DECENT WORK AND THE CRISIS OF LABOUR LAW IN SOUTH AFRICA

Jan Theron

University of Cape Town

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Not to be quoted

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1. Introduction

"Why is unemployment so stubbornly high in South Africa?" is a question often asked, by radio talk show hosts and their ilk. The sub-text is that if only the right mop were used, it would be possible to get rid of unemployment. Not altogether, perhaps, because in a capitalist kitchen some unemployment is good for discipline. Yet it should surely be possible to reduce it to more socially palatable levels.

The South African government has been trying to look on the bright side, as governments generally do. Mention of unemployment levels in terms of an expanded definition that includes so-called discouraged work seekers has been discreetly dropped.[1] Two policy instruments have been adopted that aim to alleviate unemployment, and create jobs. The first and more short-term policy goes by the name of the National Growth Path (NGP). The second and more ambitious policy styles itself the National Development Plan (NDP), and set itself the target of bringing down unemployment from its June 2012 level of 24,9 percent to 14,4 percent by 2020 and 6 percent by 2030.[2]

These targets are set in terms of a definition of unemployment that, as well as excluding discouraged work seekers, defines anyone who has worked in a given calendar month for more than one hour, whether on a paid or unpaid basis, as employed. Two observations about this extraordinarily broad definition of employment are apposite. Firstly, it is a definition sanctioned by international convention. This goes to show how much latitude governments have to exaggerate or minimize, in official statistics, this most basic of labour market indicators. Secondly, most obviously, employment is regarded statistically as encompassing all forms of work, including self-employment.

Both these policies refer not only to work, but decent work. However neither clearly or consistently differentiate between work and employment, in the narrow sense that labour law is accustomed to understand employment, namely employment in a relationship between a worker and an employer. For convenience, this will be termed the labour relationship in this paper. This seems to be the simplest way to differentiate between work to which labour law applies, and other forms of work. Yet the fact that it is necessary to justify the use of basic terms, despite increased recognition of the need to expand the

[1] D.Posel, D.Casale and C.Vermaak. 2013. The unemployed in South Africa: Why are so many not counted. At: http:/www.econ3x3.org/article/unemployed-south-africa-why-are-so many-not counted.

[2] Chapter 2, National Development Plan 2030 : Our future-make it work. National Planning Commission, the Presidency.

scope of labour law to embrace all forms of work, suggests there is little conceptual clarity as how to do so.[3]

Persistently high levels of unemployment are the fodder that fuels neo-liberal calls for deregulation. The most recent has been the launching of a constitutional challenge to the cornerstone of South Africa's labour law regime, the Labour Relations Act (LRA). "In the absence of our strict labour laws," the chairperson of the Free Market Foundation is reported as saying, "no-one who really wants to work will be without a job." [4] This constitutional challenge is unlikely to succeed, not so much because there is no right to work in South Africa's constitution (about which there will be more to say later), but because of the pre-eminent status of labour law and trade unions in society.

The status labour law has enjoyed, coupled with the political influence that trade unions wield due to the institutionalization of a form of tripartism, distinguishes South Africa from most other countries in the global South where there are correspondingly high levels of unemployment. This has in turn reinforced a narrative of South African exceptionalism that is attractive to those who believe that labour law can advance economic development and social justice, as the LRA purports to do. [5] Yet in fact the status labour is anomalous. On the one hand, in common with countries in the global South, there are significant numbers who work but are not protected by labour law at all. On the other hand, in common with countries in the global North, the capacity of labour law to protect those in a labour relationship has been significantly eroded.

The erosion of labour law's capacity to protect those in a labour relationship is not so much due to the growth of non-standard employment as a consequence of a process of industrial restructuring that in South Africa has been characterized as externalization, and has elsewhere been referred to as vertical disintegration.[6] Externalization, as understood here, gives rise to a triangular (or trilateral) form of employment in which a client or core business (what the ILO described as a "user enterprise", in its failed attempt to introduce a convention on contract labour) implicitly or explicitly determines the conditions under which the employees of the contractor or service provider it engages work. It has been the primary means by which deregulation has been effected in South Africa.[7]

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[3] The titles of a spate of works published in 2012 and 2013 acknowledging the need of regulation to extend to all forms of work are themselves suggestive: "Beyond employment: the legal regulation of work relationships"; "Rethinking workplace regulation: Beyond the standard contract of employment"; "Reinventing labour law." See for example J. Fudge. 2012. Blurring legal boundaries: Regulating for decent work. In J. Fudge, K. Sankaran and S. McCrystal (Eds). 2012. Blurring legal boundaries: Regulating work. Oxford: Hart Publishing.

[4] Sunday World, 11 March 2013. "Labour challenged- Free Market Foundation goes to court."

