

Labour Regulation and Development

Socio-Legal Perspectives

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5. Labour law and development viewed from below: What do case studies of the clothing sectors in South Africa and Lesotho tell us?

Marlese von Broembsen and Shane Godfrey

1. INTRODUCTION

Labour law is in a liminal space. Its normative premises are being called into question by the neoliberal hegemony, as is its contribution to economic development. Labour law scholars are embracing the challenge in numerous ways. Some are responding by rewriting labour law's normative goals.¹ Others argue that its normative goals of redistribution and social justice need to be realised through 'constituting narratives'² other than collective bargaining, such as constitutionalism,⁴ human rights⁵ and development.⁶ Still others are exploring ways of extending labour law's coverage to include non-standard work and workers in the informal economy.

This chapter analyses the relationship between development and labour regulation through case studies of the clothing sector in two neighbouring developing countries: South Africa and Lesotho. Our argument is that if labour regulations are to be developmental, particularly in developing countries, the labour law and development project needs to incorporate the following foci into its agenda.

¹ See, for example, Deakin (2011), or Langille (2006) who argues that redistribution should not be a goal in and of itself. Instead, he argues, the normative function of labour law should be redistribution as a means of enabling workers to live lives that they have reason to value.

² See Hepple (1986), Fudge (2011), Davidov (2007) and Weiss (2011) for different articulations of these goals.

³ This term was first coined by Langille (2006: 13).

⁴ See Arthurs (2011).

⁵ See, for example, Alston (2004) and Sankaran (2011).

⁶ See, for example, Langille (2006), Kolben (2010) and Deakin (2011).

First, labour regulation must be integrated on equal terms with trade, investment and industrial policy at national and regional levels. The case studies clearly illustrate Arthurs' contention 'that market dynamics are often a more powerful determinant of decent labour standards than regulatory legislation; that states shape labour markets and the relations of market actors as effectively by trade, fiscal, monetary, immigration, social welfare, and education policies as by labour laws' (2011: 18). In South Africa (which has a comprehensive labour regime) the conflicting goals of labour regulation, on the one hand, and of trade and industrial policy, on the other, have had the effect that labour regulation has reconstituted the labour market but in such a way that redistribution occurs between the workers themselves, rather than between capital and labour.

Second, labour law must develop a regional and global framework, since the development project is a global one. Notably, it must move away from models focusing on the employment relationship and sector-based collective bargaining between employers and employees (essentially a national model) to models that (a) focus on regional and global value chains (often straddling sectors), and (b) seek to govern the 'lead firms' in buyer-driven value chains (Gerelff 1994: 96–99). In the clothing industry, the lead firms are the major retailers. Until now, labour law has regulated national labour markets, whereas the locus of work and generation of value is increasingly in global value chains that most often straddle more than one jurisdiction. The implications of this disconnect are explored in the case studies. Value chains for mass-produced consumer products, such as clothing, are buyer-driven. As buyer, the retailer has enormous power to structure the distribution of the risks and costs of the entire value chain. The case study in South Africa illustrates how retailers exercise this power, and the impact this has on the ability of firms to comply with minimum wages set in a national collective agreement.

Third, the labour law academy needs to contest the development orthodoxy that reifies economic development over distributive outcomes. The case studies illustrate the negative distributive consequences for workers of the orthodox development narrative which typically underpins trade and industrial policy. Labour law scholars should eschew the temptation to argue for labour regulation's contribution to market efficiency, we argue, as the risk is that such a strategy serves to pave the way for labour law's co-option into the neoliberal project.

The chapter is structured as follows. It starts with a discussion of development (section 2). This is important because, unlike labour law where different articulations of its normative goals are broadly in alignment with each other, the normative goals of development are contested. There follows an outline of labour law approaches to development (section 3).

The labour law and development project needs to analyse the redistributive implications of different development paradigms and align itself with a vision of development compatible with its normative goals. In section 4 we discuss our case studies of the clothing sector in South Africa and in Lesotho; and finally present an analysis of our findings in section 5, and our conclusion (section 6).

2. DEVELOPMENT: CONTESTED PARADIGMS

The orthodox development discourse has conceptualised development primarily in economic terms, and has been concerned with two key questions: (a) how to achieve and measure economic development; and (b) whether the principal institutional driver of development should be the state or the market.⁷ Dissenting voices⁸ have challenged the privileging of economic over social development, and their views have found purchase in instruments such as the UN's Right to Development⁹ and the UNDP's Human Development Index. As we explore below, these voices create space for the defence of labour law as developmental. Nonetheless, the orthodox view remains that development essentially refers to economic development, which has often been framed in opposition to legal frameworks, such as labour law, that are perceived to hinder growth.

The prominent role that Keynesian economics gave to the state strongly influenced development thinking in the period after 1945.¹⁰ Demand management had contributed to the rise of the welfare state in advanced industrialised countries and thus resonated with the new post-colonial states in the developing world. However, in that period development was understood as a continuum of stages of industrialisation or modernisation along which countries moved, essentially in isolation from each other.

However, by the 1980s the post-war consensus was shattered, and there

⁷ For example, economic development has been understood as industrialisation, as technological modernisation, as an increase in the gross national product, or as an increase in per capita income.

⁸ See Martinussen (2004) for a comprehensive view of the history of development theories, which includes a discussion of the dissenting sociological and political development theories. See also Kennedy (2006) for a history of development, with a focus on the role of law in different eras.

⁹ United Nations General Assembly Resolution 41/128 of December 1986.

¹⁰ For the purposes of this chapter, this is a stylised version. This period was dominated by a number of 'interventionist' economic theories, such as welfare economics, Keynesian economics and early theories within development economics. See Chang and Rowthorne (1995) for a detailed discussion.

was a loss of faith in the state as development protagonist (Kennedy 2006). A new, neoliberal economic development paradigm was in the ascendant, one which combined Austrian libertarianism, for its moral and philosophical rationale, with neoclassical economics, which provided most of the analytical tools (Chang 2002). The market was now promoted as the lead actor in development: 'the economy was now imagined as a "market" in which individual economic actors transact with one another responding to price signals and thereby allocating resources to their most productive use' (Kennedy 2006: 129). Accordingly, the orthodox development approach focused on macroeconomic reform with the objective of creating markets 'free' of state interference, based on the conviction that perfectly competitive markets are the best allocators of scarce resources. This approach was bolstered by the policies of the global financial institutions (GFIs) that made aid to developing countries conditional on the implementation of macroeconomic reforms (notably trade liberalisation, privatisation and the reduction of subsidies and social expenditure).

By the early 1990s, the GFIs' macroeconomic structural adjustment programmes had attracted wide-ranging criticism.¹¹ Chastened by the failure of their structural adjustment programmes, the GFIs increasingly acknowledged the role of social factors in development. The result was a 'reformed' development approach that incorporated the macroeconomic policies characteristic of the 1980s (trade liberalisation, privatisation and the removal of subsidies), but included governance requirements in the list of conditionalities (such as rule of law¹² and 'good governance'), and recognised the legitimacy of social expenditure that contributes to economic growth (Rittich 2008). But though the neoclassical model has been reformed, its key tenets remain unshaken. The incorporation of social expenditure (ranging from primary healthcare and primary education to gender equality but excluding labour rights) is contingent upon its contribution to economic growth. In other words, as Sen (1999) points out, the social is incorporated into the development agenda on instrumentalist grounds.

Sen is a prominent critic of the 'narrow' view that equates development with economic growth. His argument is not new, but he has been 'heard' by mainstream economic development scholars. So much so that his 'capability approach' has been appropriated by development, labour law and international law scholars across the political spectrum (Du Toit

¹¹ See, for example, Stiglitz (1999).

¹² See Trubek (2009) and Santos (2009) for a critique of the World Bank's Rule of Law work.

