Abstract

Purpose: The purpose of the article is to advance a conceptual framework to help explain employment regulation as a dynamic process shaped by institutions and actors. The article builds 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’s contribution advances the case for a broader and more inclusive regulatory approach to better capture the complex reality of employment regulation.

Research limitations/implications: The research proposes a theoretical 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.

Article type: Conceptual paper.

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

I) Introduction

Regulation is a key issue in European debate. 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.

Accordingly, this paper contributes to the debate on the specific subject of regulatory theory in the area of labour law and employment relations, to better understand the dynamic and fluid nature of employment regulation. The article argues 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. From this, we outline a theoretical 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), among others. Section IV presents the core of the paper, including the components and dimensions of the proposed (multi-level) regulatory framework, which helps advance knowledge beyond the singularly narrow or exclusive legal discourse on employment regulation. Finally, the paper addresses current understandings of regulation, de-regulation and, importantly, the politics of “re”-regulation.

II) The Transformation of Work and Employment Regulation

Scholars direct attention to models of regulation that take account of legal, supranational and collective regulation (Dickens, 2004; Collins, 2001; Stone and Arthurs, 2013). Regulation is traditionally conceived as a governmental
activity, exercised by national (or supranational) institutions or other bodies, which include corporations, trade unions, self-regulators, professionals, trade bodies or voluntary organisations. It is often seen as an instrument for restricting and embedding human behaviour, but also for preventing undesired outcomes; regulation 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.² Recognition of the historical imbalance between the employer and the employee has been the corner stone of several norms for the protection of the subordinated subject; namely, the worker. 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, p.3).

Extant literature draws attention on the changing nature of work and the decline of the standard employment relationship (SER) (Adams and Deakin, 2014;Dickens, 2004, p. 603).

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’.
Stone and Arthurs, 2014). The current debate addresses the challenge to go 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 debates and issues concerned with, for example, protecting disadvantaged workers, implications arising from the ‘feminization of work’ (Rubery, 2015) 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, not just legal) 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 peculiarity of the historical moment goes beyond the incidence of the economic crisis on the transformation of labour. It is also necessary to consider the impact of changes within the inherent features of the traditional labour market pattern. The decline of trade union membership has led to a representation gap and potential structural reconfiguration of the labour market with a renewed (unilateral managerial) emphasis on voluntary and/or individualistic patterns of employment rule-making.

Hancher and Moran (1989, p. 148) stress the importance of considering work and employment changes as highly dynamic under the 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: what is the new area to be regulated, and by whom? Those 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’ (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 related or overlapping points can be considered.

First, we consider those areas that employment regulation may cover, but where no specific rule has been produced due to employment market changes. 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’ (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 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 forward-looking strategy.

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

III) The Regulatory Space
As noted previously, the range of regulatory theories is wide and fragmented:
Morgan and Yeung (2007, p.16) 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
includes a complexity in itself: the public and private spheres are seen as co-
habitants of the same space, as well 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, political decisions and the ‘limits’ and (implicitly) ‘the potential for law as one instrument of governance’ (Scott, 2001, p. 330).

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 occupy in 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, p. 155). 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 regulatory space’ (Hancher and Moran, 1989, p.161).

Within the regulatory space actors are also examined from the point of view of their actions and intentions, and by their capacity for the mobilisation of resources and power competences, cooperation and, more importantly, by how they manage, use and share important information. Across the regulatory

\(^3\) 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.
space, parties bargain, co-operate, threaten, or act according to semi-articulated customary assumptions. ‘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, thus, 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 perspective that takes the distance from the rigid hierarchical and networks analysis typical of political science (Vibert, 2014, p. 20). Relatedly, regulatory theory acknowledges implicitly the important dynamic of ‘power’ as an inherent feature in the process of regulation. 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, p159) explain that the most important way to analyse regulation and its space dimension is to consider the boundaries of the nation-state. Each nation produces its rules by following different political and constitutional responses; it conceives different relations between public and private, allowing various actors to participate in the regulatory arena. These relations 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 McKenzie, 2004). To this end a multi-level approach applicable across different spaces (e.g. transnational, national, sectoral or workplace) is considered next.

IV) Analysing regulatory space: incorporating the broader socio-economic and political dimension

Taking into account the variety regulatory forms, this section will develop a broader employment regulation framework. Four dimensions will be presented which explain how this rule-based system works and, procedurally, how these rules are generated (and constantly re-generated). The dimensions outlined in the framework take account of Vibert’s three overarching types of regulation (Vibert, 2014, pp. 14-15).

