

Perspectives on extending protection to atypical workers, including workers in the informal economy, in developing countries

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1 BACKGROUND

The hypothesis of this contribution is that if the prevailing arguments that the international market is changing so fast (partly due to the “cold winds of globalisation”) that the traditional employment relationship will be inappropriate in the future and that safe jobs will be a rarity, are correct, it is of the utmost importance that current labour and social legislation accommodates and extends protection to vulnerable workers in new forms of working arrangements. If labour law is not up to this challenge its function and impact will become negligible in the new labour market. Although this is true for all countries, it is submitted that it is particularly true for developing countries where atypical work and a high participation rate in the informal economy are really the norm and not the exception. What is more, in countries where the informal economy is increasingly creating a parallel economic world to that of the formal economy the extension of protection by facilitating the ability of these workers to bargain collectively to improve and protect their employment terms and conditions; and the role of national and local governments in the extension of labour and social protection become increasingly important.

2 INTRODUCTION

Employees in the traditional full-time employment paradigm are well protected in South Africa and most other countries in the Southern-African region. However, current regulation is largely unable to protect workers employed in the new forms of non-standard employment, and in many instances this is the case due to the restrictive interpretation of who qualifies as an “employee”. Casualisation and externalisation have therefore left many a worker outside the scope of protection offered by labour legislation. Union coverage under atypical workers is extremely low. This issue of voice and representation must be addressed as social insurance schemes and labour regulation that cover the needs of informal workers will only then become feasible. The International Labour Organisation (ILO) has also adopted the concept of “decent work”, which has set four objectives for all, namely: employment opportunities, workers’ rights, social protection and representation (ILC Platform of issues 2002). This concept of decent work could be used to provide impetus to the improvement of the precarious position of non-standard workers. In addition to publicly adopted approaches to extend social protection to informal workers, in Tanzania, Ghana, India, South Africa and in the SADC region, for example, workers have been able to provide for themselves through innovative (private) measures. The writers argue that these measures need to be strengthened and, where applicable guaranteed by governments.

3. NEW FORMS OF WORK

The writers in principle prefer the structuralist school of thought regarding the relationship between the informal and formal economy. This school views the informal economy as subordinate to the formal economy. This view has been described as: “[emphasising] that corporations in the formal sector often seek to erode employment relations in order to reduce their labour and input costs. They mainly focus on vested interests in the formal economy that promote informal arrangements” (War on Want *et al* (2006) 13).

It should be clear that work in the informal economy is an issue separate from but closely connected to non-standard employment. The informal economy refers to those sectors where work is unregulated and many descriptions thereof can be offered. There has been a rise in non-standard employment in both developed and developing countries. Governments often viewed informality as an indispensable lifeline for the vulnerable and as a sign of economic vitality, but as the paper will illustrate this is a false sense of security as informality bears high social and economic costs. Most atypical workers in developing countries are not working in this manner by choice. These jobs are usually associated with increasing job insecurity and precarious conditions of work. The growth in the informal economy as a percentage of total GDP in Sub-Saharan Africa increased from 30% in 1990 to 39% in 2003 (Olivier 2007: 419). According to Benjamin, in September 2005 total employment in the South African informal sector represented a 22.8% share of total employment (this figure increases to 29.8% if domestic workers are included) (Benjamin 2008:1583).

4 REGULATORY AND POLICY FRAMEWORK

4.1 International Law, the ILO and New Forms of Work

Over the last century the International Labour Organisation (ILO) has played a very important role in developing labour standards and conventions. New forms of work have been recognised by the ILO and in terms of its standard setting it covers employees outside the traditional employment relationship. The changes in the traditional concept of work have not escaped the attention of the ILO and since 1990 this topic has been receiving attention at annual conferences. The ILO has acknowledged the increase in non-standard work and the need for labour and social protection of non-standard work in the following ways (Lund and Srinivas 2000):

- (a) conventions and recommendations pertaining to particular categories of non-standard workers, such as part-time workers and homeworkers;
- (b) support for micro-enterprises in the informal economy;
- (c) programmes like Strategies and Tools against Social Exclusion and Poverty (STEP) to promote the extension of social protection to informal workers;
- (d) support for mutual health insurance schemes; and
- (e) the continuance of work at its social security department, commissioning research and investigating the extension of social security protection to non-standard workers.

