

INEQUALITY AND ECONOMIC MARGINALISATION



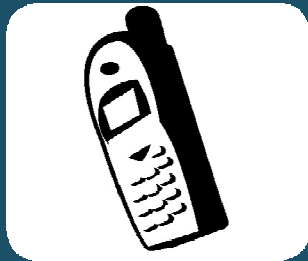
Understanding inequality: Promoting equity

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ABOUT THIS RESEARCH

The 2007 Annual Report of the Accelerated Shared Growth Initiative of South Africa (AsgiSA) identified a need to focus on what was then called ‘the second economy’, and on mechanisms to ensure shared growth reaches the margins of the economy. The Second Economy Strategy Project was initiated in this context. It reported to the AsgiSA High Level Task Team in the Presidency, but was located outside government in TIPS.

A review of the performance of government programmes targeting the second economy was completed in early 2008. The project then commissioned research and engaged with practitioners and policymakers inside and outside government. A strategic framework and headline strategies arising from this process were approved by Cabinet in January 2009, and form part of the AsgiSA Annual Report tabled on 16 April 2009.

In South Africa, people with access to wealth experience the country as a developed modern economy, while the poorest still struggle to access even the most basic services. In this context of high inequality, the idea that South Africa has ‘two economies’ can seem intuitively correct, and has informed approaches that assume there is a structural disconnection between the two economies. The research and analysis conducted as part of the Second Economy Strategy Project highlighted instead the extent to which this high inequality is an outcome of common processes, with wealth and poverty in South Africa connected and interdependent in a range of complex ways. The different emphasis in this analysis leads to different strategic outcomes.

Instead of using the analytical prism of ‘two economies’, the strategy process placed the emphasis on the role of structural inequality in the South African economy, focused on three crucial legacies of history:

- The structure of the economy: its impacts on unemployment and local economic development, including competition issues, small enterprise, the informal sector, value chains and labour markets.
- Spatial inequality: the legacy of the 1913 Land Act, bantustans and apartheid cities, and the impacts of recent policies, looking at rural development, skewed agriculture patterns, and the scope for payment for environmental services to create rural employment.
- Inequality in the development of human capital: including education and health.

TIPS’s work around inequality and economic marginalisation is built on the outcomes of this strategy process.

The research undertaken under the auspices of the Second Economy Strategy Project continues to be relevant today as government explores policy options to reduce inequality and bring people out of the margins of the economy. This report forms part of that research.

A list of the research completed is available at the end of this report. Copies are available on the TIPS website: www.tips.org.za.

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INTRODUCTION

According to the International Labour Organisation (ILO) a third of the global workforce is either unemployed or underemployed barely eking out a living through informal work; self-employment or as wage workers involved in precarious¹ employment. International competitive pressures have led to a restructuring of organizations toward decentralized production networks² and employment relationships.³ A significant global trend over the past two decades has been for firms to depart from the practice of offering long-term stable employment with large scale in-house factory production, and to adopt instead a 'free agency' or flexible model of employment, in which an increasing number of employees are classified as temporary. These workers fall outside the scope of legal protection afforded to workers engaged in standard forms of employment. They are either completely excluded from, or on the fringes of, social security protection and receive less favourable benefits than those workers recognized as employees and are accordingly vulnerable to exploitation and deepening poverty.⁴

The Report of the *Commission on Legal Empowerment of the Poor* has identified the exclusion of the world's poor from the rule of law as one of the main factors contributing to poverty and inequality in the world.⁵ The Commission argues that in affluent countries people are more likely to enjoy access to justice and other rights as workers, businesspeople, and owners of property. Wealth creation in these countries rests upon various legal protections, norms, and instruments governing matters such as property rights and labour contracts and workers associations. However, the legal underpinnings of entrepreneurship, employment, and market interaction are often taken for granted when countries adopt development strategies to overcome inequality and poverty despite the fact that most poor people do not benefit from legal protection and the opportunities it affords.

The Commission concludes that the spread of rule of law counteracts the exploitation of vulnerable participants in the informal economy and compliments other developmental initiatives such as investing more in education, public services, and infrastructure.

The Commission has developed a comprehensive agenda for legal empowerment encompassing four crucial pillars that it has identified as central in national and international efforts to increase protection and opportunities for the poor. These are access to justice and the rule of law, property rights, labour rights and business rights.⁶

The Commission envisages labour regulation. Labour rights should create opportunities for all workers to obtain decent work regardless of whether they work in the formal or informal economy. This approach is in line with the ILO *Decent Work Agenda*.⁷

¹ The term precarious employment will be used interchangeable with the term contingent work to describe work arrangements of temporary, fixed-term or leased workers, self-employed subcontractors and home-based workers.

² Katherine Stone 'Legal Protections for Atypical Employees: Employment Law for Workers without Workplaces and Employees without Employers' *Berkeley Journal of Employment and Labour Law* Vol. 27 No. 2 (2006) 215 – 286 at 251.

³ International Labour Organisation 'ILC 90 Decent Work and the Informal Economy' (2002) Available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc90/pdf/rep-vi.pdf>.

⁴ International Labour Conference Report V(1) 'The Employment Relationship' *International Labour Office* Geneva (2005).

⁵ 'Making the Law work for Everyone' Report of the Commission on Legal Empowerment of the Poor Vol 1 (2008).

⁶ The Commission's report is available on <http://www.undp.org/legalempowerment>.

⁷ Developed to promote opportunities for workers to obtain productive work, in conditions of freedom, equality, security and human dignity.

South Africa is a country plagued by high levels of poverty and inequality. The global trend of increased informalization of the workforce has exacerbated the extreme levels of inequality produced by the racial capitalism perpetuated under the apartheid regime. In addition extreme numbers of the working age population in South Africa are either unemployed or engaged in some kind of informal work which often disguises unemployment or under-employment; these people do not enjoy social security or legal protection against exploitation.⁸ These high levels of inequality and poverty are characterized by a serious skills dearth and low productivity within the workforce which in turn constrains growth and job creation.

The purpose of this paper is to stimulate debate on how South Africa's labour regulatory framework can be adapted to tackle poverty and increased inequality.

It seeks to analyse possible ways of addressing poverty and inequality by undertaking a comparative study that examines law reform strategies and policy instruments that have been adopted in several countries across the Asia Pacific and South Asian region to reduce inequality and extend fundamental workers rights to all workers. The study investigates various regulatory frameworks that have been introduced in response to new employment patterns, draw informal workers into more protected work and engage in active poverty targeting strategies to help elevate the plight of the working poor.

METHODOLOGY

Any comparative study of law labour reform strategies need to take account of the manner in which policy-makers in a particular country seeks to reconcile the capacity of employers to adapt workforces to competitive markets with the security of workers. The precise manner in which states seek to balance these two elements has been articulated in a number of ways. One of the most widely used approaches is "flexicurity", a concept developed in the European Union during the late 1990s to characterize specific aspects of labour market governance. The term broadly refers to two main components of labour market governance. The first component is the flexibility of employers to 'adjust the workforce based on their needs as determined by market fluctuations, sector restructuring, technological change and changes in business models'.⁹ The second component refers to the security of workers in employment or making a transition to new employment. These approaches involve a wider concept of security than an approach such as regulated flexibility reflected in South Africa's post-apartheid labour legislation which focussed primarily on providing employment security for workers in the formal economy. This paper will analyse law reform strategies to ascertain the extent to which they address the core elements of flexibility and security and find the 'nexus between the capacity to adapt the workforce to changes within the economy and the capacity to maintain working and living conditions'.¹⁰ The underlying purpose of this approach is to transform the regulatory systems of countries beyond formal employment protections to broader systems of labour market security¹¹ which seeks to cover all areas of the labour market including those workers engaged in various forms of precarious employment and informal employment as well as increased social protections for the unemployed.

⁸ Geeta Kingdon et al 'Unemployment in South Africa, 1995 – 2003: Causes, Problems and Politics' *Journal of African Economies* Vol. 16 No. 5 (2007) 813 – 848 at 814.

⁹ Paul Vandenberg 'Is Asia adopting flexicurity? A survey of employment policies in six countries' *Economic and Labour Market Papers* 2008/4, International Labour Office, Geneva.

¹⁰ Ibid.

¹¹ Ibid.

This study focuses on labour regulatory and social security reforms in three areas namely:

- the extension of employment protections to precarious workers in the formal economy and to individuals engaged in informal work;
- active labour market strategies which provides active support to unemployed workers making transitions to new employment;
- passive labour market policies which seek to extend unemployment insurance protections and other forms of social assistance to the unemployed and vulnerable.

Legal reforms which seek to extend employment protections to precarious workers are analysed within the context of the broader global production trends such as lean retailing, outsourcing practices and the use of manufacturing supply-chains, and will specifically focus on innovations within employment regulation which seek to extend protection to employees who work in part time, casual or fixed term work or as contract labourers.¹²

An investigation of active labour market strategies extends the analysis beyond industrial relations systems to policy methods, specifically skills and vocational training programmes, which reduce underemployment, increase productivity and assist workers in securing employment. On the other end of the spectrum, passive labour market strategies exist mainly in the realm of social security regulation. The focus is on sustainable poverty alleviation mechanisms which feed into the broader labour market aims. These include innovative extensions of various unemployment and other social security benefits to provide income relief.

After canvassing the various legal policy instruments that are being used by countries across the Asia Pacific and South Asian region in the three areas of study, the positive and negative aspects of the various reform initiatives will be considered in light of the extent to which they have achieved their stated objectives. The study will then examine the potential applicability of the various policies and laws to the debate about how strategies in respect of the second economy may lead to reductions in the level of poverty in South Africa.

Any study comparing legal norms and regulations must always take cognisance of the so-called 'law-practice' gap that exists when a country attempts to borrow and derive legal concepts from foreign and international sources in the formulation of their laws. A number of environmental factors including economic, cultural and social influence shape the way in which countries are able to successfully implement their own laws. The leading comparative law scholar Otto Kahn-Freund stresses the fact that the political environment of a country plays a major role in the reception of laws and their capacity to take effect in the country adopting them. More specifically different political ideologies, distribution of power between arms of government effecting the location and nature of policy and the composition of organised interests (such as trade unions, business and other social partners) which wield disproportionate power and influence over decision makers¹³ all play a major role in the way a particular legal concept will be received in a country.

It must also be born in mind that labour law regimes in many developing countries and in particular in East Asian Labour regimes have borrowed heavily from foreign and international sources in the formulation of their laws over the years. Many of these countries used major

¹² The term contract labour is used loosely to describe triangular employment relationships in which employer responsibilities are outsourced to temporary work agencies or persons that provide or procure employees for a client and retains responsibility for paying those employees. This term is used interchangeably with the terms labour brokers and staffing firms.

¹³ *Law and labour Market Regulation in East Asia*, Sean Cooney; Tim Lindsey, Richard Mitchell and Ying Zhu (eds), Routledge, London (2002) at 10.

international multilateral development agencies and bilateral donors to assist in the drafting of their laws. These agencies viewed good governance reform at the heart of economic stability and growth specifically in the wake of the Asian Financial Crisis and accordingly made bilateral donor and multilateral aid conditional on legal infrastructural reform informed by western legal systems.¹⁴

Asian countries like China and Vietnam have undergone major economic reforms changing from centralised state-run economies to market-orientated economies. Accordingly these countries and China in particular have had to undergo a comprehensive reconstruction of its entire legal regime over the past 20 years which was destroyed by the Cultural Revolution. The content of many of China's new laws are a mixture of 'best practices' drawn from legal systems around the world. Consequently extensive legal norms are still in the process of being developed which means substantial gaps will arise in the implementation of laws.¹⁵ India on the other hand has a well established system of law and many of the legal reforms that have taken place since their independence have been formulated internally.¹⁶ All these factors need to be born in mind when assessing the practice of laws in the various countries of comparison and more importantly when examining the potential applicability of the various policies and laws to the South African context.

We wish to emphasise that we are not holding out the regulatory models of the countries studied in this paper as in any way "ideal" models that should be adopted in South Africa. Nevertheless, an examination of this type holds value for debate because these countries have levels of informal employment that are either equivalent or greater than that found in South Africa. Thus, despite the immense political and economic differences between these countries and South Africa, their legal references may shed useful light on debates on these issues in South Africa.

