the same time employee *and* employer? Notably, labour law can be applicable also on a voluntary basis, making the issue of compliance and enforcement much more complicated than in the case where parties sign a collective agreement or are bound by such an agreement by statutory decision. In workers' cooperatives, workers are bound to each other by collective or group ownership and conclude an employment contract with the 'entrepreneur', ie the collectivity of workers. In this sense, the employment in a cooperative blurs the division between the employer and the employee, de-constructing the main core of labour law scope

Within worker cooperatives, workers are at once members of the cooperation and owners. The cooperation is a legal entity with which contracts can be concluded, including employment contracts, resulting in a situation where workers become employees of their 'own company'. Depending on how the cooperation is structured, that is the larger a cooperation is, the more representative bodies there likely will be, workers are at the same time employers, probably deciding collectively on the work to be done, the remuneration to be paid, the working hours and so on. As a result, the type of power relations known from the hierarchically set-up management-led enterprise will likely shift towards a democratic and egalitarian power relation based on the idea of 'one member, one vote'. In that way, workers are themselves responsible for labour rights and their compliance with it. At the same time, however, it is the (representatives of the) cooperation that would be the institution that trade unions could bargain with.

In light of the current 'crisis' that labour law undergoes, a look at workers' cooperatives would constitute a challenge that might have a revitalising effect by blurring the lines that demarcate its scope and rethinking the organisation of production that constitutes its ground. Starting a discussion on workers' cooperative would also contribute to promote progressive views on labour law based on horizontal relations and the relationship with communities, something that might also promote a more ecological approach to law.

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