2005; Chimni 2008). For Sen, development means 'expanding' people's 'freedoms' so that they can live lives they value and, in particular, participate in the social, political and economic life of their community. He rejects the reductionist definition of poverty as lack of income, arguing that, even if people have the same income and access to opportunities, differential capabilities determine their ability to convert these opportunities into freedoms and to lead lives they value. Therefore social expenditure (on health and education, say) is 'instrumental' to economic growth but is also 'constitutive' of development, in that capabilities are strengthened. Labour rights, such as the right to freedom of association, to benefits and to protection, contribute to the expansion of workers' freedoms and to their participation in social and economic life and, thus, are constitutive of development irrespective of their contribution to economic growth.

According to Sen, the market is an institution that contributes to (or diminishes) economic freedom. He makes two important points in this respect: first, individual 'freedom of transaction' being the freedom to decide where to work, under what conditions and encompassing the 'freedom to achieve' is constitutive of development (1999: 116–117). Individual freedom to transact freely should therefore be upheld, irrespective of the extent to which the 'market mechanism' contributes to income or to other economic inequality. Second, non-market institutions are as important as the market in promoting freedom.

Sen's approach provides an alternative normative understanding of development, but has nevertheless been co-opted by orthodox theories of development (Du Toit 2005; Chimni 2008). This co-option takes the form of legitimising social goals but subordinating them to macroeconomic reform imperatives.¹³ So, implicit in the orthodox view of development is a reliance on the market to realise social outcomes. Nowhere is this more evident than in the context of work: 'work and labour markets have become newly important to the realization of the social dimension of contemporary development and market reform projects' (Rittich 2008: 235). Not only is participation in the economy the primary strategy to alleviate poverty, but it is viewed simultaneously as the primary means of realising

¹³ Du Toit argues that in an attempt to operationalise Sen's vision, economists have tried to measure the absence of capabilities by reducing them to 'non-economic' indicators in order to create a more multi-dimensional 'poverty score'. This reduction of the complex interplay of socioeconomic deprivations that result in conceptualising poverty in terms of numerical scores misses Sen's point entirely. Chimni (2008) suggests that this co-option has been helped by the absence in Sen's theory of development of an analysis of political economy, and of the role of collective action in social change.

a range of social and economic objectives, including rural development, social inclusion and gender equality (Rittich 2008; World Bank 2013).¹⁴ In the words of the 2013 *World Development Report*, 'development happens through jobs'. Thus poverty alleviation strategies (encapsulated by terms such as 'pro-poor market development')¹⁵ focus on the inclusion of poor people in the economy, arguing that inclusion will lead to a set of positive social outcomes, but without expressing concern for the terms of their inclusion.

Thus, whether the work is 'decent' or how risks, bargaining power and value are distributed among the newly incorporated workers and the other market actors are questions simply absent from development discourse. Arguably, the weight Sen places on 'freedom of transaction' lends itself to such appropriation. The real contradiction that lies between individual freedom to transact and the role of institutions in the market, especially labour market institutions, seems to be unacknowledged by Sen.¹⁶

Several labour law scholars (Langille 2006; Kolben 2010; Deakin 2011) embrace Sen's development framework. For example, Kolben argues that:

[L]abour development should be grounded in a capabilities framework rather than a market-freedom or flexibility-centred framework. . . . [A] development approach to labour regulation recognises work as a central source and locus of unfreedoms. Consequently labour regulation can and should play an important role in achieving development through increasing workers' capabilities. (Kolben 2010: 36)

Kolben enlists Sen's capability approach as an alternative to the orthodox view of development as economic growth. He argues that if labour market institutions contribute to developing workers' capabilities, they are developmental. He therefore ascribes to Sen's position that, irrespective of the instrumental role that labour market institutions may play (in contributing to market efficiency), those institutions are constitutive of development if

¹⁴ In the words of the *World Development Report*: 'Jobs are the cornerstone of economic and social development. Indeed, development happens through jobs. People work their way out of poverty and hardship through better livelihoods' (2013: 1).

¹⁵ Specific pro-poor frameworks that are used by global aid agencies include: Making Markets Work for the Poor, Sustainable Livelihoods, and Legal Empowerment of the Poor, all of which focus on the economic participation of poor people but show no discernible concern to challenge the terms of their inclusion.

¹⁶ For a discussion of the lacunae in Sen's work regarding labour rights and labour market institutions, see Kolben in this volume, Chapter 3.

they increase workers' capabilities. Langille embraces Sen's capability approach for different reasons. Taking issue with Davidov, he argues that labour law's traditional normative role of redistribution is 'too narrow' in that redistribution should not be a goal in and of itself. Instead, he argues, the normative function of labour law should be redistribution as a means of enabling workers to live lives that they have reason to value. Sen's 'radical ideas' are, Langille argues, an invitation for labour law scholars to 're-evaluate[our] true ends – as opposed to our means for achieving them' (2011: 116).

Adopting a more critical position, Fudge (2011) argues that Sen's appeal for labour lawyers is that labour rights are constitutive of development, and that the capability approach can be married with market-oriented efficiency goals. Herein lies the problem: labour law's normative agenda has to be able to contest market ordering, which the capability approach fails to do.

Chang (2002: 539) adopts a more radical stance that challenges 'marginal tinkering' with the neoliberal framework in order to emphasise the distributive function of institutions.¹⁷ He explicitly incorporates the political into economic theory, arguing that individuals' and firms' decisions are influenced by institutions – both formal (such as laws and treaties) and informal (including norms and values). These laws, norms and values are contestable (and thus political), and therefore in a global context vary and affect economic actors in a different way. Chang argues that institutions shape individuals (or firms) themselves and, conversely, market actors shape institutions. In other words, they are mutually constitutive (Chang 2002). Labour regulations are market-constituting in that they change market actors' behaviour, but market actors also shape these institutions (Estlund 2010). This is illustrated in the case study on Lesotho: transnational retail corporations and brand merchandisers include compliance with national labour legislation as a term in their supply agreements, which shapes the labour market.

Deakin has also discussed the 'market-constituting' role of labour law, but characterises the interaction between institutions and markets as co-evolution, which sees the economic and legal systems as developing in parallel with each other. This gives a functionalist quality to the relationship between the two, whereas Chang emphasises the political, viz. that markets and institutions can clash and in so doing reshape one another (Deakin, 2011: 162–163). The latter approach is arguably much closer to the empirical reality of how workers' rights are fought for in the context of

¹⁷ IPE scholars draw on Marx, Veblen, Schumpeter, Polanyi and Shonfield.

development. The way regulation constitutes the labour market is therefore as much about contestation as it is about serving functional ends.

If we accept such a constitutive view of the market, a number of important implications follow. First, if the market is not natural but is constituted by various actors, and if one actor, namely the state in the form of public law, is 'absent' from the market, it does not follow that the market is unregulated, or 'free' as the orthodox development approach would assert. Instead, the regulatory regimes of other market actors (specifically, corporations) will dominate and the distribution of power and risk between market actors will shift accordingly.