THE SOUTH AFRICAN LABOUR MARKET IN GLOBAL PRESPECTIVE

Globalisation is a generic term used to describe a wide range of increased open trade and other activities within the global economy including international trading of goods and services as well as increasing international flow of finance and capital investment.¹⁷ There is no doubt that globalisation has a large impact on shifts in employment in labour markets around the world. This impact varies and can be both negative and positive depending from whose perspective one is looking. That trade and industry will bring benefits is not disputed if industries have the capacity to compete in the global market, but the benefits to workers and employment status are not as evident.¹⁸

A growing body of literature argues that increased global competition has led to downward pressures on labour standards and wages as firms seek to increase export shares and block import competition.¹⁹ Costs of production need to be at optimum efficiency and output which means that labour is utilised as economically as possible to achieve increased production at the lowest cost. There is a widespread consensus that emerging practices

¹⁴ Tim Lindsey 'Legal Infrastructure and Governance reform in Post-Crisis Asia' *Asia Pacific Economic Literature* Vol.18:1(2004) 12-40 at 12.

¹⁵ Sean Cooney et al (note 13 above) at 10.

¹⁶ See 'Contract Labour in India' available at <http://labour.nic.in/annrep/files2k1/lab10.pdf>.

¹⁷ Marilyn Car and Martha Alter Chen 'Globalisation and the Informal Economy: How Global Trade and Investment Impact the Working Poor' WIEGO (2001) available at <http://www.wiego.org/papers/carrchenglobalization.pdf> [June 2007] at 1.

¹⁸ Ibid.

¹⁹ Eddy Lee 'Globalization and Labour Standards: A review of Issues' *International Labour Review* Vol. 136 No. 2 (1997) at 181.

developed in response to increased globalisation of trade and investment has increased the informalization of work.

Global competition has led firms in both the manufacturing and service sectors to decentralise and disperse their production facilities, making their operations 'leaner, more flexible and less top-heavy'.²⁰ This vertical disintegration of production may be achieved by sub-contracting major parts of firms operations to smaller suppliers or by completely outsourcing certain productive functions. Some firms utilise offshore facilities with cheap supplies of labour for routine low-skilled labour intensive tasks, particularly in the textile and clothing sectors. This global restructuring has led to the growth of global and national supply chains where the worker is completely removed from the retailing firm for whom he or she is producing.²¹

New practices in retail management also emerged in response to increased competitive pressures. This has fundamentally changed the way risk is borne amongst manufactures, suppliers and distributors of various products.²² The Harvard Centre for Textile and Apparel Research (HCTAR) established in the early 1990's, was one of the first centres to study the changing nature of the retail sector in the United States. They dubbed these new efficient forms of retailing "lean retailing".²³

"Lean retailing" involves minimising the volume of stock held at any one time by retailing firms. Retailers no longer have warehouses with stock piles of products. Instead the retailing firm only own the products on the selling floor and use information from computer inventory systems to inform them what stock needs to be replenished and when to place a new order with the suppliers.²⁴ This reduces storage costs and capital tied up in goods, so that retailers only ever have small volumes of goods which are ready to be sold immediately. Although the practice of lean retailing boosts retailer's competitive advantage in the market, it also places significant demands on suppliers and passes market related risks down the supply chain.²⁵ As a result suppliers have had to restructure their methods of production in order to deal with retailing demands of low cost production, small orders, short lead times and increased unpredictability.²⁶

Suppliers and manufacturers have followed the same trend as retailers by further sub-contracting the most labour intensive production to smaller units and only retaining control of the high value activities of final delivery.²⁷ The supply chain may have multiple sub-contracting links which eventually end at individual workers who are contracted to work from home on piecemeal products. Even where manufactures and retailers do still produce products in-house, many have cut their permanent labour force significantly, choosing rather to operate with a small amount of permanent staff whilst engaging the services of labour brokers to supply the body of their labour force so that they can expand and contract the labour force according to supply and demands without having to pay employees fixed wages during periods of inactivity.

²⁰ Ibid.

²¹ Dena Freeman 'Homeworkers in Global Supply Chains' *Greener Management International*, Autumn (2003) 107 – 118, at 108.

²² David Weil 'Lean Retailing and Supply Chain Restructuring: Implications for Private and Public Governance'. Paper prepared for *Observing trade: Revealing International Trade Networks*, Princeton Institute for International and Regional Studies, Princeton University (2006).

²³ Ibid.

²⁴ Ibid.

²⁵ Dena Freeman, (note 21 above) at 108.

²⁶ Ibid 108.

²⁷ Ibid 108.

This trend towards decentralised production and informalized work has created a new breed of work relationships within the formal economy that fall (either totally or partially) outside the protective scope of labour and employment laws. This has contributed to greater inequality and more prevalent insecurity in the workforce. Core features of conventional labour regulation systems like collective bargaining rules, unfair dismissal laws and individual employment rights as well as the provision of social welfare benefits generally assume the existence of stable uninterrupted employment.²⁸

Lean retailing practices allow manufacturers to avoid paying social security and pension contributions or sick pay for subcontractors and pass overhead costs of production including water, heat and electricity onto the outsourced worker. The burden of risk associated with fluctuations in the market is also borne directly by the worker.²⁹ These work relationships are associated with deteriorating occupational health and safety standards (OHS) due to factors such as inadequate training and the longer hours and pressures associated with the piecemeal payment systems. These workers are paid at much lower rates than their factory counterparts who are able to benefit from collective bargaining through unions over wages and other working conditions.³⁰

Workers not covered by labour and social regulation standards include sweatshop production workers, homeworkers, industrial outworkers and casual or part-time workers.³¹ There are also a growing number of people who perform work in order to support their livelihood but who operate outside the formal economic sector (unregistered activities).³² These include own account workers in survival activities, those working informally in subsistence or other agricultural sectors, street vendors and micro enterprises that are not formally registered and domestic workers³³

It is however difficult to categorise employees too rigidly as working in the formal economic or informal economic sectors as many activities such as street hawking which is typically seen as survivalist work in the informal sector may in fact involve disguised employment by formal organisations.³⁴ Recycling of waste paper in Johannesburg is an illustrative example of how formal and informal economic activities are very much interwoven. The waste collectors who are informal workers collect a variety of waste including paper. The individual collectors either collect waste directly from households, businesses or factories, or from landfill sites. The waste at the landfill sites are dumped by Pikitup which is a private company in the formal economy contracted by the Municipality to provide waste collection services for the municipality. The waste paper that is collected is sold to agents at the buy-back centres. There the paper is sorted according to grades and types and then it is transported and sold to Mondi Mills, Sappi Mills or Nampak Mills, all big corporations within the formal economy.³⁵ Accordingly informality is best seen as a continuum rather than a separate phenomenon where economic activities are closely connected in hierarchical supply chains,

²⁸ Katherine Stone, (note 2 above).

²⁹ Dena Freeman (note 21 above) 109.

³⁰ Igor Nossar, Richard Johnston and Michael Quinlan 'Regulating supply-chains to address the occupational and safety problems associated with precarious employment: The case of home-based clothing workers in Australia' *National Research Centre for OHS regulation*, Working paper 21 (2003).

³¹ International Labour Organisation 'ILC 90 Decent Work and the Informal Economy' (2002) Available at <http://www.ilo.org/public/english/standards/relm/ilc/ilc90/pdf/rep-vi.pdf> at 1 [June 2007].

³² Geeta Kingdon (note 8 above) 819.

³³ Ibid

³⁴ See Fenwick C, E Kalula & I Landau (2007) *Labour law: A Southern African Perspective* (Geneva International Institute for Labour Studies).

³⁵ Edward Webster et al 'Making Visible the Invisible: Confronting South Africa's Decent Work Deficit' *Research Report prepared for the Department of Labour by the Sociology of Work Unit*, University of the Witwatersrand, Johannesburg (2008) 42-43.

however notwithstanding the interconnectedness of these supply chains the power relations at different points are grossly unequal.³⁶

South Africa

The South African labour market has experienced a large increase in informalization over the past ten years in line with global trends. There has been a massive increase of non-standard employment through the deployment of labour brokers and increased outsourcing by the public and private sector.³⁷ The informal economic sector has grown while unemployment remains disproportionately high. High unemployment and underemployment can be attributed to a number of factors including sluggish economic growth of a predominantly capital intensive nature with little labour intensive industry growth.³⁸ At the same time studies conducted over the period 1995 – 2003 using official representative household surveys revealed that over the first decade of democracy, the South African labour force grew at unprecedented rates of over 4 per cent per annum dissimilar to international trends³⁹. In contrast, wage employment grew by less than 2 per cent per annum over the same period.⁴⁰ This has forced the surplus labour force into the informal economic sector.

Despite this, the informal economy has not been able to absorb the residual labour force resulting in South Africa having one of the highest rates of unemployment in the world. 2002 figures from Statistics South Africa revealed that the informal economy⁴¹ absorbed only 19 per cent of the labour force in 2002, whilst the unemployment rate⁴² was around 29 per cent at over that period.⁴³ 2007 figures show a slight increase, with the informal sector representing 22.8 per cent of total employment.⁴⁴ The relatively small size of South Africa's informal economy compared to other developing countries in Sub-Saharan Africa, Latin America and Asia⁴⁵ where the informal economies absorb a much larger proportion of the labour force implies that there are actually barriers to enter the informal sector.⁴⁶ Studies have suggested that start up capital acts as a huge constraint, even in the case of petty-trading. Other barriers include high levels of crime, lack of basic skills and the presence of 'cohesive networks, which exercise control over location and zone operation'.⁴⁷ Barriers to self-employment in the informal economy leave a large percentage of the workforce involuntarily unemployed and worse off than their self-employed counterparts.⁴⁸

³⁶ Edward Webster et al (note 35 above) 3.

³⁷ Paul Benjamin 'Informal work and labour rights in South Africa' *Industrial Law Journal* vol 29 (2008) 1579 – 1604 at 1585.

³⁸ Geeta Kington (note 8 above) 820.

³⁹ Ibid 816.

⁴⁰ Ibid 814.

⁴¹ Defined narrowly to include persons working in own-account activities and those working for employers who are not VAT-registered including Domestic workers.

⁴² Defined narrowly as those actively searching for work. In contrast a broad definition accepts that the unemployed include those who did not search for work but who report being available for work and say they would accept an offer of a suitable job. Using the broad definition significantly increases the percentage of the workforce deemed unemployed.

⁴³ Geeta Kington (note 8 above) 824

⁴⁴ Paul Benjamin (note 37 above) 1583.

⁴⁵ Geeta Kington (note 8 above) 824.

⁴⁶ The ratio of informal sector non-agricultural employment to unemployment in South Africa is 0.7 as compared to Subsaharan Africa which has a ratio of 4.7, Latin America which has a ratio of 7,0 and Asia which has a ratio of 11,9.

⁴⁷ Geeta Kington (note 8 above) 826.

⁴⁸ Geeta Kington (note 8 above) 828.

Data collected for an ILO study of the informal sector in 2000⁴⁹ revealed that 52 per cent of informal employment was made up of domestic services and agriculture, while construction and trade accounted for another 30 per cent. The remaining percentage was made up of persons working in manufacturing and personal services. A United Nations Development Programme on informal employment revealed that 71 per cent of informal enterprises are located within households which mean a large percentage of workers in South Africa are homeworkers.⁵⁰

The spread of informalization in South Africa has led to a growing inequality between workers in the labour market. The enactment of policies and regulation that facilitate decent work for all workers in line with the ILOs *Decent Work Agenda* necessitates the extension of legal protection to workers engaged in increased forms of precarious employment within the formal economy as well as those employed by informal business and self-employed.⁵¹ The focus of regulation should be on creating laws which are flexible and have the capacity to adapt the workforce to changes within the economy whilst at the same time maintain decent working and living conditions.

THE EXTENTION OF EMPLOYMENT PROTECTION

The use of non-regular employment has expanded across the globe in both developed and developing countries. Businesses frequently hire workers on a casual, part-time or fixed term basis and use the services of labour brokers to supply workers for both core and non-core activities. These working relationships have been utilised by many corporations as a permanent solution to their labour needs which has resulted in the erosion of labour rights and protections and lowering of wages for those working in the formal economy. Externalisation of the workforce especially in clothing, textiles and accessories and other manufacturing sectors has lead to the dispersion of workers, who are commonly referred to as outworkers or homeworkers. The relationship between the employer who is outsourcing and the contractor to whom the work has been outsourced is one of subcontracting. However subcontracting need not be achieved by outsourcing, outsourcing describes a process whereas subcontracting describes a relationship.⁵² The sub-contracting relationship will be determined by the supply-chain of the goods being produced or the services rendered.