Most core labour standards apply to all workers or contain provisions for extension to other categories of workers. Furthermore, the ILO has adopted the Declaration on Fundamental Principles and Rights at Work of 1998. In terms of this declaration, member states are required to adopt at least the core conventions containing certain core rights.

Internationally the trend is to extend coverage to include non-standard workers but the number of countries that have ratified relevant conventions remains low and thus the effectiveness of these conventions in protecting the position of non-standard workers is limited. The implementation of ILO standards for workers may be more problematic in developing countries as they may be unable to fulfil the obligations placed on them. However, governments can start by removing all obstacles to the free organisation of these workers. The participation of these workers in the planning and implementation of programmes to extend protection is vital for the success of such programmes. Certain ILO conventions allow ratifying countries to enact standards in a manner applicable to national conditions. (Eg the Minimum Wage Fixing Convention 131 of 1970 provides that when fixing a level of minimum wage, economic factors of the member state must be taken into consideration. Fifty-one countries have ratified this convention including Tanzania, Zambia and Swaziland. South Africa has not ratified this convention (ILOLEX www.ilo.org/ilolex (12-04-2009)).) The ILO extends coverage to non-standard workers through specific conventions for the general acceptance, promotion and extension of protection to these workers. We submit that the ILO should prioritise a campaign focusing on ratification related to the protection of non-standard workers.

Applicable international instruments (ie those that also apply in the informal economy and to atypical employment)

<i>Convention</i>	<i>Ratifications</i>	<i>SADC Ratifications</i>
<i>The Part-Time Work Convention 175 of 1994</i>	11	<i>Mauritius</i>
<i>Homework Convention 177 of 1996</i>	5	<i>None</i>
<i>The Maternity Protection Convention 183 of 2000</i>	17	<i>None</i>
<i>Workers with Family Responsibilities Convention 156 of 1981</i>	40	<i>Mauritius</i>
<i>The Rural Workers' Organisations Convention 141 of 1975</i>	40	<i>Zambia</i>
<i>Indigenous and Tribal Peoples Convention 169 of 1989</i>	20	
<i>Freedom of Association and the Right to Organise Convention 87 of 1948</i>	149	<i>All</i>
<i>The Right to Organise and Collective Bargaining Convention 98 of 1949</i>	159	<i>All</i>
<i>Occupational Safety and Health Convention 155 of 1981</i>	53	<i>South Africa, Seychelles, Lesotho and Zimbabwe</i>
<i>Discrimination (Employment and Occupation) Convention 111 of 1958</i>	168	<i>All</i>
<i>The Equal Remuneration Convention 100 of 1951</i>	166	<i>South Africa, Angola, Botswana, DRC,</i>

		<i>Lesotho, Malawi, Mauritius. Mozambique, Seychelles, Tanzania, Zambia, Zimbabwe</i>
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4.2 Relevant Labour Law Definitions and Concepts

In South Africa most labour legislation defines an employee as follow (eg the Labour Relations Act 66 of 1995):

“any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and
any other person who in any manner assists in carrying on or conducting the business of an employer.”

There is also a presumption that assists workers who must prove that they are “employees” (section 200A). It is a rebuttable presumption that comes into effect, regardless of the form of the contract between two parties, if any of a list of 7 factors is present (similar to the ILO Employment Recommendation). The Labour Relations Act 66 of 1995 (the Act) includes the notion of a temporary employment service in section 198 of the Act. The section deems the labour broking firm to be the employer of the subcontracted worker, and, in addition, joint and several liability is created in certain circumstances (eg in the case of contravention of legislation, arbitration awards or sectoral determinations in terms of the Basic Conditions of Employment Act 75 of 1997). However, joint and several liability is not applicable in the case of unfair dismissal disputes (see the discussion below). In certain instances the Minister of Labour may also “deem” certain categories of persons as “employees” for prescribed purposes.