Moreover, the state is never entirely 'absent' since a perfectly competitive market relies on property rights that are clearly defined, protected and can be traded, and on contracts that are enforceable and enforced by the state (Kennedy 2006; Kaufman 2009; Trubek 2009). The state's role in enforcing rights created by private law, notably contractual and property rights, is therefore critical, whether or not public law has much of a role to play (Easterbrook and Fischel 1991; Trubek 2009). Efficient markets therefore rely on states to enforce private law rights, and these rights distribute power, risk and rewards. Moreover, Polanyi (2001) reminds us that the state (particularly in developed nations) plays a critical role in maintaining labour as a fictitious commodity by providing safety nets for the unemployed, educating the future workforce and regulating the migration of workers.¹⁸

While state action is constitutive of the market, whether or not it is deemed 'an interference' in the market depends on whether there is political consensus on the legitimacy of the structure of rights and obligations underlying a particular market (Chang 2002). So, for example, in developed countries, banning child labour is not considered 'state intervention' in the labour market because the prevailing hegemony is that children's right not to work trumps producers' right to employ whoever is most profitable to employ. Politically, it is 'no longer even a legitimate subject of policy debate' (Chang 2002: 543, original emphasis). However, in those developing countries where the right of children not to work is contested, it is considered a legitimate policy debate (Chang 2002: 543). Likewise, environmental regulations (aimed at curbing factory pollution and automobile emissions) were initially considered an interference with business freedom, whereas now the political consensus in some countries has shifted and citizens' right to a clean environment trumps a firm's

¹⁸ For a related discussion of what Deakin calls 'systemic integration' between institutions and markets see Chapter 2 of this volume.

right to choose the most profitable technologies (Chang 2002: 543). Therefore,

... depending on which rights are regarded as legitimate and what kind of hierarchy between these rights and obligations is (explicitly and implicitly) accepted by members of that society, the same state action could be considered an 'intervention' in one society and not in another. And once a state action stops being considered an 'intervention' in a particular society ... debating their [*sic*] 'efficiency' becomes politically unacceptable. (Chang 2002: 543)

The problem, of course, is that in a world in which products can move into and out of countries with very few barriers, state 'interventions' in the market are effectively in competition with one another. The pressure thus created influences whether an intervention in a market is politically legitimate or not. For example, as our case study shows, the impact of cheap clothing imports into South Africa has given rise to a heated debate about the legitimacy of the centralised bargaining institution for the sector and the authority of the Minister of Labour to extend its agreements to all clothing employers. These institutions previously enjoyed legitimacy but are now perceived as so illegitimate that a number of court challenges to the extension mechanism have been launched in the country.

Chang's institutionalist political economy perspective provides a useful macro-theoretical framework, but global value chain analysis, with its roots in world systems analysis,¹⁹ has a much stronger empirical and policy orientation. The new international division of labour which began to emerge some 40 years ago saw a dispersal of manufacturing operations from developed to developing countries which had limited regulation and lower labour costs. The global value chain (GVC) concept is primarily intended to help in understanding what this shift means for development. GVC analysis traces the different stages in the production and sale of a good, from raw material to final product and through to the retailer and consumer. A key element in GVC analysis is governance, a concept used to understand the power exerted by the various participants in the value chain (Gereffi et al. 2005). Another element is how value is distributed to the various operations along the value chain. Gereffi, a leading GVC scholar, distinguishes between two types of global value chain according to where the power lies, namely whether the value chains are producer-driven or buyer-driven (1994: 96–99). The production and distribution of most consumer goods takes place in buyer-driven value chains, which are controlled and coordinated by the major retailers and brand

¹⁹ See Hopkins and Wallerstein (1994).

merchandisers. The production and sale of clothing is a classic buyer-driven value chain.

Much of the research conducted using GVC analysis has employed the concept of 'economic upgrading' to determine whether firms in developing countries that participate in GVCs are able to increase the value they accrue in the chain.²⁰ More recently, however, researchers have added 'social upgrading' to GVC analysis. In practice, social upgrading is generally measured using the four pillars of the ILO's Decent Work concept, i.e. employment creation, fundamental rights at work, social dialogue and social protection (Barrimentos et al., 2011). Effectively, this has led to the concept of governance being broadened to include not just the power exercised within value chains, but also the power exerted on firms by the regulatory and institutional frameworks within which they are embedded. Through the addition of the social upgrading element and the concomitant expansion of the concept of governance, GVC analysis has explicitly incorporated a concern with redistribution (through labour regulation) into how it conceptualises development. But the notion of governance also takes account of the effect of trade agreements, industrial policy and the like on economic and social upgrading (or downgrading).

The value chain literature highlights another important dimension of social upgrading, namely, consumer pressure on 'lead' firms (such as retailers) regarding wages and working conditions in their supplier factories. The 'reputational damage' suffered by retailers and brand merchandisers from exposure of poor working conditions in supplier factories has spawned a management sub-discipline – corporate social responsibility (CSR) – that is tasked with driving compliance with labour standards down the value chain. However, studies show that despite considerable energy and expenditure on CSR, the results are unimpressive.²¹ The challenge is how to improve and better integrate CSR and local labour enforcement so that social upgrading occurs at the same time as economic upgrading. A more ambitious project would be the development of regulation that would hold 'lead' firms to greater account for conditions in supplier factories.

²⁰ The process was initially described as 'industrial upgrading' but later changed to economic upgrading. Four main types of economic upgrading are identified in the literature: process upgrading, functional upgrading, product upgrading and chain upgrading.

²¹ See Pike and Godfrey (2012) and the references cited at 3–4.

3. LABOUR LAW APPROACHES TO DEVELOPMENT

Labour law scholars who argue that labour market institutions can embody development goals base their argument on two approaches to development, broadly speaking. Reflecting a largely new institutional economics (NEI) perspective, the first approach argues that labour market institutions can remedy market failures (caused by factors such as asymmetrical access to information or failure to account for transaction costs),²² and thereby contribute to market efficiency and economic development (Collins 2002; Kaufman 2009; Deakin 2011). For example, Deakin (2011:160) argues that minimum wage regulation can remedy market failure caused by asymmetrical information allowing employers to 'depress wages below the market-clearing rate'. Minimum wage regulation can therefore play 'a market-correcting role'. This resonates with the *World Development Report* (World Bank 2013: 3), which endorses labour regulation that 'address labour market distortions', provided they are not 'a drag on efficiency'. Specifically, the Report states that: 'The centrality of jobs for development should not be interpreted as the centrality of labor policies and institutions' (2013: 3).

Although strategically it may be an important defence of labour market institutions to argue for their market-correcting role, there are risks involved. As Fudge (2011) points out, this developmental argument for labour law fails to acknowledge that there are many instances in which labour regulation favours considerations of equity over efficiency. In such instances, the ideological imperatives of economic development and labour law are incompatible. However, the NEI view leaves little political space to challenge the underlying premise of the neoliberal, orthodox view of development that market ordering is natural, and therefore to challenge the distributional consequences of market allocation.

The second approach (and some authors present a hybrid) relies on Sen's conception of development and argues that labour market institutions are developmental because they increase workers' capabilities. Arthurs reminds us that 'labour law . . . is an experiment in social ordering' (2011: 16).²³ Its very essence, therefore, is to contest market ordering and, as we have argued, Sen's paradigm (which is radical for the way it has re-envisioned development) has nevertheless been co-opted by the

²² See institutional economist perspectives, for example, in Kaufman (2009). See also this argument in Collins (2002).

²³ See Kolben (2010), Deakin (2011) and Langille (2011).

(Theron 2010). Informal employment has grown, but unemployment remains high. These trends have focused attention on the role that labour regulation is allegedly playing in stifling employment growth. The spotlight has fallen, *inter alia*, on the clothing industry, a labour-intensive, low-wage sector that has shed thousands of jobs over the past decade or so. A sharply divided debate on this sector has highlighted the role of labour regulation, trade liberalisation and industrial policy as factors behind its restructuring and the decline of formal (regulated) employment.²⁴ In essence, this debate reflects contesting views of what constitutes development and a clash between workers' rights to decent work and employers' rights to pursue profit maximisation without constraints.

Lesotho is an extremely poor country, with limited labour regulation and a very small manufacturing base. The exception is its clothing industry, which mirrors the types of export-oriented clothing sectors that emerged in many developing countries during the Multi-Fibre Agreement (MFA) regime. Clothing production began only in the 1990s, all firms are foreign-owned, and all production is exported, initially only to the United States (US), but currently to the US and South Africa. The sectors in both countries are linked by the South African Customs Union (SACU), which allows Lesotho's clothing manufacturers to export their products duty-free to South Africa. Because Lesotho has limited and poorly enforced labour regulation, South African manufacturers relocate to Lesotho to lower their labour costs. This relocation points to a stark contradiction: development and employment in Lesotho (albeit at low wages) is paralleled by a crisis in the South African industry, steep formal job losses, and pressure on collective bargaining institutions and on labour standards.