Homework is work undertaken on contract from home, and is thus a form of subcontracting. Yet homework has distinctive features. The International Labour Organisation's *Home Work Convention 177* of 1996 defines homeworkers as 'work carried out at the workers home or at other premises of his or her choice other than the workplace of the employer, which results in a product or service as specified by the employer irrespective of who provides equipment, materials or other inputs used unless that person has a degree of autonomy and economic independence necessary to be considered an independent contactor under national laws'.

In the vast majority of cases the work relationship is informal, the homeworker receives no written contract and agreement is only reached on a given piece-rate which often amounts to less than half what a factory worker performing the same function would earn. These workers are contracted by middlemen or an agency and are therefore far removed from the

⁴⁹ *Woman and Men in the Informal Economy*, International Labour Office, Geneva (2002).

⁵⁰ Lourdes Ferran *Notes on Concepts and Classifications to improve Statistics on Home-based workers*, prepared for the UNDP and WIEGO (2003). Available at http://unstats.un.org/unsd/methods/timeuse/infresource_papers/ferran_1.htm.

⁵¹ See Geeta Kington (note 8 above) 828, where it was pointed out that South Africa is unique in the world by having a higher rural than urban employment rate.

⁵² Jan Theron 'Employment is not what it used to be' in *Labour Market Review*, Department of Labour (2004).

firm for whom they ultimately produce. The work is performed in cramped and unhygienic spaces and workers are often exposed to significant health and safety problems including eye strain, headaches, backache etc. They also often have to work with toxins such as glues and other adhesives in unventilated areas.⁵³ Some of the main concerns for homeworkers are the unpredictability and irregularity of work, very low rates of pay, unclear employment status, OHS concerns and lack of social security benefits.⁵⁴ The fragmented nature of homeworkers also places these workers beyond the protection of unions.

While extensive research has been done and increased regulatory protection afforded to domestic workers in South Africa,⁵⁵ not much attention has been paid to the growing number of homeworkers notwithstanding the United Nations Development Programme's estimate that a disproportionate amount of people in South Africa are engaged in home-based work.⁵⁶

Outsourcing, subcontracting, homeworking and labour broking give rise to similar structural relationships between the parties. First there is the primary employer, who has outsourced, or subcontracted, or is utilising labour brokers. Then there is the intermediary who is providing workers to the core business.

At the end of the supply-chain are the workers providing goods or services to the core business. There can however be more than three parties in the supply chain. In the case of homework, for example, there are often many more intermediaries between the core business commissioning the goods, the contractor who undertakes to supply the goods and the worker producing the goods. Non-standard work may also involve a direct relationship between an employer and a purportedly 'independent' contractor. The social outcome of all these forms of work is the reduction of the number of workers protected by labour regulation as employment relationships are externalised either through substituting existing employees for employees of an external contractor or when employers engage the use of independent contractors instead of employing the worker directly.

A number of countries across the Asia Pacific and South Asian region have enacted new labour regulations to address the rise of externalisation and the abuses associated with them. Korea and China both passed new laws in 2007 to cover some of these rapidly increasing forms of precarious employment, although Korea has regulated labour brokers since 1998. Legislation regulating labour brokers in India has been in place for over 30 years.

Studies reveal that around 20 – 25 per cent of the non-agricultural labour force in middle-income developing countries consist of homeworkers, including around 20 million in China and 30 million in India.⁵⁷ There has been very little policy debate and enactment of regulation in response to the re-emergence this type of work relationship. This can be partly attributed to the fragmented nature of the work which makes homeworkers difficult to locate and monitor. While the topic has generated some policy debate in the UK and US, Australia is perhaps the leading innovator of regulation on the topic. Newly enacted supply-chain legislation in the Australian states of New South Wales, Victoria and South Australia provides useful insight on tackling this widespread phenomenon. Some states have gone

⁵³ Dena Freeman (note 21 above) 112.

⁵⁴ Ibid 113.

⁵⁵ Over 1.2 million people are employed as domestic workers in South Africa.

⁵⁶ Lourdes Ferran (note 50 above). Homework in the narrow sense as defined by the ILO Home Work Convention 177 is distinguished from home-based work, which includes all forms of work undertaken from home. However the term 'homework' is commonly used without drawing this distinction.

⁵⁷ Dena Freeman (note 21 above) 110.

further by extending supply-chain regulation to other outsourced industries and sub-contracted work relationships.

These regulatory innovations in the above mentioned four countries will now be analysed, looking at each innovation within the economic and social context of the country of origin and comparing these legal policies to South Africa's policies (or lack thereof) which seek to deal with similar problems.

China

Over a quarter-century of market reform in China has drastically restructured its economy and labour market. State-owned enterprises have declined to 18 per cent of the economy over the last 25 years, while private enterprises and foreign owned firms have flourished. Bankruptcy and privatisation of state owned enterprises have undercut the number of citizens who enjoyed stable long term employment and livelihood security under the planned economy.⁵⁸ In addition an immense supply of labour was released from agriculture in the late 1970's when collective land use rights were redistributed to peasant households.⁵⁹ This huge labour force supply was absorbed to some extent by the proliferation of private and foreign enterprises that employed these new migrant workers as factory workers in China's growing manufacturing and other capitalist industries.

In 2003 the total population of China reached 1,292 billion of whom 760,75 million of those were economically active. Workforce participation over this period was at 76, 2 per cent.⁶⁰ Labour supply continues to increase and despite massive economic growth over the past decade labour demand is still inadequate resulting in growing unemployment pressures.⁶¹ The working age population in China will continue to grow to about 1 billion in 2015 but economic restructuring in China has resulted in a much smaller demand for employment further aggravating unemployment.⁶² Informal employment in both the formal and informal sectors is growing at a rapid rate and accounts for more than 50 per cent of employment.⁶³ At the same time differentiation in the labour market is intensifying: the degree of employment protection in some areas is falling and the coverage of social security is wholly insufficient. Those working as unskilled workers in the 'low-end' of the labour market are experiencing a general worsening of labour conditions with low wages, inadequate protection of workers rights and little or no social security or other benefits.⁶⁴

The use of labour brokers in China increased dramatically with the opening up of markets. This was partly due to the fact that China's foundational laws regulating the labour market⁶⁵ were sparse in content and wholly inadequate to fill the legislative gap left by the communist regulatory regime which had regulated the labour market until then. The use of contract labour created a new breed of workers who were inferior in labour status, lacked job security and who were subjected to poor economic conditions. China's labour laws did not set out the principles governing the proliferating forms of precarious employment such as the use of labour brokers and casual workers nor did it distinguish between employment

⁵⁸ Ching Kwan Lee 'Livelihood Struggles and Market Reform (Un)making Chinese Labour After State Socialism' *United Nations Research Institute for Social Development* (February 2005) at 4.

⁵⁹ Ibid.

⁶⁰ 'China's Employment Situation and Policies (2004)' *Chinese Government's Official Web Portal* Available at http://english.gov.cn/official/2005-07/28/content_17992.htm

⁶¹ *Study on Labour Market Flexibility and Employment Security in China* Institute for Labour Studies, Ministry of the Labour and Social Security of China, International Labour Organisation, December 5, 2004 at 14.

⁶² Ibid 14.

⁶³ Ibid 15.

⁶⁴ Ibid 15.

⁶⁵ *Zhonghua Renmin Gongheguo Laodong* [Labour Law of the Peoples Republic of China 1994], passed by the National People's Congress 5 July 1994 with effect from 1 January 1995.

and independent contracting.⁶⁶ The regulatory gaps in China's labour law was exacerbated by the fact that China does not have general principles of common law to fall back on and the key statute regulating contracts in China, the Contract Law of 1999, did not cover employment contracts.⁶⁷

China's labour laws also failed to prohibit a wide range of abusive practices which would be deemed unlawful in South Africa and most other countries. These practises included the requirement that employees pay bonds to ensure continued access to work, the use of continuous fixed term contracts to evade obligations owed to permanent staff, the use of restraint of trade clauses which inhibited employees ability to seek work elsewhere on completion of their contracts and the imposition of training fees deductible from their wages on employees.⁶⁸

In response to the growing use of labour brokers and other forms of casualisation, the Chinese government adopted China's new *Labour Contract Law in 2007*.⁶⁹ It is the most significant reform to labour regulation in over a decade. It covers all types of employment (regular, fixed-term, casual labour, contract labour etc) and regulates their establishment, performance, variation and termination. In response to employers being able to evade their obligations to workers due to lack of evidentiary proof of the relationship, the law now requires all employment contracts to be in writing.⁷⁰ Article 11 of Chapter II of the law, which deals with the conclusion of Labour Contracts, states that:

'[w]here an employer fails to conclude a written labour contract with an employee before the employee commences work, and it is unclear what labour compensation was agreed...the labour compensation ...shall be paid in accordance with the standards stipulated in the collective contract; where no collective contract exists or is silent on the matter, the principle of equal pay for equal work shall apply.'⁷¹

In addition, article 14 stipulates that if an employee fails to conclude a written labour contract with an employee within one year from the date of employment, then the contract is deemed to be indefinite: where the parties have agreed not to stipulate a definite termination date. Article 26 protects employees from exploitative contracts by deeming contracts that are concluded through fraud, coercion or exploitation of the other parties' disadvantageous position to be partially or wholly invalid. If such a contract is declared invalid, compensation will be paid with reference to the amount payable to employees in the same or similar position.

The new Contract Labour Law classifies employment into four categories. The first three types are: fixed term contracts which end on a specified date, continuing (open-ended) contracts which can only be terminated for cause and project or specific task contracts which terminate on completion of a specific task. All these employment relationships require written contracts. Fixed-term contracts may only be renewed once; after which work must be offered on an open-ended contract, thus stopping the practice of employing people on a

⁶⁶ Sean Cooney, Sarah Biddulph, Li Kungang and Ying Zhu 'China's New Labour Contract Law: Responding to the Growing Complexity of Labour Relations in the PRC' *University of New South Wales Law Journal* Vol 30 (3) (2007) 786 – 801 at 788.

⁶⁷ Ibid 788.

⁶⁸ Ibid 787.

⁶⁹ *Zhonghua Renmin Gongheguo Laodong Hetong Fa* [PRC Labour Contract Law 2007] adopted at the 28th session of the Standing Committee of the Tenth National Peoples Congress on 29 June 2007, effective on 1 January 2008.

⁷⁰ Sean Cooney et al (note 66 above) 792.

⁷¹ Labour Contract Law of the People's Republic of China, 2007. Interpreted by Lheman, Lee & XU. Available at <http://www.lehmanlaw.com> .

perpetual fixed-term basis.⁷² The fourth category of contract regulates casual labour.⁷³ This employment must be remunerated by the hour and must be paid no later than a 15-day cycle.⁷⁴ The use of casual employment is restricted to an average of no more than four hours per day and no more than 24 hours per week.

Part II of Chapter V of the Labour Contract Law regulates work placement or “staffing firms”. The primary regulatory concern with the practice of labour brokers is that the observance of labour standards will be undermined by the displacement of regular employees with temporary workers who are not subject to collective or individual contractual agreements negotiated with the employer. There is also a concern that labour broker agencies will abrogate their responsibilities to these workers. Article 58 now provides that “staffing firms” are deemed to be the employers of workers they place and they must perform all the employers’ obligations to the worker. The labour contract must specify where the employee is to be placed, the terms of placement and the position.