The first of these types is related to the rules coming from governments or government agencies. These rules can be supported by the coercive power or the law and are usually expressed as ‘official regulation’. In the proposed framework, the law dimension is intended to have a broader significance: instead of referring to only ‘government’ coercion, we discuss the wider socio-economic and political role of the ‘state’, in which government is just one of the structural institutions. The second type occurs ‘when rules emanate from and are enforced by a private body with rule-making authority’ (Vibert, 2014). This
process is often referred as ‘self-regulation’. In our framework this type of regulation may include the unilateral and/or voluntary agreement processes of industrial relations rule-making. The third type is called co-regulation: in this process of rule-making, ‘private bodies may borrow official authority’ in order to create rules. The proposed framework identifies both voluntarist and co-determination dimensions which are capable of capturing the range of co-regulatory processes between different actors and state agencies.

The proposed framework, illustrated in Table 1, is not presenting a static or specific hierarchy within the system: the four dimensions are regarded as complementary and fluid elements of the regulatory activity. Furthermore, it must be remembered that these regulatory spaces change accordingly to the contextualisation in time and space (i.e. the historical moment and the national jurisdiction). In a multi-level analysis of the regulatory space, ‘when regulatory authority is dispersed across different actors and levels of government, hierarchical types of regulation are said to face inherent limitations, leading to a greater emphasis on modes of regulation that stress bargaining and deliberation’ (Baldwin et al., 2012, p. 373). Therefore, this framework aims to take account of the broader socio-economic and political dimension of regulatory activity within and between different actors across multiple spaces. According to Hancher and Moran:

‘The result in the sphere of regulation is that decisions cannot be made, let alone implemented, by involving only a small group in the regulatory process. Social complexity ensures that effective regulation typically demands the co-operation of countless interdependent social actors, often including those well beyond the boundaries of any conventionally defined regulatory community’ (Hancher and Moran, 1989, p. 169).
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3.1) 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’. Labour law is indeed an inherently political matter: according to Hepple (2013, 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 instance, company law, fiscal law or administrative law have to be taken in consideration.

Within the regulatory space, law assumes facilitative functions; it also has a proceduralist dimension (Morgan and Yeung, 2007, p. 59), 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 labour market 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: ‘worker-protective labour law continues to have the potential to realize a progressive policy agenda’ (Adams and Deakin, 2014, p. 781).

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 it is analysed at the company level. Indeed, 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).
Arguably, therefore, 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). In this sense, recent calls for the simplification of labour law or for better regulation, evidence the attempt to respond to the limitations of an excessively legalistic paradigm. Recognising that the relationship between the actors within the employment regulation is not shaped by legal regulation alone, it is now necessary to outline additional dimensions capable of capturing other aspects of employment regulation.

3.2) Co-Determination

Co-determination is one mechanism to make decisions within a company, which directly involves the employees and gives them participatory rights. The main example of a co-determination system 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 allows employees to participate in a democratic decision-making process. In specific situations, such as work councils or supervisory management boards, companies must consult and include worker representatives in decisions. 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, the institution of 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 homogeneous 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, p. 71).

The final result of the attempt of introducing a model of codetermination in Europe 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 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.
3.3) Voluntarism

As previously outlined, in employment regulation law is required to protect workers by limiting the imbalance of bargaining power between the employer and the employees, and to give them effective rights through a fair employment contract. Voluntarism is typically most prevalent as a form of rule-making in liberal market economies.

In voluntarism, the law ‘encourages’ and ‘facilitates’ the parties to voluntarily arrive at their own rule-making agreement, 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 or might not assume (depending on the specific institutional design of the state) the force of law, or an erga omnes effect. 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. While such a negotiated outcome has no statutory force, the agreed rate becomes 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; the voluntary Social Partnership system at national level (as in Ireland, although this collapsed following the economic

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4 Controversial issues about the effectiveness and the regularity of these procedures have been analysed by the European Court of Justice (i.e. in Laval case) in order to avoid conflicts with other EU regulatory sources (i.e., legislations on economics competition).
crisis in 2010); the ‘Concertazione’ (as belonging to the Italian tradition). 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).

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 even 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 legal intervention (Dobbins, 2010). A further important point is the politicised nature of weak regulation, state institutions and the promotion of voluntary self-regulation by business leaders. 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. In this sense, free market voluntarism has been left relatively intact, to the advantage of capital over labour.

Further, the weakening of trade union power in the last decade has narrowed the space for these actors to develop their regulatory authority (McDonough and Dundon, 2010). O’Sullivan et al. (2015, p. 228) 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 de jure 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, p. 34).

3.4) 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 has a potential role in the analytical framework to assess regulatory spaces.

At the supranational level it can be described as the imposition of some regulation from a superior authority that stands above the national democratic regulatory process. An example of 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.