The “employee” definitional hurdle, which excludes most informal economy workers from social insurance schemes (for example the self-employed and (in)dependent contractors), and often also excludes them from the protection of labour legislation needs to be addressed. With regard to social security this could easily be achieved by broadening this concept in social security laws, as was done in other South African labour laws. Furthermore, it has previously been argued that a wide interpretation of the notion of “employee” as found in current definitions in labour legislation is possible – it is just not practised in the country. The issue of “economic dependency” features strongly in such a wider interpretation.

Another mechanism to bring workers within the scope of protective measures is sectoral determinations. Collective bargaining agreements can also be extended, subject to the representativeness requirements set out in section 32 of the LRA.

4.3 The way forward

All countries are currently faced with challenges regarding a labour market in flux in a globalised world. In Europe, the policy debate seems to centre on whether

policymakers will listen to calls made for greater flexibility or whether they will continue to place their trust in a “flexicurity” model. Consequently it is clear that the traditional dependence of labour law on the contract of employment will have to be addressed. As Hyde (2006:60) states:

“Labour law has a bright future, once it understands itself as a collection of regulatory techniques, not a side-car on the motorcycle of subordinate employment”.

Recently questions have been raised as regards the outlaw of temporary employment agencies (labour brokers), particularly in South Africa and Namibia, and this would represent a major regulatory intervention in the labour market. Opponents to such moves will, however, refer to section 22 of the Constitution of South Africa, which provides every citizen with the right to choose their trade, occupation or profession freely. It therefore seems probable that the South African regulatory framework will shortly undergo major changes. It is submitted that at a minimum the current regulation of unfair dismissals in such triangular relationships needs revision.

5. Voice and representation

Through collective action, social insurance schemes can be established to cover the needs of informal workers, although the task of organising these workers can be demanding and requires innovative approaches. Historically, unions have provided social protection to their members. Workers in the informal economy have the right to protect themselves through organisation, and to resist exploitation through collective action. Self-employed workers need mutual aid and solidarity to rise out of poverty and dependency. As far as social security protection is concerned, it must be remembered that the role of unions is not just to negotiate with the employer, but also to engage in social and political bargaining with public authorities and legislative bodies. It is clear that even in instances where employees in the informal economy may in principle be covered by statutory protection, the fact that they are often unaware of these rights result in the non-uptake of such protection measures. Surveys done on organisations representing street traders in South Africa (Bennett 2003) and other informal workers in Malawi, Mozambique and Zambia indicated that these organisations are confined to a specific geographical area and often only display links with local governments. Membership fees are their main source of income and the majority of members are still male. (The problems facing women are more severe as they face the dual responsibilities of work and family.) These organisations often face structural constraints and their effectiveness is diminished by the irregularity of employment and income of their members.

In South Africa the South African Clothing and Textile Workers’ Union (SACTWU) found that organising in the informal economy is a gruelling exercise as they had to use significantly more resources to recruit these workers. As mentioned in the Small Enterprise Development (SEED) working paper of the ILO (Bennet 2003:41), SACTWU realised that by offering non-traditional benefits such as funeral benefits, educational bursaries, access to primary health care

and training facilities, they attract and retain members from the informal economy. Benefit packages can be an incentive to recruit members but should be supported by medium- and long-term strategies to strengthen the ability of informal workers to organise. The long-term aim must be to bring about social and economic change. Cooperatives can provide for a link between formal and informal economies and together with trade unions can strengthen organisation in the informal economy to the benefit of their members (Trebilcock 2005).

5.1 Case Studies

In addition to publicly adopted approaches to extend social security protection, informal workers in the following countries have been able to provide for themselves and extend protection through collective action.

5.1.1 Tanzania

A large number of market vendors of the Mwanayamala cooperative in Dar-es-Salaam pay a daily rate of Tsh. 20-30 for renting their stands (Technical Committee on Social Security 2005:44). These contributions finance amongst others two social benefits: in the case of death an amount of Tsh. 12,000 is paid for a funeral and in the event of hospitalisation, Tsh. 3,000 is taken to hospital for food and medicines. It is clear that an effective social insurance scheme is in existence here.