Article 58 provides that all workers engaged by a “staffing firm” must be engaged under a fixed term contract of duration of not less than two years. This ensures that they are in one of the more secure categories of employment.⁷⁵ In addition the “staffing firm” must ensure that the workers in their ‘employ’ receive at least the minimum wage on a monthly basis, even when they are not placed.⁷⁶

There must also be a formal agreement between the staffing firm and the user firm which must detail the placements made, remuneration including social insurance, terms and methods of payment and liability for breach.⁷⁷ Another very important innovation regarding the remuneration of labour hire workers is that they must be paid at the same rate as workers in the user firm who are engaged in similar work⁷⁸ and must receive the same overtime rates and benefits. If there is no similar position within the hiring firm, then employees will be paid the same as people in similar positions at a place of work near where the entity is located. The law stipulates that the practice of labour hire shall only be used for job positions of a ‘temporary, auxiliary or substitute nature’⁷⁹ and prohibits firms from establishing “staffing firms” to place workers with themselves or their subsidiaries.⁸⁰

All staffing firms must be established in accordance with the relevant provisions of the Company law and have a registered capital of no less than RMB 500,000.⁸¹ This provision is there to ensure that the company will be able to meet its obligations and have enough capital to pay the workers. In addition Article 92 imposes a fine of no less than RMB 1000 and no more than RMB 5000 for each person where serious violations of provisions of the Act have occurred as well as the revocation of the staffing firms licence.

Although the provisions regulating labour broker’s do not go as far as initially envisaged⁸² they are significant and remove the incentive for employers to use labour hire workers as a basis for reducing wages or avoiding labour law obligations. They also prevent employers using this form of a triangular employment as a basis for employing permanent and core personnel. The express regulation of fixed-term and contract labour with restrictions on

⁷² Paul Vandenberg (note 9 above)16.

⁷³ Sean Cooney (note 66 above)794 – 795.

⁷⁴ Paul Vandenberg (note 9 above) 16.

⁷⁵ Sean Cooney (note 66 above)798.

⁷⁶ Ibid.

⁷⁷ Article 59.

⁷⁸ Article 63

⁷⁹ Article 66.

⁸⁰ Article 67.

⁸¹ Article 57.

⁸² The Draft provisions provided for automatic conversion to permanent status.

engagement and termination also goes a long way to curbing some of the abuses prevalent in those types of employment relationships, although proper implementation of this law will go a long way to determining whether it will be effective or not.

One element of the new law which has already attracted some academic criticism is the approach to enforcement dealt with in Chapters VI and VII. This approach which is prevalent in much Chinese regulation, places a huge reliance on administrative agencies to secure compliance with the law at the expense of dispute resolution processes and courts. This could be partly due to China's communist past which relied heavily on the administration thus creating a weak and ineffective court system. In addition some obligations do not seem to have correlative penalty provisions revealing again some of the problems China faces in having to recreate its legal system.⁸³ These law-practice gaps which are peculiar to China's political and historical dispensation should be born in mind when assessing the performance of the Contract Labour Law in the future.

Korea

The Asian financial crisis in 1997 had a major impact on employment patterns in the Republic of Korea; the externalisation of employment exploded with more than 50 per cent of total wage workers reported to be precariously employed over that period. Notwithstanding the recovery of the markets at the beginning of the 21st century, the externalisation of employment continued to increase. Regularly employed workers have been replaced by precariously employed workers through redundancy, restructuring and outsourcing. This was made possible by major labour market reforms⁸⁴ introduced in the wake of the crisis. Since the recovery of the crisis, new jobs have overwhelmingly been created in precarious employment making up the core of most workforces.⁸⁵ Precariously employed workers accounted for 56 per cent of wage workers in 2005.⁸⁶ Accordingly even though the reported unemployment rate in Korea is less than 5 per cent,⁸⁷ the growing trend of casualisation and informalization of the workforce means that an increasing number of workers in Korea are experiencing loss of decent work and increased insecurity of employment.

Although the average working hours between regular employees and precarious employees differs marginally, the wage gap between the two categories of workers is vast. The average wage for precarious employees is approximately half that of regular workers who perform similar or equal work. In addition, the Korean wage scheme is characterised by the payment of various fringe benefits on top of a basic wage. This exacerbates the wage gap between permanent and precarious employees, because most precarious employees are excluded from many of the fringe benefits. Less than 20 per cent of workers engaged in precarious employment receive legal benefits such as severance pay, overtime and paid leave and only around 30 per cent of these employees are covered by social insurance.⁸⁸

This marked trend to casualisation in Korea led to the enactment of the *Act concerning the Protection of Fixed-Term and Part-Term Employees*⁸⁹ which came into effect in July 2007. The Act provides for equal treatment between regular and precarious employees. Article 8(1) of

⁸³ Sean Cooney (note 66 above) 801.

⁸⁴ The revised Labour Standards Act 1997, reintroduced "flexible working time" which had been previously abolished in 1987.

⁸⁵ Aelim Yun 'The ILO Recommendation on the Employment Relationship and its Relevance in the Republic of Korea' *Global Union Research Network* discussion Paper No. 4 at 4.

⁸⁶ *Ibid.*

⁸⁷ Paul Vandenberg (note 9 above) 11.

⁸⁸ Aelim Yun (note 85 above) 9.

⁸⁹ Act no 8074, December 21, 2006.

the Act now provides that an employer 'cannot give discriminatory treatment⁹⁰ against fixed-term employees on the ground of their employment status compared with other workers engaged in the same or similar jobs...' Article 8(2) provides the same prohibition against discriminatory treatment of part-time workers. Article 4 (1) of the Act also prohibits an employer from hiring fixed-term employees for a period exceeding two years unless the contract is project related and the period needed to complete the project exceeds two years. The only other circumstances in which a fixed-term employee can be hired is to fill a vacancy while the permanent employee is temporarily suspended, on study leave or engaged in vocational training away from work. Irrespective of whether these grounds exist or have ceased to exist, an employee who is hired on a fixed-term basis for more than two years is considered to have concluded an indefinite labour contract with the employer⁹¹

Korea had earlier enacted the *Act Relating to the Protection of Dispatched Employees of 1998*⁹². This has contributed to a situation in which less than one per cent of workers are employed through labour brokers. This number is also reflective of the fact that until 2007, employers had been able to make unrestricted use of fixed-term and temporary staff and therefore the demand for labour broker services was not as high as in other jurisdictions.⁹³ Before the enactment of the 1998 Act, triangular employment relationships were prohibited in principle. Now the new regulatory regime allows labour brokers in 26 different work categories⁹⁴ for a maximum of two years.⁹⁵ In addition, labour brokers are permitted to supply temporary workers as substitutes for employees who are absent due to pregnancy or disease or injury of workers for up to six months.

The labour broker agency is party to the employment contract with a worker and takes legal responsibility for worker's entitlements such as wages and social insurance. At the same time, the user firm assumes legal responsibility for working hours, holidays and occupational health and safety.⁹⁶ Article 6(3) of the Act provides that a hired worker is regarded as being employed directly by the user firm if that worker has worked there for longer than two years. One of the major gaps that have been identified in the labour broker regulation is that there is no prohibition on employers replacing a labour broker worker with another worker every two years and thus avoiding their legal obligations as employer. However the strengthening of fixed-term and other precarious employee's rights seems to have filled this gap.

The Act was recently amended in 2008 by the insertion of section 11(1) which now provides equal pay for contract workers. Section 11(2) states the following:

"Where as an entrepreneur has anyone, which is not recruitment business, to supply other persons into the work that is any parts of production or business of the entrepreneur, the entrepreneur shall be deemed as the employer of such persons regardless the supplying person is a supervisor of working performance or has the responsibility of payment for the working persons.

⁹⁰ Discriminatory treatment is defined in Article 1(3) as unfavourable treatment in terms of wages and other working conditions given without justifiable reasons.

⁹¹ Article 4 (2).

⁹² Also interpreted as the Act on the Protections for Temporary Agency Workers.

⁹³ Paul Vandenberg (note 9 above) 17.

⁹⁴ These categories include work requiring expert knowledge, technology and experience.

⁹⁵ Aelim Yun (note 85 above)11.

⁹⁶ Ibid 12.

The entrepreneur shall arrange, without discriminatory manner, the reasonable benefits and welfare for a dispatched employee performing the similar work performed by a directly employed employee.”⁹⁷

The Act regulating labour broker services is innovative insofar as it prohibits the use of such agencies from certain job categories in order to restrict the use of labour brokers to replace permanent employees. The Act, unlike China’s regulations, does not provide for the payment of minimum wages to all temporary agency workers regardless of whether they are placed.

India

India’s labour force population was recorded at 447 million people in 2006. Although the labour force participation rate is at 60 per cent, around 54 per cent of the labour force is engaged in agricultural activities. 93 percent of the labour force works in the informal economy, making India the largest informal economy in the world.⁹⁸ This means that only around 7 per cent (an estimated 30 million workers⁹⁹) of India’s workforce are covered by the full raft of labour protection legislation.

After the liberalisation of the Indian economy, the rate of growth increased significantly, measuring at around 8 per cent in 2005-2006.¹⁰⁰ Growth has been led mainly by service industries although there are certain technological industries such as car manufacturing and pharmaceuticals which have become internationally competitive and are growing at a steady rate. However notwithstanding the high rate of growth in GDP there has been a constant slowdown in growth in employment over the past few years. Employment grew by a sluggish but steady rate of around 2 per cent from 1961 – 1990, but has declined to around 1 per cent from 1993 – 2000 at the same time as the acceleration in the GDP growth rate.¹⁰¹

One of the reasons for the slowdown in employment is that a significant portion of growth in GDP came from increased productivity and capital intensive growth rather than labour intensive industries. This slow down in employment has been accompanied by an increased informalization of the workforce with organised sector employment growing more slowly than total employment. Growth in organised sector employment fell to below 0.7 per cent over the period 1993 – 2000.¹⁰² Employment protection in India has been widely criticised as being inefficient and polarising workers into protected and unprotected categories whilst social security benefits are only enjoyed by around 8 -9 per cent of the workforce.¹⁰³

Notwithstanding the many criticisms directed at India’s labour regulatory regime over the years, the *Contract Labour (Regulation and Abolition) Act* of 1970, was an extraordinary innovation for its time and contains key provisions for the protection of indirect or contract employees which many other countries are only now seeking to regulate in light of the increasing use of precarious employment relationships across the globe. The conditions of contract labour in India were studied by various commissions as well as the labour bureau and ministry of labour post independence. These studies revealed that conditions under these triangular employment relationships were horrendous and completely exploitative.¹⁰⁴

⁹⁷ Translated by Ukridh MUSICPUNTH in “Dispatched workers anti-discrimination clause: Section 11(1) of the Labour Protection Act” Suruswadee JAISUWAN, Department of Labour Protection and Welfare. Available at <http://www.labour.go.th>.

⁹⁸ Paul Vandenberg (note 9 above) 11.

⁹⁹ Ibid.

¹⁰⁰ Alakh N Sharma ‘Flexibility, Employment and Labour Market Reforms in India’ *Economic and Political Weekly* May 27, (2006) 2078 – 2085 at 2079.

¹⁰¹ Ibid at 2079.

¹⁰² Ibid at 2079.

¹⁰³ Ibid at 2079.

¹⁰⁴ ‘Contract Labour in India’ available at <http://labour.nic.in/annrep/files2k1/lab10.pdf>.

The studies concluded that the utilisation of labour brokers was primarily to deprive workers of due wages and other protections under the law. At the same time the studies concluded that there may be certain types of work which is more efficiently executed by contractors through contract labour.

The government therefore sought to regulate the use of labour brokers and in certain cases prohibit the use of such employment relationships.¹⁰⁵ One of the primary objectives of the Act was to give effect to the Supreme Court of India decision in the case of *Standard Vacuum Refinery Company v their Workmen*.¹⁰⁶ The court observed in this case that contract labour should not be employed where the following characteristics are present: the work is perennial and must go from day to day; the work is incidental to and necessary for the work of the factory; the work is sufficient to employ considerable number of full-time workers and the work is being done through regular workers.¹⁰⁷

The Act applies to all working establishments in which 20 or more workers are employed but excludes establishments where work is performed on a seasonal basis.¹⁰⁸ The establishments covered by the Act are required to be registered as principal employers with the appropriate designated government authority. Every contractor is in turn required to obtain a license and must undertake not to provide contract labour except in accordance with the license which will only be granted subject to such conditions as to hours of work, fixation of wages and other issues laid out in labour laws.¹⁰⁹ The contractor is obliged to ensure that all OHS measures are put in place for contract workers but the principal employer is also liable to provide OHS protection in compliance with the law.¹¹⁰ Contractors are also responsible for paying the wages of the worker but if they fail to do so, the principal employer becomes liable to pay the wages. The law further provides for the principle of equal pay for equal work, therefore reducing the incentive to hire contract workers in order to save costs due to payment of lower wages.