[5] See section 1, Labour Relations Act (66 of 1995). Tripartism is institutionalized in terms of the National Economic Development and Labour Council Act (35 of 1994), by the establishment of the National Economic Development and Labour Council (NEDLAC). Both the aforegoing laws preceded the adoption of the current Constitution.

[6] A standard job in this paper has the same sense as standard employment, namely employment that is ongoing and full-time time. It is also, for the purposes of this study, direct employment, ie employment that has not been externalised.

[7] J.Theron. 2000. Responding to externalisation (Part 1) South African Labour Bulletin, Vol. 24 No. 6 and (Part 2). South African Labour Bulletin, 2001. Vol. 25 No. 1.

It does not seem to be an overstatement to suggest that labour law is in crisis, as a consequence. This is not to suggest that the demise of labour law in South Africa is imminent, or any of its key institutions are about to collapse, although bargaining councils are certainly under threat. The bargaining council is the key institution for collective bargaining in terms of the LRA, and the constitutional challenge referred to is directed at the extension of bargaining council agreements to so called non-parties. The nature of the crisis, rather, is one of legitimacy.

It is probably not coincidental, in this regard, that the strikes that took place toward the end of 2012 and early in 2013 began on the platinum mines. The platinum mines, more than other branches of mining, have externalized employment, and rely on agencies and contractors to complement a relatively small "core" workforce.[8] The mine or place where workers actually work is what is regarded as the workplace in this paper. Labour law, however, regards the workplace, as the place(s) where the employees of an employer work, which in the case of agencies and contractors is somewhere else. Consequently, it remains blind to rampant inequalities this situation gives rise to. It is this, more than anything else, that calls into question labour law's legitimacy.

"Equality is at the heart of the notion of 'decent work'", according to Bob Hepple, "the ILO's exciting new vision..."[9] The object this paper is to interrogate this vision, in order to assess what practical application the concept of decent work has in ameliorating inequality in South Africa. Flowing from this, the object is to assess what contribution decent work can make toward developing a new paradigm for labour law: a paradigm in terms of which rights that currently apply only to the labour relationship will extend to all forms of work. This implies a re-conceptualisation of rights, which amounts to a project to re-regulate the labour market.

Re-regulation of the labour market might be regarded as an essential component of any plan to re-float the global economy. The failure to regulate financial markets is clearly not the only cause of what is generally referred to as the current global financial crisis. It is also due to a decline in consumption, to which the deregulation of the labour market has contributed significantly. Not only have wages been falling, but incomes of producers of all stripes. The consequence is massive inequality, not only between the so-called one percent and the rest, or between the global North and global south, but also, in the case of South Africa, in the workplace and labour market at large.[10]

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[8] A. Bezuidenhout. 2008. New Patterns of Exclusion in the South African Mining Industry. In K. Bentley and A.Habib (eds), Racial Redress and citizenship in South Africa. HSRC Press, Pretoria.

[9] B. Hepple, 2001. Equality and empowerment for decent work. International Labour Review, Vol 140 (2001),no 1.

[10] The term "job" is used here in the same sense as "work", to include all forms of work. So too, the term "worker" in this paper refers to all who work, and not just workers in an employment relationship. I do not agree with Perez's proposition that "jobs are work activities that the markets values and for which it gives money and recognition in exchange." See JLR Perez, 2005. The right to work reassessed: How we can understand and make effective the right to work. Rutgers Journal of Law and Urban Policy, Vol 2, No1.

The question that arises in the context of a fragmented workplace and labour market, is whether a project to re-regulate the labour market is at all realistic? However the lesson of the strikes is that there may be no alternative, if socially destructive conflict is to be avoided. To assess the role decent work may play in this regard it is first necessary to consider the concept more closely. This is the subject of the next section of this paper, section 2.

2. The elusiveness of the concept of decent work

The ILO's adoption of the concept of decent work, which it now regards as reflecting its main purpose, might be seen as a response to its own crisis of legitimacy following the historic defeat of the contract labour convention. The difficulty of persuading developing countries, in particular, to ratify ILO conventions was a related factor. In a context of increasing fragmentation in the workplace and the labour market, to describe the concept as representing "an exciting new vision" is perhaps to look too much on the bright side.