4.1 Decline and Restructuring of the South African Clothing Sector²⁵

The South African clothing sector differs from its counterparts in most developing countries. First, it developed early, with clothing firms being established at the start of the 19th century. Second, it has always focused on the domestic market, which is quite large and for years was protected by an Import Substituting Industrialisation (ISI) strategy. The domestic orientation was strengthened by economic sanctions against the country in

²⁴ An example of one side of the debate is the working paper by Natrass and Seekings (2013), which elicited sharp responses from the employers' organisation (AMSA), the trade union (SACTWU) and others.

²⁵ This section and the following section on Lesotho draw extensively on Godfrey (2013).

the 1980s. By the early 1990s, the sector supplied 93 per cent of local clothing demand, exporting only a small proportion of total output (October, 1996: 6). In the light of the sector's domestic orientation, clothing manufacturers have always been dependent on the country's retailers. Initially the retail sector comprised many small, independent firms. But, as in many industrialised countries, the retail sector became increasingly concentrated in the latter half of the 20th century. Currently, five retailers account for over 70 per cent of formal clothing sales in the country (Vlok, 2006: 228; Morris and Reed, 2008: 10). These retailers exercise immense power in the value chain, especially since local manufacturers have enjoyed little success in exporting to external markets.

Third, almost from its inception, workers in the clothing sector were organised by trade unions and the sector was characterised by well-established, centralised collective bargaining structures. Industrial councils were established in Johannesburg, Cape Town, Durban and Port Elizabeth in the late 1920s and 1930s. The industrial councils' agreements were generally extended to all employers and employees within their jurisdictions.²⁶ From the 1940s, rural areas outside the jurisdiction of the industrial councils fell under an administered minimum wage (i.e. a wage determination) that set wage rates lower than those in the industrial council agreements.²⁷ The differential in wage levels induced geographical dispersion, as some manufacturers sought to avoid industrial council regulation (Barker, 1962). This dispersion increased from the 1960s owing to government programmes that provided incentives to manufacturers to locate operations in 'decentralised areas.'

From the early 1990s onwards the clothing industry was in a state of ongoing crisis. The reasons relate to trade and industrial policy, and also to changes to the labour environment. First, trade and industrial policy were not synchronised. The country engaged in rapid trade liberalisation from 1994, following the conclusion of the Uruguay Round of the General Agreement on Tariffs and Trade (GATT). Thereafter, imports of clothing increased rapidly and the output of South African clothing manufacturers declined. The Government's efforts to assist the industry in restructuring

²⁶ Agreements could be extended by the Minister of Labour to cover all employers and employees within the jurisdiction of an industrial council if the employers' organisations and trade unions that were parties to the agreements were held to be 'sufficiently representative' and the Minister deemed it expedient to extend the agreement.

²⁷ A wage determination could be issued in terms of the Wage Act 5 of 1957 for sectors or areas where there was limited trade union organisation or collective bargaining.

and increasing competitiveness lagged well behind the tariff reduction. Initial attempts at industrial policy sought to create a knowledge economy built on innovation and the hi-tech sectors, ignoring labour-intensive sectors such as clothing. It was over a decade before this oversight was addressed.

Second, clothing manufacturers failed to adjust to the new competitive environment. They persisted with outdated technology, low levels of training, poor management systems, and inefficient production processes (Swart Commission 1994).

Third, the large regional unions became bureaucratic and passive. Collective bargaining in the regional industrial councils was perfunctory, leaving clothing wage levels lagging behind the rest of the manufacturing sector (Barker 1962). But worker militancy rose during the 1980s, resulting in a series of mergers in the sector that led to the establishment of the South African Clothing and Textile Workers' Union (SACTWU). The union has raised wages and narrowed wage gaps between regions and rural areas.

4.1.1 Trade and industrial policy

Over the past two decades, trade and industrial policy have moved at very different speeds.²⁸ In the 1970s and 1980s, the apartheid Government slowly shifted away from the ISI strategy (thereby changing the nature of import protection), and started to promote exports. In the early 1990s, however, the Government undertook a complete overhaul of the tariff system and implemented steep tariff reductions as part of its commitment to the Uruguay Round of GATT. The newly elected ANC Government continued with this commitment after 1994. But a coherent set of supply-side measures that would help clothing firms improve their competitiveness came only much later. In the decade after 1994, the new tariff regime

²⁸ The lack of synchronicity between trade and industrial policy was presaged by the Government's rejection of the Swart Commission's recommendations. The Commission (also known as the Panel and the Task Group) was a multi-party body set up in 1992 with two objectives for the clothing sector: to make it internationally competitive and export-oriented; and to make it achieve labour-absorbing growth. It produced a range of recommendations regarding technology upgrading, productivity, training, etc. as well as proposing two different schedules of tariff reductions, its point of reference being the apartheid Government's commitments made in the Uruguay Round of GATT. The Government ultimately chose a schedule somewhere between the two recommendations, which introduced a faster phase-down than required by GATT. But it rejected all but one of the Commission's proposals regarding supply-side assistance for the sector (Hirschsohn et al., 2000: 118–120; Gibbon, 2002: 16).

therefore drove restructuring in the clothing sector. Its most visible impact was a rapid increase in clothing imports, especially from China. After increasing steadily through to 2002, clothing imports accelerated sharply from 2003 (Vlok, 2006; Morris and Reed, 2008; Staritz, 2010). Exports by local manufacturers failed to offset the share of the domestic market lost to imports. Local firms downsized or closed, and thousands of formal jobs were lost.

Three measures were available to the Government to assist the ailing clothing sector. The first two could be categorised as trade policy, and the third as industrial policy. First, the country invoked temporary protection from imports through safeguard measures approved by the World Trade Organization (WTO); and second, it sought benefits from favourable terms in trade agreements or unilateral preference arrangements, such as the US's African Growth and Opportunity Act (AGOA). The third measure was to deliver supply-side programmes to help firms become more competitive.

The first two measures have brought little relief to the clothing sector. SACTWU kick-started the process to introduce WTO-approved temporary safeguard measures, which were implemented against 31 lines of Chinese clothing and textiles from 2007 to 2009. This had the perverse consequence of stimulating South African retailers to diversify and source from other East Asian countries. When the quotas ended, Chinese imports rapidly reached previous levels. Furthermore, the temporary relief did not see local output increasing and neither did it stop job-shedding.

Trade agreements have also done little for the industry. The effect of the South African Customs Union (SACU) has been to undermine the industry in South Africa by opening up the domestic market to duty-free imports of clothing from other member countries. The more recent Southern African Development Community (SADC) Free Trade Protocol has had similar negative consequences, with sharp increases in imports from Mauritius and Madagascar. The trade agreements entered into with the European Union, the European Free Trade Association and MERCOSUR have not brought significant benefits to the sector. The African Growth and Opportunity Act (AGOA) has been a boon to clothing manufacture in many African countries but not to South Africa, which is not classified as 'less developed' and therefore excluded from a special rules-of-origin dispensation for the clothing sector.

The third measure has seen the Government in recent years introducing the National Industrial Policy Framework and the Industrial Policy Action Plans 1 and 2 (IPAP 1 and 2), which identify clothing manufacturing as a priority sector. A range of supply-side measures were introduced under IPAP 2 and are being administered through the Industrial Development Corporation, but many believe these to be 'too little, too

late'. Furthermore, unless firms are certified by the bargaining council as fully compliant with its agreements, they are unable to gain access to any programmes. The latter condition is understandable – the measures use public funds and only firms that comply with government policy should be able to tap into such funds – but the effect is to deny non-compliant firms any chance of upgrading that would enable them to pay bargaining council wages.