Chapter III of the Act deals with the prohibition of employment of contract labour in certain instances giving effect to the Indian Supreme Court ruling in the *Standard Vacuum Refinery* case discussed above. Chapter III also regulates the granting of exemptions and permits the government to prohibit the employment of contract labour in particular processes, operations or other categories of work.¹¹¹ Examples of prohibitions in the past have included certain hospitals which were prohibited from using contract labour for electrical maintenance jobs of wiremen, the Airport Authority of India in Calcutta and Chennai was prohibited for using contract labour for its computer operations and certain ports were prohibited from using contract labour for spillage removal and muck cleaning.¹¹²

Employer organisations have long argued for a relaxation of some of the provisions in the Contract Labour Act in light of the liberalisation of the economy. Employers claim that they need flexibility and need to utilise contract labour to improve productivity and service competitiveness. They have therefore argued that the Act should only apply to the main or core activities of an establishment with outsourcing being permitted in non-core activities such as cleaning. In addition specialised skills unavailable within the firm should be able to be

¹⁰⁵ Rupinder Kaur and Suil Maheshwari 'Labour Reforms: A delicate Act of Balancing Interests' *Indian Institute of Management Working Paper No. (2005) 4*.

¹⁰⁶ 1960 II ILJ 233.

¹⁰⁷ Contract Labour in India (note 104 above) 85.

¹⁰⁸ These workplaces are governed by the Act if work is performed for more than 120 days and 60 days in a year respectively.

¹⁰⁹ Chapter IV of the Act.

¹¹⁰ See Chapter V of the Act.

¹¹¹ Section 10.

¹¹² Contract Labour in India (note 104 above) 90.

contracted out. Other social partners however argue that contract labour is always deployed in weaker sections of society and a relaxation of the laws would deprive these vulnerable workers of benefits and stability. In addition, unions have argued that in order to increase competitiveness and productivity, firms should look to internal restructuring and training instead of outsourcing. The government of India is in the process of rationalising all of its labour laws and a report on the topic is widely anticipated although there is no indication that the Labour Contract Law will undergo drastic changes.

Supply chain regulation

Supply-chain regulation is a relatively new concept which seeks to structure regulation according to industry patterns of outsourcing and accordingly regulate various types of work at different levels of the supply-chain. This regulation is based on the theoretical assumption that there is one single interrelated economy which comprises formal and informal elements however there are unequal power dynamics in the economy at differing points along economic supply chain or value chains. These unequal power dynamics perpetuate inequality within the workforce.¹¹³ The example canvassed earlier in this paper on waste collectors in Johannesburg is illustrative of the interrelatedness of the formal and informal sectors of the economy along a single supply-chain in the waste collection industry in South Africa.¹¹⁴

Supply-chains take on varying forms. The buyer-driven value chain is common in the clothing and textile industries where large retailers play a central role in setting up decentralised production networks. Producer-driven commodity chains occur mainly in capital-intensive and technology-intensive industries and consist of multilayered production systems which are outsourced at different points.¹¹⁵

Australia has played a leading role in the regulation of supply-chains. Legislation in the Australian states of New South Wales, Victoria and South Australia has been enacted to address a variety of outsourced work relationships in the manufacturing and other sectors.

Australia

In the early part of the 20th century until 1987, Australia sought to regulate the pay and conditions of homeworkers through prohibitions on the use of homework supplemented by the use of minimum award pay rates in relation to certain restricted categories of legally permissible outwork. Up until the 1970's, Australia's manufacturing industry was highly protected by substantial tariffs and import levies. Import protection allowed large manufacturing factories to flourish. These workplaces were characterised by a high degree of unionism and compliance with awards and OHS obligations. However these protections fell away when Australia began to restructure its economy in the 1980's.¹¹⁶

The opening up of the Australian market led to redundancies in the "visible" manufacturing industry and many of these individuals were not redeployed to another industry but moved to the "invisible" industry.¹¹⁷ At the same time more and more employees working in the services industry were outsourced, or hired as own account workers, which exempted employers from legal requirement such as OHS responsibilities and the payment of other benefits to employees.

¹¹³ Edward Webster et al (note 35 above) 9.

¹¹⁴ See Edward Webster et al (note 35 above) where linkages between the formal and the informal economy are illustrated through case studies of the Mining, liquor distribution and clothing manufacturing industries.

¹¹⁵ Edward Webster et al (note 35 above) 14-15.

¹¹⁶ Igor Nossar (note 30 above) 8.

¹¹⁷ Igor Nossar (note 30 above) 9.

The plight of Australia's outsourced workers and homeworkers, estimated to be in excess of 300, 000 people¹¹⁸ are disproportionately worse than that of their factory counterparts. Studies reveal that outworkers report three times the number of acute and chronic injuries as factory based workers, but do not make workers' compensation claims. These workers may also be subject to violence and abuse by "middlemen".¹¹⁹

The first regulatory innovation in Australia dealing with the issue of outsourced workers was the introduction of a new regulation under the *New South Wales Occupational Health and Safety Act 2000* on lorry driver fatigue.¹²⁰ This legislation places obligations on consigners and consignees in relation to long distance truck driver fatigue among self-employed carriers that are similar to the obligations of employees. These include requirements to assess the risk of harm from fatigue, eliminate risks and control potential dangers. They are required to prepare plans that detail trip schedules and driver rosters that take into account the amount of time required to perform a task safely including rest periods.¹²¹ In addition the regulation obliges freight consigners and consignees to monitor compliance and prohibits agreements with carriers that deliver goods in unreasonable timeframes or do not have a freight management plan to cover driver fatigue.¹²²

The second regulatory innovation in Australia has been the enactment of the *Industrial Relations (Ethical Clothing Trades) Act 2001 (NSW)*. This legislation imposes contractual legal obligations on clothing suppliers and retailers to 'facilitate targeted compliance auditing and enforcement throughout relevant supply chains by regulatory authorities'.¹²³ The act prohibits retailers from entering into an agreement with a supplier without having first ascertained whether the services of an outworker will be engaged by the supplier or a contractor of the supplier. The supplier must provide certain information including whether the outworker is used by the supplier personally or through a contractor and if so, the names and addresses of these workers.¹²⁴ Thirdly the legislation prohibits retailers from entering into agreements without first obtaining an undertaking from the supplier that any workers engaged in work will be subject to 'conditions that are no less favourable than those prescribed'¹²⁵ under the relevant laws. Any infringement of such an undertaking is grounds for termination of the agreement.

The legislation also obliges retailers to disclose fully all details of their suppliers including contact prices, delivery times, and precise details of goods supplied. They are further obliged to locate and disclose all locations of production and proactively report their suppliers to the Director General of the NSW Department of Commerce when they become aware of any avoidance of provisions. If they do not provide full details of supply chain contracting, they will bear the liability for any unpaid worker's compensation insurance premiums throughout the supply chain.¹²⁶ *The Outworkers (Improved Protection) Act 2003* has also since been enacted in the state of Victoria and explicitly entrenches the status of outworkers as

¹¹⁸ Michael Rawling 'The Regulation of Outwork and the Federal Takeover of Labour Law' *Australian Journal of Labour Law* Vol 20 (2007) 1 – 17 at 3.

¹¹⁹ Igor Nossar (note 30 above) 10.

¹²⁰ Phil James, Richard Johnstone, Micheal Quinlan and David Walters 'Regulating Supply Chains to improve Health and Safety' *Industrial Law Journal* Vol. 36 (163) (2007) 1 – 19 at 10.

¹²¹ *Ibid* 11.

¹²² *Ibid*.

¹²³ Igor Nossar (note 30 above) 15.

¹²⁴ Clause 10(1).

¹²⁵ Clause 10(2).

¹²⁶ Phil James *et al* (note 120 above) 11.

employees for the purpose of Victoria OHS laws; the rest of the provisions are almost identical to the NSW legislation.

In 2005 South Australia enacted the *Industrial Law Reform (Fair Work) Act 2005*¹²⁷ which introduced among other things a procedure by which outworkers can claim unpaid remuneration from the contractor who procured or distributed the work rather than against their direct employer. The state also enacted the *Fair Work (Clothing Outworker Code of Practice) Regulations 2007* which came into operation on the 1st March 2008. The aim of the code is to monitor the use of outworkers in the manufacture and retail of clothing products within South Australia; and prescribe practices and standards that will aid compliance with, and prevent avoidance of, the *Clothing Trades Award (SA)* and other relevant industrial instruments with respect to the performance of work by outworkers in the supply or retail of clothing products within South Australia. The code also prescribes reporting practices and facilitates, complements and encourages compliance with the *Homeworkers Code of Practice (Voluntary Code)* by signatories to that code.

The South Australia Code is closely modelled on the NSW mandatory code but encourages compliance with the national and voluntary *Homeworkers Code of Practice*. A party engaged in the clothing industry is exempt from the Mandatory Code if it is a signatory to, or accredited under, the Voluntary Code.

The Voluntary Code is closely linked to the *Fair Wear* Campaign, which aims to eliminate the exploitation of outworkers at home in the Australian clothing industry through actively encouraging Australians to think critically about where and how clothes are produced. Accredited companies' benefit from having a group of suppliers they can select from who are meeting legal and community standards. Hence, these companies can be certain that their clothing products and brand names are protected from unscrupulous activities.¹²⁸

This approach by Australian legislators to modifying regulation to effectively address power relationships in manufacturing supply chains is an innovative step toward improving the lives of outsourced and vulnerable workers. This type of regulatory monitoring can also be applied in other multi-tiered subcontracting structures such as in the construction industry and other areas where outsourced work is prevalent.

There have also been a number of voluntary initiatives for the regulation of supply chains in the US. Social groups such as unions and non-governmental organisations have started initiatives to tackle the problem such as voluntary company codes and fair-wage labelling however many of these initiatives have not addressed the appalling conditions of homeworkers. A voluntary system of reporting and labelling was introduced in the garment industry in Los Angeles and New York. The idea is to combine public enforcement of labour standards via private market leverage by naming and shaming retailers who do not comply with labour standards. Currently the system operates through the ability of the US Department of Labor's Wage and Hour Division (WHD) to disrupt the flow of goods from those manufacturers who do not comply with minimum standards in the retail sector. Monitoring is however voluntary and is done by the manufacturers themselves, who are required to subcontract only to those suppliers who conform to the labour standards.¹²⁹

¹²⁷ Act 3 of 2005 South Australia.

¹²⁸ Information obtained from the Government of South Australia Attorney-Generals Department available at <http://www.legislation.sa.gov.au>.

¹²⁹ Edward Webster et al (note 35 above) 94.

Other nongovernmental initiatives involve multiple actors with new processes of standard setting and monitoring: this poses a number of challenges to the effectiveness of these initiatives. In addition companies who opt to conform to codes of good conduct run the risk of being shamed due to honest reporting whilst those companies who refuse to comply or report on their retailing supply chains often go unnoticed by the public.¹³⁰

Comparative analysis

The use of labour brokers has become the primary mechanism for informalization in South Africa. Temporary employment services in South Africa are deemed to be the employer and the user enterprise has a default liability if the broker does not comply with its statutory obligations. The lack of any limitations in respect of the amount of time that a hired worker may be utilised has led to employers utilising labour brokers as a permanent labour solution to outsource both auxiliary and core business functions. There is no appropriate statutory mechanism to register and control Labour Brokers, nor are there any provisions which regulate equal pay for equal work. Research commissioned by the Department of Labour has shown that employees in outsourced firms or engaged through TEs earn at a lower rate than their permanent counterparts who perform the same work. Workers contracted through labour brokers are effectively denied protections against unfair dismissals which are afforded to permanent employees under the Labour Relations Act.¹³¹ The LRA does not restrict the type of work that may be performed by employees supplied by labour brokers and as a result many firms are outsourcing both core and non core activities to labour brokers or outsourced firms.¹³² Although there may be situations where firms employ certain categories of workers through temporary employment agencies based on reasons related to efficiency and flexibility which should not be prohibited, by creating laws which regulate the use of labour brokers and prohibit the utilisation of brokers in certain instances, such laws remove the incentive for employers to exploit workers in the race to the bottom and therefore ensure that decent work standards are maintained.