5.1.2 India

India serves as a good example indicating that it is possible to extend coverage to informal workers. Various social insurance schemes designed for specific occupational groups exist and are administered by the state-owned Life Insurance Company (LIC) and General Insurance Company (GIC). In India, social assistance concentrates on specific occupational groups and the welfare fund introduced by government at both national and state level is an example of the top-down approach. The Minister of Labour administers the central funds for *bidi* workers as well as workers for whom no direct employer-employee relationship exists. These schemes exist and are implemented without any contribution from government. Social assistance is provided, for example, to *bidi* workers and cane workers through earmarked taxes. The benefits provide for health education, health facilities, water and wash supplies and family welfare. Though the system of financing through earmarked taxes is secure, the administrative costs can be high. This discussion however will focus on the Self Employed Women's Association (SEWA), highlighting the remarkable work that they have done through organising their members.

5.1.3 Self-Employed Woman's Union (SEWU) – The South African counterpart

SEWU was launched in 1994, a time of political change, and is modelled on SEWA in India (Skinner & Devinish 2005:46). SEWU is open to all adult women involved in "economic activity" who earn their living by their own effort without

regular employment, targeting the lower end of the informal economy. The exclusion of male members is very much criticised by COSATU but SEWU argues that this is not only to confront a patriarchal society but also the gendered nature of informal work. SEWU's members consist predominantly of black women and surveys indicate that their income is extremely low. They have a gender-specific agenda as the majority of supporters in many issues driving social movements tend to be women, yet most of the strategic leaders in these organisations tend to be men. Much emphasis was placed on policy interventions at local and international levels. Another important activity of SEWU is membership training and this has given members confidence and skills to better establish themselves in their work. SEWU assisted members to obtain loans, by making existing institutions more accessible to their members. The access to loans was combined with extensive training. Unfortunately, SEWU has been experiencing huge funding problems, threatening their long-term sustainability (Skinner & Devinish 2005:50).

6 EXTENDING SOCIAL PROTECTION: EXAMPLES FROM THE SADC REGION

6.1 The Southern Africa Development Community (SADC)

A characteristic of the Southern Africa Development Community (SADC) region is that most of the social security schemes provide protection only to those in formal employment (in the formal economy) and this despite the continuous growth of atypical employment and the informal economy. The Charter of Fundamental Social Rights in SADC contains important provisions relevant to labour and social security protection of workers, such as the harmonisation of working and living conditions, creating an enabling environment for purposes of providing protection of health and safety, consultation and participation of workers, employment and remuneration and education and training of workers. These rights apply to every worker regardless of status and type of employment. It must however be noted that this charter is not as such directly enforceable.

7 DECENT WORK

As it is clear that vulnerable groups are often found working in the informal economy and under atypical working arrangements it seems that reducing decent work deficits in the informal economy will definitely improve the conditions of these workers (including women, children and migrants). It is the recognition of the International Labour Conference that "all those who work have rights at work, irrespective of where they work" that informs the basis of this whole contribution.

8 SOME EXAMPLES OF LEGISLATIVE ATTEMPTS TO EXTEND SOCIAL PROTECTION

Several governments have realised that the informal sector is a growing rather than a passing phenomenon and that the extension of social protection is of vital importance and attempts have therefore been made to extend protection through legislation. For example, the Unorganised Workers Social Security Act 33 of 2008, India; the Social Security Bill, 2005, United Republic of Tanzania; and the The Social Security Act 34 of 1994 of Namibia.

9 CONCLUSIONS

The plight of atypical workers and workers who work in the informal economy can easily seem so immense that one might be tempted to think that there is nothing to be done to improve their lives. The approach of this contribution is that much can be done (and in actual fact has been done) to extend protection to the marginalised and increasingly unprotected workers in the globalised world of work that we live in.

The writers do not argue that the informal economy will disappear and that all economically active persons will at some stage in the future be absorbed into the formal economy where they will be protected by the law. Instead, we have argued that the informal economy is but a part of one organism, a gamut with an upper and lower level. There will constantly be movement between the upper and lower levels and protection may be lacking in parts of the economy or in the whole thereof in some respects. What the writers believe is critical is that the place where you work should not ultimately determine whether you enjoy labour, social or other protection. Neither should the type of work that you perform be the deciding factor. Rather the relationship in which you function or the nature of such relationship (ie economical dependency) should weigh heavily in a determination of one's status and rights. Furthermore it is imperative that not only government or business decides what status and rights workers should enjoy – civil society must play an important role in this regard.

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