Retailers have been the main beneficiaries of the clothing sector's restructuring. Increased imports have put downward pressure on clothing prices and expanded the clothing market. Additionally, retailers have a wide range of sourcing options: (a) thousands of suppliers in Asia and China, which provide large orders of relatively standard goods at low prices; (b) manufacturing supply chains in neighbouring states such as Lesotho and Swaziland that provide smaller orders of standard goods more quickly and almost as cheaply; (c) manufacturers in the traditional clothing centres that have improved their efficiency and, by working closely with retailers, provide smaller orders on a quick-response basis; (d) design houses, which act as intermediaries between retailers and networks of CMTs,²⁹ many of which are informal, home-based operations; and (e) manufacturers located in rural towns in South Africa who face lower minimum wage rates than manufacturers in the main centres (despite the lower wages, in recent years many of the latter have openly refused to comply with the prescribed wage rates). These sourcing options mirror the survival strategies of firms, i.e. to upgrade and compete on the basis of efficiency and proximity to their customers; to transform into a design house and outsource the manufacturing operations; to relocate to low-wage rural areas or neighbouring states; or not to comply and/or not to register with the bargaining council. Over the past decade or two, these strategies of downsizing and relocation have had major implications for employment and labour standards.

4.1.2 Labour regulation

Concurrently with tariff reductions, labour regulation in South Africa underwent a major revision, as a key part of the ANC Government's reform agenda. The series of new statutes displayed some continuity with those of the previous system (e.g. the collective bargaining framework), but also introduced significant changes (e.g. employment equity

²⁹ A cut-make-and-trim (CMT) operation is supplied with the technical specifications, the pattern and the fabric by the retailer or design house and is focused on cutting the fabric and assembling the garment.

legislation and a completely revamped training system). In order to address the inequities of the past, the statutes enhanced and expanded protection for employees. At the same time, they sought to improve the functioning of labour market institutions and to gear the new system to the demands of competition in the global economic environment. It was an ambitious and difficult balancing act, captured by the term 'regulated flexibility'. However, with hindsight, the new statutes were probably out of date with labour market realities at the time of their promulgation, and failed to address adequately the processes of casualisation and externalisation that were rapidly gaining ground.

As noted above, the main strategic thrust of SACTWU was with respect to the existing set of regional centralised bargaining structures (i.e. bargaining councils). It used its organisational muscle to force employers to merge the councils into a national bargaining council, which was achieved in 2002, after a long struggle. At the same time, the union bargained hard to improve the historically low wages in the sector and to narrow differentials between regions, and between urban and rural areas.³⁰ But this push came at the same time as cheap imported clothing was flooding into the South African market. The downsizing and restructuring that resulted was outlined above. Importantly, the route to flexibility in the clothing sector differs from that in many other sectors. Rather than pursuing a strategy of increasing non-standard employment, manufacturers have elaborated upon earlier models of sub-contracting and geographical dispersal. This has shifted employment to low-wage areas, or from formal to informal operations, many of them home-based. Many are supplying the major retailers through intermediaries such as design houses.

In recent years, a variation on these processes has emerged, particularly in KwaZulu-Natal (KZN) Province. Some firms located in low-wage rural areas and registered with the national bargaining council are openly refusing to comply with the council's agreement, on the grounds that it prescribed unaffordable labour costs. This new category of non-compliant employers is significant: in September 2004, 71 per cent of firms which employed 52 per cent of employees failed to comply, while in August 2009, the figures were respectively 53 and 26 per cent.³¹

³⁰ The council has a set of collective agreements that covers the clothing sector nationally: one set of agreements covers specified Metropolitan Areas (these mostly cover the areas that fell within the old regional councils); one agreement covers Non-metropolitan Areas, but with wage differentiation for two sets of non-metropolitan areas (this agreement replaced the sectoral determination for the clothing industry); and one agreement covers certain 'country' areas in the Western Cape.

³¹ The data are taken from documentation for the Seventh Annual General

The stand-off between the bargaining council and these firms became highly politicised. Late in 2010, the bargaining council initiated a campaign to clamp down on non-compliant manufacturers, who threatened the future of a reported 385 firms across the country, and meant a potential loss of 20 000–25 000 jobs, mainly held by women. When the campaign moved to the Newcastle area of KwaZulu-Natal, over 100 firms under threat locked out their workers in protest. The protest action was co-ordinated by the Newcastle Chinese Chamber of Commerce (NCCC), and most of the firms that participated in the protest were CMTs owned by Taiwanese and Chinese immigrants. National and provincial governments intervened, lengthy discussions ensued and a number of moratoria were agreed. Ultimately, agreement was reached to phase in compliance, with the firms being expected to pay 70 per cent of the minimum wage rate by 31 March 2011, 90 per cent by 1 January 2012, and 100 per cent from 30 April 2012. However, this agreement seems to have merely delayed the inevitable for many firms, which were unable to keep to the deadlines.³²

Besides the direct challenge that these firms are making to the legitimacy of the national bargaining council, the growing number of registered but non-compliant firms means that the representativeness of the regional employers' organisations is declining. This jeopardises the council's ability to have its collective agreements extended by the Minister of Labour. If the Minister refuses to extend the council's agreement, it probably means the end of the council.³³ Few employers would have reason to continue complying with the council's agreements if the agreement is not extended to competitors.

A further threat to the council was a court action, launched by a group of the Newcastle CMTs, which challenged the extension of the national

Meeting of the National Bargaining Council for the Clothing Industry (15 October 2009).

³² 'A big day for wages in the clothing industry' in *Business Day*, 30 September 2010; 'Minister faces court action over clothing wages' in *Business Report*, 17 June 2011; 'High wages unravel Newcastle's industry' in *Mail & Guardian*, 22–28 July 2011. The decline in proportion of non-compliant firms reflects the fact that many of the firms that closed down in the five-year period were non-compliant firms. So the decline in non-compliance is not because a lot of non-compliant firms became compliant.

³³ In KZN the constitution of the employers' organisation requires member firms to be compliant with the bargaining council agreement. A firm that becomes non-compliant automatically ceases to be a member of the employers' organisation and at the same time becomes a non-party. This is not the case in all the regions but in practice it is unlikely that non-compliant firms will be or remain a member of a party employers' organisation.

bargaining council's agreement to non-parties. The plaintiffs relied on a number of grounds, including a constitutional challenge to the extension mechanism. The court challenge was successful but did not have much effect: it was decided on a technical issue and by the time judgment was handed down a new agreement had replaced the implicated one. However, the court action is only one of a number being pursued vis-à-vis the extension of bargaining council agreements, all of which signal a systematic push-back by employers to labour regulation they perceive to be excessively rigid.

Largely absent from the debate on the Newcastle issue has been the role of the retailers and the intermediaries (i.e. the 'suppliers'), and the margins they are realising. Instead, all the attention has been on the conflict between SACTWU and manufacturers over the distribution of the very thin margins that manufacturers are forced to accept.

4.2 Foreign Direct Investment Creates a Clothing Sector in Lesotho

The role of the clothing sector in Lesotho's development resembles the experience of many other developing countries. Most of Lesotho's citizens are engaged in subsistence agriculture and live in poverty. Historically, the main source of income was from migrant labour to South Africa's mines. However, employment in the mines contracted from the 1990s, reducing this income as a supplement to agriculture. At much the same time Lesotho became a site for Taiwanese clothing manufacturers to locate their factories in order to avoid the limitations of Multi-Fibre Agreement (MFA) quotas. Most engaged in triangular manufacturing, whereby orders placed at head offices in Taiwan or elsewhere were sent out to factories in several countries (including Lesotho) for manufacture and delivery to retailers in the United States. The creation of over 50 000 (albeit low-paying) jobs was a development boon for Lesotho. Clothing was the first significant manufacturing sector to emerge in the country.