There are a number of regulatory innovations that have been outlined in China, Korea and India which are relevant to the practice of informalization in South Africa. All three countries have introduced comprehensive legislation which deals with the problem of outsourced work and the practice of temporary employment services. The laws in China, Korea and India stipulate that “staffing Firms” or Contract Labour must pay wages in accordance with the principle of equal pay for equal work whilst China’s laws go further by obliging firms to hire temporary employees for a period of two years and obliging the staffing firm to pay the employee a minimum wage regardless of whether they are engaged in work or not. Korea on the other hand caps the amount of time that a temporary worker can be engaged before they must be made permanent in order to stop the practice of permanently outsourcing work functions.

All three countries restrict the type of work for which employment services may be utilised. India’s law is the most prescriptive and allows the government to prohibit certain industries and individual firms from engaging the use of contract labour. This halts the proliferation of employment agencies as a mechanism for externalisation. All three regulatory regimes also provide for the compulsory registration of employment agencies. India once again has the most comprehensive registration and licensing provisions which set out the terms and

¹³⁰ Dara O’Rourke ‘Outsourcing Regulation: Analysing Nongovernmental Systems of Labour Standards and Monitoring’ *Policy Studies Journal* Vol 31(1) (2003) 1 – 29.

¹³¹ Chapter VIII of the Labour Relations Act 566 Of 1995 governs unfair dismissals and unfair labour practices, however only employees as defined by the Act are protected under these provisions.

¹³² Certain bargaining councils do place restrictions on the type of work that can be performed by employees supplied by TEs.

conditions that a contract labour company must abide by in order to operate and places full responsibility for OHS standards onto the contract labour company.

The regulation of outsourced work through supply-chains, in which Australia has been a primary innovator, offers considerable potential for extending protection to workers involved in informal work and other forms of vulnerable non-standard employment. This approach has the potential to provide a basis for regulating a range of working conditions including hours of work and occupational health and safety issues. Studies done on informal or outsourced work in a number of sectors in South Africa reveal that occupational health and safety specifically the effect of excessive working hours, accidents and illness is a major problem.¹³³ Regulating outsourced and self-employed truck-drivers in South Africa is an example of the potential for supply-chain regulation to improve not only the lives of workers involved in informal work but also have a very favourable impact on public safety. However, the difficulty of achieving this through conventional approaches is shown by the fact that recommendations to do so for the Department of Transport made in the 1980s and 1990s were rejected on the basis that this should be done through collective bargaining and labour legislation, even though many drivers are not employees.

ACTIVE LABOUR MARKET STRATEGIES

Active labour market policies are used to assist workers who are in transitional stages of their working life to either find new employment or enhance their employability. Active labour market strategies seek to address the core elements of labour market flexibility and security by equipping the workforce with the necessary skills to adapt to changes within the economy and participate in decent work.

An influential response to evolving modes of work is the 'transitional labour market' proposed by Gunter Schmid as a basis for combating unemployment in European economies.¹³⁴ This work has also been influential in Australian debates.¹³⁵ This approach suggests that there are five types of major life course transitions. These are between -

- education and employment;
- (unpaid) caring and employment;
- unemployment and employment;
- retirement and employment;
- precarious and permanent employment.

In adapting this model for presentation to a South African audience, Clive Thompson, mindful of the HIV-AIDS epidemic, suggests the addition of a further transitional factor: absence from the workplace to deal with health impairment.¹³⁶

Transitional labour markets, Schmid argues, should provide institutional arrangements which support flexibility and security and are stepping-stones from precarious to stable jobs. New institutional arrangements should increasingly take account of the need for ongoing training, that the diversity of individual needs requires greater flexibility in the organization of work

¹³³ Studies conducted by the Human Sciences resource council in 2008 reveal that Truck drivers in the KwaZulu-Natal Midlands work on average 16 hours a day. Falling asleep at the wheel has been implicated in 24% of heavy-vehicle road accidents in South Africa (Professor Karl Peltzer 'The Road Kill Factor' *HSRC Review* Vol 6:4 (2008)).

¹³⁴ G Schmid 'Is Full Employment Still Possible? Transitional Labour Markets as a New Strategy of Labour Market Policy (1995)16 *Economic and Industrial Democracy* 429 – 456.

¹³⁵ See I Watson, J Buchanan, I Campbell and C Briggs *Fragmented Futures* (Sydney, Federation Press, 2003).

¹³⁶ C Thompson 'The Changing Nature of Employment' (2003) 24 *Industrial Law Journal (SA)* 1793, 1813.

and that atypical work calls for reconsideration of the relationship between paid work and other socially useful activities. In term of this approach, social policy should move from passive social protection to the social management of risk. Social policy should promote social inclusion through jobs based on proper social standards, rather than merely alleviating poverty. For example, it has been suggested that unemployment insurance should be transformed to an employment insurance to provide income security during transitions between education, training and employment.

It has been suggested that these approaches offer a useful framework for understanding work within the informal sector in developing countries.¹³⁷ The concept of the transitional labour market poses a very significant challenge to conventional labour law which has primarily focused on regulating existing employment relationships while providing some security in the case of involuntary transitions such as retrenchment or occupational injury. However, the contemporary reality is that the contemporary worker is likely to undergo many more transitional phases in their working life than workers in the past.

Skills and vocational training has been the primary mechanism utilised by countries across Asia and the Pacific to increase workforce participation and increase necessary skills in the economy.

These programmes are therefore often quite specific in content, focusing on those skills that are currently in demand within the economy or that are in line with the country's broader economic goals.

However the dual purposes of increasing labour force participation and specific skills training aimed at stimulating economic growth do not necessarily always coincide. This is because increasing labour force participation specifically in countries where the majority of the labour force are low skilled workers requires a large amount of general education or basic training which enables the labour force to be flexible and change tasks and types of work.

Vocational education on the other hand focuses on job-relevant skills and is more specialised and costly although the benefits to the economy and the individual workers involved in vocational training are often much greater. Vocational training is also seen as an equity measure specifically in rural and poor areas where traditional academic education is poor. It enables workers to acquire a skill in a specific field of work facilitating self-employment and improving productivity.

It is therefore argued that skills development strategies should include both general and vocational training in varying proportions in order to ensure that as many people as possible are able to re-enter the labour market whilst at the same time encouraging certain vocational skills that are in demand.¹³⁸

Korea and India both have highly specialised skills and vocational training programmes which link skills training to current and future labour demands. China on the other hand utilised skills and vocational training programmes to restructure the labour force from a centralised state-run economy to a privately run market economy through massive training programmes which modernized the labour force to fit the governments' economic policy objectives. In both Korea and China, these skills training programmes are linked to some type of job placement service which links workers to the labour market. These innovations will be looked at in detail below.

¹³⁷ J- M Servais 'Globalisation and decent work policy: Reflections upon a new legal approach' (2004)143 *International Labour Review* 185 at 199.

¹³⁸ Jandhyala B G Tilak 'Vocational Education and Training in Asia' in *The Handbook on Educational Research in the Asia Pacific Region* John P Keeves and Rye Wananabe (eds), Kluwer Academic Publishers, 2002.

China

Skills training initiatives in China have focused mainly on reemploying the massive surplus of public sector workers during the countries economic restructuring in the last decade and improves vocational training in order to increase market productivity. The sheer size of the active labour force in China means that the magnitude of these programmes is much larger than in other countries.

The large-scale restructuring and privatisation that took place over the last ten years meant that China needed to impart general skills training to masses of state workers who needed to be absorbed into the private sector. In addition China has attempted to alleviate poverty in the undeveloped rural regions by embarking on basic training in rural regions. The general training programmes set up by China to assist retrenched workers have two key features: training and job placement. The Chinese government together with organised industry set up re-employment service centres for industry workers who were being retrenched. The first of these was in 1996 where two such sectors were set up in Shanghai, one for textile workers and another for electronic workers, five more industry sectors followed suite.¹³⁹ The main objective of these centres was to train workers and at the same time register them on a job seekers database which placed them in private sector jobs. The government later required all state-run enterprises retrenching workers to set up re-employment service centres at their enterprises where workers received training and assistance in finding new jobs.¹⁴⁰ This strategy of training and placement has been able to ensure that 65 per cent of retrenched workers are re-employed.

China has launched 2324 poverty-alleviation training centres in rural poverty stricken areas around China. These centres offer courses in agricultural sustainability and forestry and have had a huge success rate with around 80 per cent of the 5 million rural participants finding jobs. China has also dramatically increased the number of vocational training institutions and work-orientated education training in schools. Over 14, 400 secondary schools now provide specialised vocational training to learners who will be able to enter the labour market immediately after school as well as technical training institutions for adults. The government also operates 3465 employment training centres which offer non-degree training options with a heavy focus on labour market relevance. These institutions are subsidised and are cheap to access.¹⁴¹ Training of existing employees is also subsidised, with over 34 million employees receiving new training in 2003.¹⁴²

Korea

Korea's skills and vocational training programmes have always been informed by its broader economic development strategies. These programmes have evolved over the years to meet the economy's demand for skilled workers and as a supplementary means to promote continued productivity of workers. In 1995 the government of Korea introduced an unemployment insurance (UI) system which included occupational skills training and development levy-rebate programs for employers to train their workers voluntarily.¹⁴³ All enterprises have to pay training levies as part of their UI contribution. If they carry out

¹³⁹ These enterprise based re-employment centres gained momentum and a total of 111 cities set up similar centres.

¹⁴⁰ *China's Social Security and Its Policy*, White Paper issued by the Information Office of the State Council of the Peoples republic of China (2004)

¹⁴¹ Ibid.

¹⁴² *China's Employment Situation and Policies*, White Paper issued by the Information Office of the State Council of the People's Republic of China (2004).

¹⁴³ Compulsory training is prescribed for large enterprises who employ 1000 workers or more.

training programmes (in-plant or institutional), their expenses are reimbursed as an incentive for enterprises to undertake training. Low-interest loans are provided to workers who enrol at junior colleges, university or approved vocational training providers. The unemployed can receive a grant to cover the cost of training and transportation and training allowances, in addition to tuition costs are provided to certain individuals including certain disadvantaged persons and self-employed.¹⁴⁴

SME's receive rebates of up to 270 per cent of training levies in order to encourage them to train workers whereas large companies are reimbursed at about 80 per cent of training levies paid.¹⁴⁵ This system has seen a doubling of the number of enterprises and workers who participate in the scheme although participation by SME's has been dismal.¹⁴⁶

A pilot project for SME training consortiums' was subsequently rolled out in order to try and encourage skills training in SMEs. Local chambers of commerce assisted in organising around 50 SME's to organise themselves into training consortiums for management of their training activities by financing and seconding two training managers. These managers conducted training-needs surveys, planned and programmed training activities and collaborated with training institutions for development of training programmes and materials. The pilot programme was hailed a success with the number of employees trained under the project far exceeding the number initially identified by employers. The key lesson learned through conducting the pilot project is that SME's do not have the institutional capacity to train workers and therefore financial incentives alone will not bolster skills training for employees in these enterprises. What is needed is institutional and technical assistance in addition to financial incentives. Another key reason identified for the success of the pilot programme was that the training consortiums were entrusted to external training institutions on a competitive market basis for quality training services.¹⁴⁷

Like China, Korea couples skills and vocational training with job placement programmes. The Government operates a network of 157 Employment Security Centres which assist workers in finding jobs through counselling, advice and vocational training. All persons who seek to collect unemployment insurance must register at the centres. These centres list all the registered workers on a public website of job vacancies call WorkNet.¹⁴⁸ The Korean government has also embarked on a programme similar to the Chinese enterprise-based re-employment service centres. The government provides an 'Out-placement service subsidy' to companies that help their retrenched workers find jobs with other employers either through in-house assistance or by contracting the service out to a professional agency. The subsidy covers a proportion of the cost per worker using the service.

India

India has embarked on a massive drive to train the workforce in order to increase the productivity and competitiveness of its economy internationally. The focus is on market oriented vocational training rather than general education. The government has embarked on three major initiatives designed to bolster economic productivity through up-skilling the workforce. The first initiative which will piggyback off the governments' existing 5100

¹⁴⁴ Paul Vandenberg (note 9 above) 36.

¹⁴⁵ Kye Woo Lee 'Effectiveness of Governments Occupational skills development strategies for small and medium-scale enterprises: A case study of Korea' *International Journal of Educational Development* 26 (2006) 278-294, at 282.

¹⁴⁶ In 2002, 77.6 per cent of large enterprises trained 37.5 per cent of their total workers but only 4.7 per cent of SME's developed job skills of only 4.2 of total SME workers. See Kye Woo Lee at 283.