At national level, unilateralism can be seen in the forms of corporatism and lobbying and the idea of corporate ‘self-regulation’. As an example, Crouch 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’. 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). 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 by Stiglitz (1992). It is 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 ‘any serious legal regulation’ that could provide employees with basic standards and guide the work of HR Managers. In the UK, Ireland or US, employers and managers 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.

The above four dimensions – law, co-determination, voluntarism, 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 interconnected. In this way the proposed framework may offer a more dynamic
approach to the limitations of a static debate about ‘regulation versus de-
regulation’, which we turn to next.

IV) Regulation, de-regulation, re-regulation
Regulatory space is always changing: it is subject to a continuous process of
innovation from the point of view of its actors, instruments and contents. The
process of change is the outcome of multiple sets of decisions and transfers
(Martinez Lucio and McKenzie, 2004, p. 94). Neo-liberal policies or liberal
market changes in regulatory space are often defined as ‘deregulation’, while
coordinated market regimes are seen as more rule-bound and ‘regulated’
(Esping-Andersen and Regini, 2000, p. 25). With the aim of exploring this
debate, the dichotomy between ‘regulation’ versus ‘deregulation’ is subject to
critical and more in depth analysis. As Esping-Andersen and Regini (2000, p24)
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 (Vibert, 2014):

1) 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’;
2) As an instrument for removing rules and institutions that are able to
impose ‘excessive rigidities on labour market activity’.
3) As ‘the 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’.

However, from a regulatory space theory, all the definitions presented above
describe ‘deregulation’ as a process of redefining and rebalancing allocation
within the regulatory arena. If we consider the two first descriptions of the term,
it could be found that deregulation does not indicate a process, but rather an
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.

Deregulation, as an instrument for minimizing labour rules and protections connected with the idea of flexibility of the labour market, has been a central issue in the debates of the last decades, especially in times of economic and financial crisis. As Hepple (2013, 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. Italy, Spain and Portugal), recent labour reforms have been presented as an instrument for the rebalancing-of-protection in the national labour market between standard and non-standard workers, with the covert aim of deregulation. This has a distinct ideological intent which has been criticized by some authors interested in considering the socio-political outcomes of deregulation (De Stefano, 2014, p. 285). In reality, as Scott (2001, p. 337) has pointed out, ‘deregulation’, ironically, often involves the development of systematic regulation over state bodies which develop and administer regulation’. It has been shown that the regulatory authority is dispersed between the actors within the regulatory space: Scott reported, by showing the result of an official investigation, that in the absence of State regulation, a privatised company can become de facto the 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.

This example leads to an important consideration about the nature of deregulation: the term entails a necessary and 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.

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 decisions from the centre (the supranational or national authority) to the periphery.  

Similarly, the misleading use of deregulation has been highlighted by MacKenzie and Martinez Lucio (2005), who 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’ (MacKenzie and Martinez Lucio, 2005, p. 501). Echoing Standing (1997), Martinez Lucio and MacKenzie suggest ‘there is no such a thing as the ‘deregulation’ of labour markets. No society could exist without modes of regulation’ (Martinez Lucio and MacKenzie, 2004, p. 82).

Hence, 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, TNCs 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. Accordingly, we argue a more appropriate way to describe the process of re-distribution of regulatory space (e.g. the downsizing of the role of the law and the dismantling of specific norms in favour of others forms of regulation, such as voluntarism or unilateralism) could better found in the concept of ‘re-regulation’.

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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 inadequates rules (Giugni, 1986, p. 331; translation made by the author).
De-regulation in contemporary political and socio-economical spaces requires extensive regulation: for example, the de-regulation of financial markets requires the passing of very complex and detailed regulations in order to re-regulate the market. Likewise, protective legislation (e.g. a national minimum wage) is in itself a detailed regulatory requirement. Hence, we consider that the concept of re-regulation is a better way to capture the dynamic processes of employment transformation and change.

V) Conclusion
In the advancing 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) and the varieties of regulatory mechanisms. Indeed, the proposed framework goes beyond a traditional understanding of regulation as a legal matter: it encompasses other means of regulation such as co-determination, voluntarism and unilateralism.

According to the analysis of the four dimensions of the regulatory space, the difficulty of finding a hierarchical structure within the framework has been stressed, as the regulatory authorities can overlap and the process of regulation may follow power relationships that go beyond the overall structure provided by the law.

Finally, the regulatory space perspective allows a consideration of the process of regulatory change as a mechanism of re-distributing space among the actors, rather than the simple absence or removal of legal rules. Accordingly, the analysis of the responses to changes within regulatory processes has been considered of vital importance to better understand the diversity 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.
Bibliography