Employment in the industry peaked at 53 000 in 2004, but then declined sharply when the Textile and Clothing Agreement (TCA) (successor to the MFA), ended. Fortunately, the African Growth Opportunity Act (AGO), introduced in 2000, provided sufficient incentive to keep some of the Taiwanese firms in the country. In about 2006, however, there was a new development in the industry: South African clothing manufacturers began to establish factories in Lesotho, with the objective of 'exporting' clothing back to their retail customers in South Africa. This allowed manufacturers to avoid the much higher labour costs and unionised environment in South Africa. The process was enabled by SACU, which permitted goods to move duty-free between member countries. The new

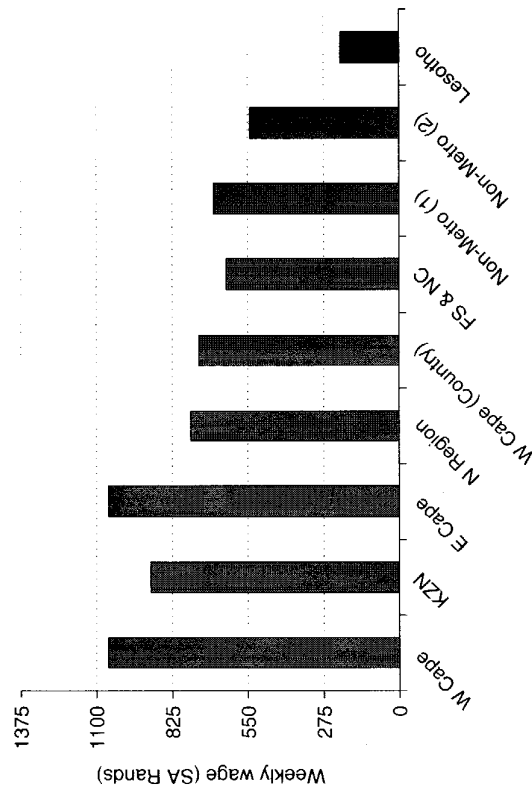
investments offered a life-line to the industry, and employment stabilised, then slowly began to increase. This trend continues: a queue of South African manufacturers is waiting to move into Lesotho, held up only by the inability of the Lesotho National Development Corporation (LNDC) to develop the necessary infrastructure. Furthermore, while efficiencies slowly improve, labour costs are less than half those in much of South Africa.

At present, there are effectively two clothing sectors in Lesotho, of about the same size. One is mainly Taiwanese-owned and is located in Maseru, the capital. It continues to operate in the country only because of duty-free access to the US provided by AGOA. If AGOA ends, most of these manufacturers will leave. Most fabric (except denim) is imported from China and other East Asian countries, and the made-up garments are exported to the US. The other sector is South African-owned and is located in Maputsoe, a small town to the north of Maseru on the border with South Africa. Low labour costs explain the emergence of this sector. The firms in this sector also import most of their fabric from East Asia, but almost all output returns to the South African market (Morris et al. 2011; Pike and Godfrey 2012).

Both sectors are weakly established in Lesotho, with few forward or backward linkages in the country, and limited skills transfer. Twenty years after clothing factories were established, there are no locally owned clothing firms in Lesotho and most managers (except human resource managers) are expatriates. In fact, most managers – including the Taiwanese ones – commute to work each day from South Africa. There are even many expatriate supervisors, although these are now outnumbered by local supervisors (Morris et al. 2011; Pike and Godfrey 2012).

Lesotho's membership of SACU and SADC as well as the existence of AGOA mean that investment policy (not trade policy and industrial policy) is crucial to the growth of the industry. The need to create employment has induced the Lesotho Government to introduce a range of incentives to attract foreign-owned manufacturers. The incentives are administered by the LNDC, which helps new firms set up production facilities in the country, register for tax, and so on. It also guides firms on compliance with labour standards.

Since 1990, labour relations and the labour market have been regulated by the Lesotho Labour Code. The Code provides for freedom of association and collective bargaining and sets minimum standards. Wages are set by the Wages Advisory Board (WAB), established in terms of the Labour Code. Although conceived of as an administrative body, the WAB has evolved into a forum at which government, employers' organisations and trade unions annually 'negotiate' wage increases for the sector. Collective bargaining also



Source: Godfrey (2013: 169).

Figure 5.1 Weekly wage rates: South Africa regions and Lesotho

takes place outside the WAB, at enterprise level, but unions have recognised at only some plants and negotiations are usually limited to non-wage issues. Organisation and the effectiveness of collective bargaining have been undermined by the presence of and rivalry between five unions in the sector.

Only from 1996 onwards did the WAB prescribe minimum wages specifically targeting the clothing sector: minimum rates were set for trainee machinists (0–6 months) and qualified machinists. A wider range of employment categories was covered a few years later, when the WAB issued a dedicated wage schedule for the clothing sector. Wage rates nominally increased each year from 2005 to 2010, but they generally lagged behind inflation. Significantly, wage levels are below half of those in South Africa (Figure 5.1). But wage levels tell only part of the story. Other than a workmen's compensation scheme, Lesotho has no social benefit funds, either at national or at sectoral level. South Africa, on the other hand, has a national workmen's compensation scheme and an unemployment insurance scheme, while the national bargaining council for the clothing industry administers a contributory provident fund for metro and non-metro areas as well as a sickness benefit fund (i.e. medical aid) for metro areas. Employers' contributions to the latter add considerably to labour

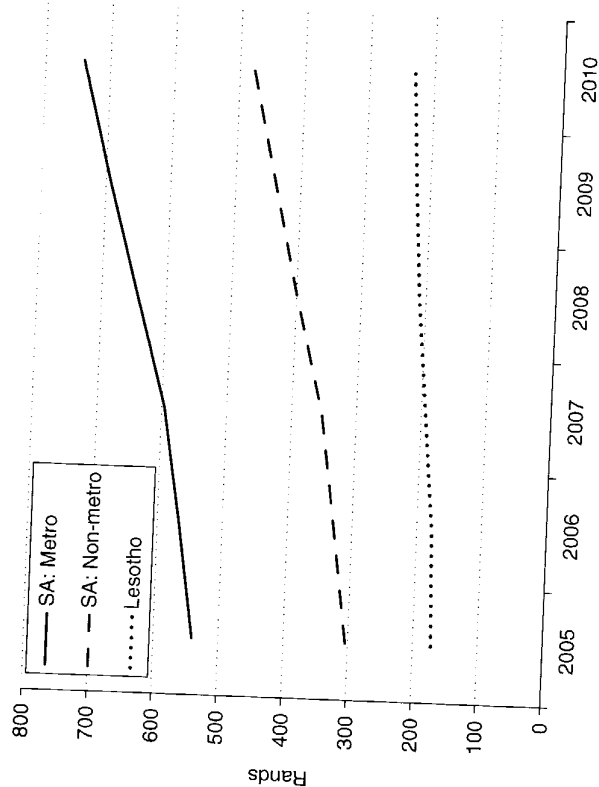
Table 5.1 Lesotho/South Africa comparison of wages and minimum labour standards for apparel sector in 2011

	SA Metro (KZN)	SA Non-Metro	Lesotho
Minimum weekly wage	R739.90	R489.00	M229.00
Ordinary maximum weekly hours	42.5	45	45
Overtime rate	× 1.5	× 1.5	× 1.25
Overtime limit per week	10 hours	10 hours	11 hours
Annual leave days	15 days	15 days	12 days
Annual bonus	3.47% × actual annual wage	1% × standard annual wage	None
Sick leave	40 days p.a. at 50% of wage	30 days paid in full	12 days at full pay & 24 days at 50%
Maternity leave	Max. 6 months/3.25 weeks paid & UIF benefit	Min. 4 months/ UIF benefit	12 weeks/2 weeks paid
Paternity leave	3 days unpaid p.a. UIF benefit	3 days paid p.a.	None
Notice periods	Weekly paid = 1 week	0-6 mths service = 1 wk 7-12 mths service = 2 wks >12 mths service = 1 mth	2 wks after 1 month service*
Severance pay	1 week per year service	1 week per year service	2 weeks per year service*

Note: * Severance pay in Lesotho is not restricted to operational requirements terminations.