¹⁴⁷ Kye Woo Lee (note 145 above) 292.

¹⁴⁸ Paul Vandenberg (note 9 above) 29.

industrial training institutes is the Centres of Excellence Scheme.¹⁴⁹ The scheme aims to upgrade the industrial training institutes¹⁵⁰ into highly productive and industry orientated centres which will be managed directly by representatives of the business community who also have a major input in the curriculum taught at these centres.

The second major initiative is the Skills Development Initiative. The aim of this programme is to provide vocational training to as many people as possible. The government seeks to improve its vocational training system, offering short courses to scholars at school and during post-secondary education in order to prepare learners for entry into the labour market. There are over 6800 schools that offer vocational training and currently enrol around 400 000 students.¹⁵¹ The government has identified two key factors that contribute to the success of vocational institutions: ensuring private sector participation in the management of institutions and curriculum design so that graduates fulfil labour market demands and strengthening general education components of vocational programmes providing basic knowledge competencies so that learners can adapt to various scenarios in the workforce.¹⁵²

The third policy initiative utilised by the government of India to bolster workforce productivity and participation is the Trade Apprenticeship Training Scheme. This scheme was launched as far back as 1959, initially on a voluntary basis. The Apprentices Act 1961, which has been amended several times to date, makes it obligatory for employers in the public and private sector industries to engage trade apprentices according to the ratio of apprentices to workers other than unskilled workers in designated trades prescribed under the rules.¹⁵³ The duration of training will vary according to the specific requirement of the trade, with the syllabi prepared by the respective Trade Committees comprising trade experts from the industry. 254 groups of Industries are covered by the Act.¹⁵⁴ The programme has been hailed a success with Government statistics revealing that overall 1,68,821 apprentices were on the roll of 20, 990 establishments over the period measure. Although the capacity was only at 69 per cent, there has been a rising trend in the overall trade apprenticeship of about 7 to 12 per cent per annum over the period measured. Workers receive statutory prescribed apprenticeship wages during their time under apprenticeship and receive a National Apprenticeship Certificate on completion of their training.

Comparative analysis

The South African government has committed itself to halving unemployment by 2014 which will require the creation of millions of jobs over the next five years. Relying on a labour-intensive exports strategy based on low wage competition is unrealistic in a middle income country like South Africa which cannot compete on the basis of low costs alone in the open world market. This leads to the argument that the government should focus on expanding industries which produce high value-added exports because these require deeper linkages which in turn creates jobs however this requires varying degrees of skills from the workforce.¹⁵⁵ The Government has therefore identified skills development at the forefront of

¹⁴⁹ Ibid 31.

¹⁵⁰ The Government initially earmarked 500 for upgrade.

¹⁵¹ The government has however acknowledged that these vocational programmes are currently only operating at about 40 per cent of their capacity and intends to increase enrolments by 25 per cent. See 'Skills Development in India: The Vocational Education and Training System' *The World Bank South Asia Human Development Sector Report* No. 22 (2008).

¹⁵² Ibid.

¹⁵³ 'Trade Apprenticeship Training in India Under Apprenticeship Training Scheme' *Government of India: Ministry of Labour and Employment Survey and study division*. New Delhi (March 2007).

¹⁵⁴ Ibid.

¹⁵⁵ Marina J. Meyer and Miriam Altman 'South Africa's economic development trajectory: implications for skills development' *Journal of Education and Work* Vol. 18 No. 1 (2005), 33 – 56, at 47.

the agenda for poverty alleviation and job creation. The approach taken by the government must however provide for ways of absorbing the large pool of low skilled labour as well as enhancing the skills base of the labour force. The new skills development environment developed in South Africa rests on four key pillars namely: the National Qualifications framework (NQF); learnerships; the levy-grant system funding model and the formation of 25 Sector Education and Training Authorities (SETAs) and a National Skills Authority (NSA).¹⁵⁶

A major problem that has been identified with the current skills environment in South Africa is the fact that training is primarily occurring in large and medium sized enterprises and therefore people engaged in small enterprises and those primarily engaged in the so called “second economy” are still not receiving any training. Training in large enterprises are measured at around 2 – 4 per cent of the payroll per annum which is well above the mandatory levy-grant payment of 1 per cent of the pay-roll however this was the case even before the launch of the new skills development levy-system which is in any event confined to actual employees and not outsourced workers. Moreover notwithstanding the high provenance of training in large firms, there is no evidence of higher productivity as the purpose of most of the training is to service the enterprises current production regimes.¹⁵⁷

Small enterprises which are the most numerous and employ the majority of workers in both the formal and informal economies have dismal training records. This is in line with the experience of Korea under its levy-grant system. Korea’s experience suggests that what is needed is institutional and technical assistance in addition to financial incentives as small enterprises do not have the capacity to organise and perform training.

Notably absent from the South African skills development scheme is a focused commitment to vocational training. Vocational training is important for economic growth although the type of vocational training will depend on the demands of the economy and the level of development in a country. The viability of providing vocational education should be investigated where there is some demand already apparent and where demand for skills is being manifested.¹⁵⁸ Such vocational training should balance technical skills with general skills that are useful across occupations and should be integrated in schools as well as firm-based institutions.¹⁵⁹ The experience from China and India has been to involve industry stake-holders in the process of developing vocational training and to integrate such training into overall education planning.

South Africa have however embarked on a learnership training strategy under the National Qualifications Framework which is demand led, appeals to a wide range of learners and have curricula which integrate theoretical education and training. They are not linked to specific age cohorts and can provide foundational development of competencies that may have been missed at the primary or secondary school level. The learnerships provide workplace learning which will culminate into a nationally recognised qualification in accordance with the level of competency and training achieved. Although there has been little monitoring and evaluation of the success and impact of learnerships they are viewed as a possible solution to vocational training needs¹⁶⁰ specifically in light of the dismal performance of the old Apartheid Regime technical colleges which had very limited application. The learnership scheme needs however to be fully integrated with the governments’ broader skills training objectives and

¹⁵⁶ Andre Kraak “The Challenge of the “Second Economy” in South Africa: the contribution of skills development” *Journal of Vocational Education and Training*, Vol. 57 No. 4 (2005) 429 – 452, at 434

¹⁵⁷ Ibid at 447-448.

¹⁵⁸ Jandhyala B G Tilak at 15.

¹⁵⁹ Ibid.

¹⁶⁰ Andre Kraak (not 156 above) at 437-438.

vocational training needs in order for it to be effective and meet the demands of the economy and labour market.

Another noteworthy strategy adopted by both China and Korea has been to couple skills and vocational training with job placement programmes. In addition both have embarked on unemployment prevention strategies where sectors of workers are being retrenched. The Chinese government created enterprise-based re-employment service centres and the government of Korea provides an 'Out-placement service subsidy' to companies that help their retrenched workers find jobs with other employers. In both countries these programmes have facilitated over half of retrenched workers back into the labour market, which although not a stellar performance, still significantly reduces the number of persons who would otherwise be unemployed and have to carry the burden of finding a new job themselves. Lastly by linking skills development and training initiatives to unemployment insurance funds and benefits, the Korean government has put in place measures to support workers who are making transitions in the labour market

A key consideration that needs to be taken into account is the law-practice gap which inevitably exists whenever new strategies are implemented. One of the main pitfalls which all these countries have experienced has been the lack of institutional capacity to manage these programmes. Countries need to conduct detailed manpower analyses and forecasts before implementing such schemes. Vocational training in particular is necessarily expensive therefore realistic budgetary allocations need to be made to support skills and vocational training programmes.¹⁶¹ The foremost reason for the underperformance of India's industrial training institutes prior to their current conversion into centres of excellence was underfunding and lack of adequate training equipment.¹⁶²

Although South Africa has introduced a fairly comprehensive body of laws aimed at skills development over the past few years, comparative studies of active labour market strategies in parts of Asia have revealed a myriad of approaches to increasing the participation the workforce, facilitating job transitions and enhancing workforce skills and productivity which can inform the policy debate in South Africa and facilitate workers in transitional labour markets. South Africa has experienced massive capacity problems which have slowed down the performance of the skills development scheme and had not been able to generate meaningful private sector cooperation. Capacity development of the state is therefore crucial for the successful roll-out of the scheme with the encouragement of industry stakeholder participation and support.

PASSIVE LABOUR MARKET STRATEGIES

Passive labour market strategies are primarily situated in the realm of social security regulation. The purpose of these strategies is to provide protection against extreme poverty where there is no income due to loss of employment. These strategies are therefore fundamentally different from those that seek to promote employment and economic growth.¹⁶³

The most commonly used regulatory tool in this area is unemployment insurance (UI). The main problem with using UI as a source of income support is that it is limited in coverage to those persons who are engaged in formal employment relationships and thus excludes a

¹⁶¹ Ibid.

¹⁶² Paul Vandenberg (note 9 above) 31.

¹⁶³ Wouter van Ginneken 'Extending Social Security: Policies for developing countries' *International Labour Review*, Vol. 142. No.3 (2003) 277 – 294, at 280.

large percentage of the working population who are involved in informal work within the formal economy or who are engaged in work within the informal economy.

This paper has already analysed various innovative methods of extending employment protection to precarious employers. Where such innovation is successful, the extension of UI to these employers may also occur. This is not however the case where workers are employed in the informal sector as own account workers or casual workers who are employed on an adhoc basis for short periods. It is therefore imperative that one investigates alternative mechanisms of providing income support to the unemployed that does not seek to rely on the existence of an employment relationship. India provides a useful case study in this regard. Not only have they rolled out a national social assistance programme which encompasses a national policy for social assistance benefits to poor households in the case of old age, death of a breadwinner and maternity,¹⁶⁴ there are currently a number of innovative social security models which operate to protect workers in the unorganised sector. In addition the government has set up a special committee whose aim is to identify the appropriate legal and policy environment for extending the coverage of labour laws and social security laws to persons in the unorganised sector.

India

The first policy model which assists own account workers specifically petty traders and shop owners as well as agricultural labourers, is the social insurance schemes launched by the central and state governments through the Life Insurance Corporation of India and General Insurance Corporation of India. These schemes include the “*Krishi Shramik Samajik Suraksha Yojana*”, which is a unique social security scheme for agricultural workers introduced in 2001. The scheme seeks to provide comprehensive life insurance protection, a periodical lump sum survival benefit and pension to agricultural workers. The scheme was initially launched in 50 areas across the country covering 20 000 landless agricultural labourers in each area. Marginal farmers were then brought in during the second stage of implementation. Subscribers pay a nominal fee of one rupee per day whilst the government contributes double that amount. In case of natural death, accidental death/injury or partial or permanent disability before attaining age of 60 years, the subscriber or his nominee receives a lump sum payment ranging between Rs.20,000/- to Rs.50,000/- . If however the subscriber attains the age of 60 years, the subscriber receives a monthly pension ranging from Rs.100 to Rs.1900 and in case of death the family receives a lump sum payment ranging between Rs.13,000 to Rs.2.50 lakhs depending upon the age of entry to the scheme.¹⁶⁵ A similar scheme called the “*Janashree Bima Yojana*” exists for other vulnerable occupational groups like Beedi workers, Brick Workers (Jalandhar), Carpenters, Cobblers, Fisherman, Handicraft Artisans, Handloom Weavers etc.

An additional model developed in India to provide social protection to workers in the unorganised sector is social assistance through welfare funds of central and state governments. The government has set up five welfare funds administered through the Ministry of Labour.¹⁶⁶ The operation of these welfare funds are not dependant on the existence of an employment relationship. The purpose of the funds is to provide housing, medical care, educational and recreational facilities to workers employed in beedi industry

¹⁶⁴ Patricia Justino ‘Social Security in Developing Countries: Myth or Necessity? Evidence from India’ Journal of International Development Vol. 19 (2007) 367 – 382, at 372.

¹⁶⁵ Information obtained from the Press information Bureau of the Government of India available at <http://pib.myiris.com/ministry/article.php3?fl=010630191936>.