Source: Summarised from Godfrey (2013: 178-179).

manufacturers signed up with the IL/International Finance Corporation's Better Work Lesotho programme, which provides an 'umbrella' audit that all retailers accept. South African-owned manufacturers have been slow to sign up, mainly because few face the same CSR requirements from South African retailers, who in turn are not subject to consumer pressure for ethical sourcing. In any event, compliance with wage rates and other conditions of employment appear not to pose a serious challenge to the South-African-owned manufacturers, because labour costs are so much lower than those they face in South Africa (Pike and Godfrey 2012).



Source: Graph compiled using data from bargaining council agreements, the Lesotho Labour Code, and Wages Advisory Board schedules.

Figure 5.2 South Africa and Lesotho weekly minimum wages: 2005-2010

costs. Clothing workers in Lesotho have worse conditions in a number of other respects (see Table 5.1), although provisions in respect of severance pay are better than in South Africa.³⁴

Furthermore, as illustrated in Figure 5.2, wage increases prescribed by the WAB have been lower than the bargaining council wage increases in South Africa over the period from 2005 to 2010.

The Labour Inspectorate of the Ministry of Labour and Employment enforces labour standards but is widely seen as ineffective. However, major US retailers have imposed codes of conduct on their Taiwanese suppliers, which generally require compliance with Lesotho's Labour Code. Such compliance is monitored and enforced through CSR audits conducted by the US retailers or third-party auditors. About two years ago, most of these

³⁴ It should be noted that severance pay in Lesotho is not confined to retrenchments, but applies to all terminations of employment except dismissal for misconduct.

5. THE CLOTHING SECTORS IN SOUTH AFRICA AND LESOTHO: HEIGHTENED TENSIONS BETWEEN ECONOMIC DEVELOPMENT AND LABOUR LAW IN A REGIONAL AND A GLOBAL CONTEXT

Trade liberalisation has produced different challenges for South Africa and for Lesotho, given their respective levels of development. Moreover what benefits the clothing sector in one country, disadvantages it in the other. For South Africa's clothing sector, the challenge is to retain jobs while continuing to raise labour standards, in a context where it must compete with cheaper imports in its domestic market. For Lesotho, which does not have a domestic market to speak of, the perverse effect of the MFA was the creation of jobs, partly as a result of its low labour costs. However, many new jobs in Lesotho's clothing factories come at the expense of jobs in South Africa, which adds to the pressure on labour standards and labour market institutions in the South African clothing sector. It is impossible to determine empirically whether the developmental benefit to Lesotho of these low-paid jobs outweighs the growing decent work deficit in the South African clothing sector.

However, this case study does shed light on the theory of the relationship between development and labour law. First, it very clearly illustrates Arthurs' contention (2011: 18) that the choice of labour law to emphasise collective relations 'has impaired the vision of labour law' (Arthurs 2011: 26). This challenge to labour law – to extend its focus to the plethora of national policies and the global background rules that have an impact on labour markets – is especially pertinent in the context of developing countries.

Expanding the scope of labour law scholarship to include this wider set of rules will not be a simple process. The case of South Africa reveals that the impact of these policies varies and can be contradictory. South Africa's Constitution, with its Bill of Rights which includes justiciable socioeconomic and labour rights as well as the horizontal application of rights, suggests a political economy that shares the goals of labour law. But other rules in the form of economic prescriptions emanating both from formal sources (such as multilateral agreements to liberalise trade) and from informal sources (such as IMF country reports) affect foreign investment, limit developed nations' policy options and dilute the efficacy of the above-mentioned institutions to shape the political economy.

Second, the case study illustrates the extent to which current 'models' of labour regulation are inadequate to the task of dealing with the regional and global dynamics it uncovers. The focus of labour regulation is the

national labour market, and collective bargaining's ambit is usually the industrial sector. However, sectors are becoming ever less relevant and externalisation means that employees from different sectors work in the same workplace.³⁵ Firms are increasingly defined by their place in the value chain, rather than by their sector. In the case of buyer-driven value chains, such as that of clothing, the 'lead' firms are retailers. In reality, manufacturers produce for retailers rather than for a notional market; in fact, retailers now constitute *the* market for manufacturers. Retailers' sourcing decisions take account of the domestic, regional and global location of manufacturers and this has the effect of subverting labour regulation's national goals, pitting economic development and labour regulation against each other. Economic development depends increasingly on firms' participation in regional or global value chains, with national labour regulation a key factor in whether they participate or not and in the terms of their participation. At the same time, the core power relation, traditionally the focus of labour regulation and collective bargaining, is subverted: supply agreements between retailers and manufacturers determine the distribution of risk and value within the value chain. Distributive battles between employers and workers are only relevant within the constraints imposed by retailers. Traditional concepts of collective bargaining exclude retailers, who are often in an entirely different sector and/or country.

Piecemeal attempts to address the changing world of work do not begin to challenge this restructuring of the production and distribution of goods. Amendments to the South African Labour Relations Act (LRA) in 2002 sought to remedy the ways in which standard employment was being undermined, by introducing a rebuttable presumption that a worker is an 'employee' if one of seven circumstances is present. The amendment, however, dealt only with the process of casualisation and did not address the distribution of power between commercial and industrial firms and the ability of the latter to restructure, either by focusing on particular functions or by relocating some operations to other regions. Further amendments to the LRA passed into law recently make a more concerted attempt to address the threats to standard employment, but the focus remains casualisation. It deals with externalisation only to the extent that it is achieved through temporary employment services/agencies. Despite these attempts at adapting labour regulation, the model remains rooted in

³⁵ The sector to which an employee is attributed is usually defined by the nature of the employer's enterprise rather than by what the employee does. A security guard employed by a clothing factory is therefore employed in the clothing sector, whereas if he or she was employed by a security firm they would be classified as employed in the security sector.

a conception of work as being conducted through a standard employment relationship within a national labour market.

As noted briefly earlier, Chang's notion of the political legitimacy of state intervention in the market recognises that such legitimacy can shift adversely. Bargaining councils have been present in the South African clothing industry for many years (as well as in many other sectors of the economy). There were always some complaints by small firms not participating in negotiations via an employers' organisation about the extension of agreements. But it was only once tariff barriers came down and cheap imports began to make inroads into the domestic market and to put pressure on the labour cost structure that the bargaining council itself came to be fundamentally challenged on the grounds that it was to blame for job loss.³⁶ The debate has highlighted sharply different approaches to development in South Africa that pits labour regulation (with a strong distribution element) against development driven by job creation (that emphasises the primacy of economic growth). In other words, the role of the state in the labour market is a critical and highly contested policy issue.

Our case study of the clothing sector shows that the debate over the role of the state in the labour market arises because (a) the underlying consensus of the rights-obligation structure between labour and capital has been disrupted by the liberalisation of the sector, and (b) because trade, industrial and labour market policies in South Africa are premised on different and competing development narratives.

State intervention takes different forms: macroeconomic, trade and industrial policies are generally regarded as legitimate state intervention in the market, because they tend to be facilitative rather than regulatory, i.e. they aid competitiveness in the market rather than restricting it; they create an enabling framework rather than prescribing constraints. Furthermore, trade policy is perceived as externally imposed on the country, with the rider that trade is good for development, as local firms are forced to become more competitive, and consumers benefit from cheaper products. The distributive implications of these so-called enabling policies in the labour market are viewed as natural outcomes of market competitiveness. By contrast, the legitimacy of state intervention in the form of labour regulation and regulation that facilitates labour market institutions is contested, as these are deemed to undermine 'development'.

When macroeconomic, industrial and trade policies, on the one hand,

and labour market policy, on the other, are premised on different articulations of what constitutes development, the contradictions become manifest in the labour market, generally in the form of contestation over its institutions. This is what has happened in South Africa: macroeconomic policy (specifically the Growth, Employment and Redistribution strategy (GEAR)), trade liberalisation, and the various iterations of industrial policy have been at odds with the agenda of redress and redistribution of post-apartheid labour market regulation. Labour-intensive consumer goods sectors have been the hardest hit, with bargaining councils a lightning rod attracting the blame for job loss, while at the same time suffering the impact of firms' non-compliance and the informalisation of work relations.

Retailers have benefited from trade liberalisation and the resultant restructuring of the clothing industry, while groups of workers have had to trade off social upgrading and downgrading between themselves. Labour law and collective bargaining have become the villains of the piece, allegedly obstructing entrepreneurship and job creation, and labour market institutions are blamed for the failures of economic and industrial policy. This is ironic given the proposition of neoclassical economics that demand in the labour market is derived demand that flows from demand for goods. In other words, if one is examining the question of state intervention, then entrepreneurship and job creation are the responsibility of macro-economic, industrial and trade policy, not labour market regulation. Nevertheless, labour market institutions suffer the impact of the failures and contradictions of industrial, trade and monetary policy as their legitimacy is challenged, which ultimately has an impact on workers, who rely on regulation and institutions for protection.

6. CONCLUSION: THE LABOUR LAW AND DEVELOPMENT PROJECT

In this chapter, we have voiced an alternative view of development as *economic* development, namely, a combination of Sen's idea of 'development as freedom' (which includes, but is not limited to, economic aspects of well-being) and Chang's institutional political economy approach. Sen has challenged the orthodox definition of development, arguing that social goals, such as socially desirable working conditions (including remuneration) constitute development, irrespective of their contribution to economic development. Chang's focus is on the nature of the market. He challenges the neoliberal development paradigm's assertion that the market is natural. Instead, he argues, it is an institution constituted and continually reconstituted by its actors (including the state), whose

³⁶ See, for example, Natrass and Seekings (2013).

behaviour is influenced by a range of formal and informal institutions.³⁷ When labour regulation has a redistributive function, it either reallocates resources or power, or it influences the behaviour of market actors to do so, i.e. it has a market-constituting role. Moreover, Chang argues that the same regulation might be regarded as an interference in one country and as a human rights issue in another, depending on the political consensus on the distribution of rights in a country. Our case study illustrates how the broader political economy influences political consensus in a country. In the case of South Africa, the collective bargaining system in the clothing sector historically enjoyed legitimacy, which is now under threat. In the case of Lesotho, the American multinationals' incorporation of minimum wages and working conditions as contractual terms in their supply agreements has lent legitimacy to legislation governing the employment relationship. Sen and Chang's approaches are likely to resonate with labour law scholars who take issue with the orthodox development paradigm's privileging of efficiency over equity. While some scholars have shown that labour regulation can contribute to market efficiency, others, such as Fudge (2011), warn that the normative goals of the orthodox view of development and those of labour law are often incompatible. Labour law's normative agenda has to be able to contest market ordering.

It might be politically expedient to counter the hostility to labour regulation displayed by protagonists of the orthodox view of development (including capital, the global financial institutions and the WTO) by showing that labour regulation *can* contribute to market efficiency.³⁸ We offer a counter-view, namely that the battle lines should be drawn more sharply. Kennedy argues that development has always been framed by the language of economics, yet relies on law – public law during the heyday of the welfare state and, since the 1980s, the private law of contract and property – to enable either the State or the market to distribute. He argues that law has played an instrumental role to realise a project animated by economics, and has failed to articulate its own vision.

Of course, labour law is an exception. As Arthurs puts it:

³⁷ New Institutional Economists (NIE) would argue similarly that institutions affect market actors' behaviour. However, NIE scholars would not contest the legitimacy of market ordering.

³⁸ Deakin's typology of the functions of labour regulation also include: a constitutive role, facilitating co-ordination, distributing risk, encouraging participatory forms of governance in the workplace and empowering people, by promoting economic opportunity and greater social cohesion.

Labour law – as it functions in actual workplaces – has often been used by legal scholars not only to challenge the hegemonic claims of state law and legal institutions, but also to initiate alternative approaches to law such as legal pluralism, reflexive law, and critical theory. Seen from this perspective, labour law ... is law incarnate, an experiment in social ordering that reveals the true nature of the legal system in general. (2011: 16)

Labour law, like all law (including private law), is constitutive. As labour law scholars wrestle with their subject's liminality, we should be conscious that to argue for labour regulation as developmental on the basis of its contribution to market efficiency is to risk the co-option of labour law into the neoliberal market reform project and to deny its commitment to social ordering, based on equity. If, then, our argument is accepted, what might a project of labour law and development look like in developing countries? We venture the view that the starting-point should be a rigorous analysis of the regulatory models prevalent in developing countries, combined with empirical research to understand the development challenges countries face.

The first challenge is to address the high levels of informality that exist in developing countries.³⁹ In sub-Saharan Africa, for example, 70 per cent of non-agricultural employment is informal. If one excludes South Africa, informal employment rises to 78 per cent of total employment.⁴⁰ The proportion of women in non-agricultural informal employment is even higher, at 84 per cent.⁴¹ In sub-Saharan Africa the principal challenge is therefore to regulate or, more specifically, to extend regulation to a much larger proportion of the employed. The challenge in developing countries is therefore not to resist the rolling back of labour regulation (as is the case in many developed countries), but rather to roll out regulation from narrow enclaves made up of the public sector, extractive industries and commercial agriculture to the wider labour market. The implications for development of such a roll-out of labour regulation are immense.

The question is whether the tension that this creates between the social outcomes pursued by labour law, on the one hand, and by economic development, on the other, can be managed through a concept such as the ILO's Decent Work Agenda. Our concern is that both South Africa

³⁹ For a more extensive discussion of the challenge posed to labour regulation by informal employment, see Marshall and Fenwick in this volume, Chapter 1.

⁴⁰ If one were to include agricultural employment then the proportion of informal employment would rise, because many sub-Saharan African countries exclude agricultural workers from labour regulation, i.e. they are effectively informal.

⁴¹ ILO (2007) Decent Work Agenda: Africa, 54, 65.

and Lesotho have Decent Work Country Programmes which, like all Country Programmes, have a national focus. The programmes have proved futile in the face of the regional dynamics highlighted by our case study.

Clearly, labour law cannot continue with a national focus in a globalised world. Both its 'constituting narrative' and enforcement mechanisms must have regional and global reach if it is to realise its distributive goals within the context of contemporary forms of work relations.

The second challenge is to re-think the regulatory model, specifically its relationship to trade and industrial policy and its focus on the employment relationship, as opposed to the commercial relationships between different actors in the global value chain. The regulatory 'model' that is generally advocated for developing countries is the one that had its heyday in advancing industrialised countries during the post-war boom: freedom of association, organisation of workers into unions, collective bargaining, minimum standards and social protection legislation. This is the model South Africa has implemented. And as we have shown, the case study shows up the model's limitations, illustrating (a) that labour law has to engage with trade, industrial and investment policy, and (b) that labour law's distributive battles are fought nationally between employees and their employers, whereas the real distributive battles need to be fought within global value chains.

At the same time, the core power relation, traditionally the focus of labour regulation and collective bargaining, is subverted: supply agreements between retailers and manufacturers determine the distribution of risk and value within the value chain. Distributive battles between employers and workers are increasingly irrelevant. The traditional concepts of collective bargaining exclude retailers, who are often in an entirely different sector and/or country.

If labour law is to remain true to its axiomatic normative agenda, which is to act as a countervailing force to the power of capital, then it must find a way of bringing lead firms to the bargaining table, whether they are located in the developed countries of the North or in the emerging powers of the South.

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