¹⁶⁶ These funds are: The Mica Mines Labour Welfare Fund Act, 1946; The Limestone and Dolomite Mines Welfare Fund Act, 1972; The Beedi Workers Welfare Fund Act, 1976 and the Cine Workers Welfare Fund Act, 1981.

and non-coal mines and cine workers. Resources are raised by the government through a cess collected from the employers and manufactures/producers of the particular industry concerned and no contribution is required from workers.¹⁶⁷

In addition the government of India has enacted central legislation which enables states to create similar welfare funds for various categories of workers at state level. The state of Tamilnadu has created over 11 Welfare boards for workers including construction workers, truck drivers, footwear workers and silk weavers. The Delhi Construction Workers Welfare Fund has funds to the tune of Rs.1.2 billion for the benefit of labourers. One of the main problems experienced in the operation of these funds has been the fact that very few workers register with the fund and therefore do not receive benefits under the fund. Notwithstanding the underutilisation of some of the funds, the number of welfare funds has sharply increased during the last decade. In 2005 the International Labour Organisation recorded 62 welfare funds operating in 14 different states of India. Their present total coverage may be estimated at some 15 million informal workers.¹⁶⁸

Concerns relating to the plight of workers in the informal labour were pushed to the national agenda in 2004 when the Government of India set up a commission to study various problems facing enterprises and workers and to make recommendations for better working conditions and social security for workers employed in it. The National Commission for Enterprises in the Unorganised Sector (NCEUS) set up¹⁶⁹ in 2004 was tasked with assessing whether there is an appropriate legal and policy environment which would effectively extend the coverage of labour laws and social security laws to persons in the unorganised sector.¹⁷⁰ NCEUS has since submitted three sets of proposals to the government which relate to a national minimum social security scheme for all informal workers, minimum conditions of work for all wage workers in the informal sector and promotional measures to enhance livelihood opportunities for workers in the informal sector specifically the unemployed.

Two Bills proposing comprehensive legislation for regulation of employment and conditions of service, social security and welfare of unorganized sector workers have also been proposed by National Centre for Labour and the National Campaign Committee for Unorganised Sector Workers in 2005. The Bills cover wage workers, home-based and out-workers duly registered under the Act but do not include agricultural, plantation, sericulture, horticulture, poultry farming, animal husbandry workers and other allied workers and the persons employed in factories and mines. The Bills provide for the right to livelihood including the right over common properties and natural resources. They also include provisions for regulation of working conditions, provide for continuity of employment, bonus and social security, non-discrimination, and provisions against harassment of women workers. They also provide for the right to have a uniform social security card; occupational and other safety measures; vocational training and guidance, and ensuring special protection for migrant workers. The tri-partite Boards formed under the proposed Act will be responsible for its administration. Enforcement will be through a system of inspections and trade unions will be vested with powers of inspectors.

The National Advisory Council of the government has also formulated a stand alone Bill on social security for unorganised sector workers which was also forwarded to this Commission for review. These Bills were considered in the 40th Indian Labour Conference, which is the

¹⁶⁷ 'Extension of Social Security Protection in India: The contribution of welfare funds' *ILO Sub-regional office for South Asia*, New Delhi (2005)

¹⁶⁸ Ibid.

¹⁶⁹ Set up by the Ministry of Small Scale Industry, India.

¹⁷⁰ K.P Kannan and T.S Papola 'Workers in the Informal Sector: Initiatives by India's National Commission for Enterprises in the Unorganised Sector' *International Labour Review* (2007) vol 146:3-4 321 – 329 at 322.

main tri-partite consultative forum, in its meeting held in December 2005. The Conference suggested that the NCEUS Draft Bill be used as a basis for further discussions.¹⁷¹

NCEUS has proposed that a national scheme of minimum social security for all informal workers be set up in order to address the core needs of health, death, disability and old age. The proposed health benefits consist of coverage to all family members to cover hospitalization expenses and maternity benefits for female workers or spouses of the main worker. Life insurance is also recommended to provide benefits to survivor's of registered workers as well as old age security which will pay out an amount equal to the poverty line paid as a state pension to all poor households contributed by the central and provincial governments with a contributory provident fund for non-poor households. NCEUS has proposed that "work facilitation centres" be set up for the registration of workers and to assist them in the delivery of these benefits.¹⁷² The Commission's proposal on social security has been considered by the Ministry of Labour and Employment and by the Cabinet in 2007 but as yet no recommendations have been adopted.

Comparative analysis

The 2002 Taylor Committee Report from the Commission of Inquiry into a Comprehensive Social Security System in South Africa recommended that social protection should be more comprehensive, rather than just a narrowly-defined system of social security. The commission raised the challenge of how labour law can engage with social security systems in order to extend protections to those workers who currently work outside the social safety net.¹⁷³ The National Treasury Report on Social Security and Retirement reforms has also identified a number of inadequacies with South Africa's current social security and retirement framework. One of the main shortcomings is the fact that the Unemployment Insurance Fund only provides limited income protection to those with a record of formal employment, but workers in the informal sector who do not contribute or benefit from UIF and work-seekers without employment experience remain unprotected. In addition privately funded life and retirement coverage has not kept pace with the changing patterns. Instead of supporting workers during transitional phases of employment, these funds still penalise workers heavily when they change employment status.¹⁷⁴ As a result of these and other inadequacies more than two thirds of South Africans reach retirement without any pension benefits and therefore has to rely on social old age grants. For example, employees who leave their employment to set up their own businesses or further their education are not able to claim benefits.

The process of social security reform initiated in 2007 expanded social assistance grants, a safety net against poverty in old age, and providing basic support to the disabled, children and care-givers. However workers engaged in informal employment or who are self-employed still remain extremely vulnerable to illness, disability and death and do not have access to risk management mechanisms such as savings and insurance.¹⁷⁵ The insurance schemes and welfare grants developed in India are not reliant solely on the governments' limited financial and administrative capacity but involves partnerships with private industry and other social partners to utilise forms of taxation and insurance to create social

¹⁷¹ National Commission for Enterprises in the Unorganised sector Report. Available at http://nceus.nic.in/Report_Bill_July_2007.htm.

¹⁷² Ibid at 327.

¹⁷³ Paul Benjamin (note 37 above) 1586.

¹⁷⁴ Republic of South Africa National Treasury 'Social Security and Retirement Reform' Second Discussion Paper (2007).

¹⁷⁵ Paul Benjamin (note 37 above) 1586.

protection who would promote equality and social cohesion for workers otherwise be beyond the reach of the social safety net.

LEARNING LESSONS FROM THE ASIAN EXPERIENCE

South Africa is a country plagued by inequality and poverty in an era in which work has become increasingly informalized on a global scale at a rapid rate. Orthodox methods of labour regulation are constantly being challenged by the diversity and variability of new forms of work. Any effective regulatory policy which seeks to protect workers and reduce levels of poverty and inequality will need to transform the current regulatory systems beyond formal employment protections to broader systems of labour market security which seek to cover all participants in the labour market, including those workers engaged in outsourced and informal work as well as the self-employed. These laws must therefore operate in conjunction with the wider range of laws impacting on the labour market in order to provide meaningful legal empowerment to counteract the exploitation of vulnerable participants in the informal economy and accordingly work towards achievement of the *Decent Work Agenda* and the achievement of a more equal society.

This paper has focused on three interrelated regulatory aspects of labour market security. The first is the extension of employment protection through new forms of regulating the increased and diverse forms of precarious workers, the second is active labour market strategies which promote the capacity of workers to enhance their productivity and employability and support them during transition stages. These two labour market strategies aim to reduce the high levels of inequality that currently exist in the labour market by reducing the disproportionate number of workers who have no protection. The third regulatory aspect focused on passive labour market strategies which seek to find points of interaction between the labour market and social security regulation where new strategies can be developed to enhance and expand workers social protection. This form of regulation aims to reduce the levels of absolute poverty of vulnerable workers and alleviate some of the risks associated with marginalised and informal work. Passive labour market strategies should not overlap with existing social security regulations but rather coincide in order to increase the scope of protection beyond government funded social welfare grants.

The current labour market governance in South Africa was designed to meet the needs of standard employment relationships within the formal economy. It is inadequate to protect the increased number of workers who are engaged in informal work across South Africa's economic landscape. There is now widespread agreement on the need for regulatory policies that address the inequitable position of these workers and is accordingly faced with the challenge of deciding which regulatory models would be the most appropriate means of addressing these inequities.

The countries examined in this paper in the South Asian and Asia Pacific regions have all embarked on law reform strategies that seek to address one or more of the problems identified as contributors to increased inequality and poverty in the workforce. An investigation of these various regulatory frameworks has exposed a range of innovative regulatory models that seek to respond to new employment patterns, draw informal workers into more protected work and elevate the plight of the working poor.

The comparative study has revealed three distinct policy agenda's which can effectively reduce inequality in the workforce. Firstly all the countries under comparison regulate the use of labour brokers (temporary employment services) as a means of sub-contracted labour. Although the method and extent of regulation varies in each individual country, their legislative regimes show a shared commitment to eradicating the abuses that may flow from

these type of working arrangements. This flows from recognition that these employment practices are a primary contributor to workforce inequality when used as a means of avoiding labour obligations. South African policy makers therefore need to regulate the use of labour brokers in accordance with the country's labour market needs in order to curb the usage by employers of labour brokers purely as a means of avoiding the responsibilities imposed on them by labour regulations whilst at the same time ensuring that employers still have sufficient flexibility in the workforce to adapt their individual workforce needs.

Key features of the legislation discussed above are-

- placing limits on the time period for which triangular employment can be utilised;
- restricting the categories of work for which these arrangements can be used;
- applying the principle of 'equal pay for work of equal value to these employees when compared with ordinary employees;
- ensuring adequate security of employment.

None of the protectors have been provided in South Africa.

These regulatory solutions point to the need for more detailed regulation that responds to the particular insecurities attached to specific forms of non-standard work. It supports an argument for detailed regulation that permits the diversity of work to continue but seeks to control the abuses associated with it. Policy makers can therefore respond to the rise of non-standard work by-

- retaining the status quo and allowing these forms of work to continue while turning a blind eye to their negative consequences;
- drawing on the extensive research that has been conducted in South Africa on non-standard work, as well as comparative experience, and develop a regulatory framework that permits these practices to continue while at the same time seeking to minimise their adverse consequences and enhancing the security of employees who perform this sort of work;
- prohibiting certain types of employment relationships.

There is widespread consensus that retaining the current status quo is not feasible. Recently there has been support in both political and academic circles for outlawing triangular employment. In 2007 the Namibian Parliament included a clause in their country's Labour Act prohibiting the operation of labour hire firms and there have been suggestions that South Africa should go this route. However, this is a proposition that needs thorough interrogation. One consequence would be to outlaw the genuine supply of temporary workers as substitute workers. A further issue is whether such a prohibition would have its desired consequences. One possible scenario is that while the larger labour supply firms who generally comply with the law might close down, the smaller operators might continue to provide their services in a manner that either breaches the law but for which they are not prosecuted or that manages to avoid breaching the law and is therefore entirely unregulated. It is suggested that a detailed regulatory model offers better prospects of providing appropriate protection without adverse economic consequences.

Secondly the study has revealed policy initiatives which reconceptualise labour regulation in accordance with market trends and global supply chains. Supply chain regulation which explores the possibilities of restructuring regulation according to industry supply-chains in

the informal and formal sectors can be applied in a number of multi-tiered subcontracting structures within the manufacturing and other outsourced industries in South Africa. Accordingly this approach to labour market regulation is a useful innovation to explore in the quest to protect a broader number of workers engaged in informal and externalized work. The shift to using supply chains as a basis for providing protection for workers involves a range of regulatory initiatives including promoting sectoral self-governance as an alternative to regulation and obligations in respect of information disclosure.

Thirdly the comparative study has reiterated the paramount importance of active labour market strategies specifically skills and vocational training and the creation of linkages between job training and job placement. However central to this part of the analysis is the understanding that the content of skills and vocational training and the balance struck between general and vocational training will depend heavily on the particular market demands of the country in question. A particularly noteworthy observation in this study is the policy debate over skills training in small and medium enterprises. The case analyses have revealed the crucial role that institutional support plays in addition to financial incentives when seeking to encourage skills training in SME's.

These areas, in particular the first two, provide important new conceptual underpinnings that can inform debate on policy and regulatory reforms in South Africa and the choice of modalities that South Africa might use to achieving its policy objectives. This study also acts as a useful benchmark against which South African policy and law makers can measure the extent of regulatory reform that is being utilised in other middle-income countries which face similar levels of poverty and inequality.

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