Nevertheless, as others have pointed out, the ILO constitutes a "transnational space" which trade unions and labour-oriented NGOs can use, and have been using, to address the conditions of work of vulnerable groups.[11] This could lead to the development of a new paradigm such as has been mooted above, although it must also be said that there is little indication of this happening, judging from the conventions and recommendations adopted by the ILO since 1999, including its Employment Relationship Recommendation.[12]

Perhaps that is as it should be, and it is at a national and regional level that the concept of decent work needs to be articulated. The ILO is also active at this level, in implementing decent work country programmes. A decent work country programme for South Africa was adopted in 2010. Other programmes have been adopted by countries in the region, and a regional programme for the SADC region is currently being debated. At the same time the fact that the NDP and NGP both commit themselves to decent work suggests the concept has acquired some traction in society. Yet there is little if anything in these programmes either that suggests a new paradigm is beginning to take root

This might have to do with the elusiveness of the concept of decent work. This could, less sympathetically, be described as its conceptual incoherence. At the root of this problem is the conception of its objectives as comprising four pillars, as though they were independent of each other. The effect is to avoid (or evade) the thorny issue as to how different and potentially contradictory objectives relate to each other, and how they should be prioritized. This amounts to an avoidance of the political. Adapting a distinction drawn by David Kennedy, the political inevitably involves decisions as to

[11] See L.Vosko, 2002. 'Decent work': The shifting role of the ILO and the struggle for global justice. Global Social Policy 2002, Vol 2: 19.
[12] Recommendation 198 of 2006.

how resources are allocated between competing groups, as well as affecting "the distribution of power among ideological positions associated with political contestation".[13]

The potential for the different objectives to contradict one another is clearest between the first objective of decent work, "creating jobs", and its second objective.[14] Without a vibrant economy, the objective of "creating jobs" implies, there will not be jobs. Without jobs, workers will not be at work. The second objective guarantees rights at work, and it goes without saying that it can only apply to workers who are actually at work. [15] Any such guarantee must also, by definition, come at a cost (both the cost of compliance and costs associated with non-compliance). The costs of a guarantee must therefore also be a cost of creating jobs.[16]

Although the definition of employee was always open to a more expansive interpretation in the case of South Africa, rights at work have (with few exceptions) applied only to workers in a labour relationship. Accordingly, they have become synonymous with labour rights and labour regulation, giving rise to the argument that compliance with labour regulation was a deterrent to creating jobs. However, this argument rests on certain assumptions as to how jobs are created. Essentially the same set of assumptions as gave rise to legal challenges during the New Deal era in the United States, framed in terms of a right to work, now underpin the Free Market Foundation's constitutional challenge in South Africa.

The fundamental assumption is that "the market" create jobs, and that it is through promoting the growth of the market that the jobs society requires will be created. Indeed, a job must be understood as a work opportunity the market creates or, as once commentator on the right to work puts it, "jobs are work activities that the markets values and for which it gives money and recognition in exchange."[17] The proposition that any job is better than no job flows from this.

If, however, the reason employment remains stubbornly high is that under conditions of economic globalization the market is incapable of generating the number of jobs that are needed, and that the only realistic way to ameliorate unemployment will increasingly be through a combination of state intervention and self help, the question becomes not so much the costs associated with compliance with

[13] D. Kennedy, 2006 . The 'rule of law', political choices and development common sense. In David Trubek and Alvaro Santos, The new law and economic development. Cambridge University Press.

[14] A current formulation of the first objective of decent work is as follows: "Creating jobs – an economy that generates opportunities for investment, entrepreneurship, skills development, job creation and sustainable livelihoods." See www.ilo.org/global/about-the -ilo/decent-work-agenda. Accessed November 2012.

[15] "Guaranteeing rights at work – to obtain recognition and respect for the rights of workers. All workers, and in particular disadvantaged or poor workers, need representation, participation, and laws that work for their interests."

[16] Similar arguments can be made as a potential contradiction between the first objective, on the one hand, and the third and fourth objectives on the other. These are extending social protection, and promoting social dialogue, respectively.

[17] See JLR Perez, 2005. The right to work reassessed: How we can understand and make effective the right to work. Rutgers Journal of Law and Urban Policy, Vol 2, No1.

labour regulation, but as to how labour regulation favours the allocation of resources between different categories of workers.

In this regard, the binary terms in terms of which workers are often categorized, such as formal/informal and standard/ non-standard employment, do not take us very far. For present purposes it is only necessary to consider the term non-standard employment. This conflates two conceptually distinct forms of employment: the situation in which the employer of temporary or part-time workers is directly employed (ie the employer is economically and legally accountable for the conditions under which they work) and the triangular employment situation (in which the employer is legally accountable, but not economically accountable). This relates to another important limitation of the decent work concept: it fails to provide any guidance as to how its objectives can be implemented, given how radically the structure of employment has changed.

Some commentators have sought to remedy the elusiveness of the concept of decent work by developing indicators of decent work.[18]This approach is evidently supported by the ILO itself. Based on these indicators, a country like South Africa now puts out a Decent Work Country Fact Sheet. But this approach begs the question as to how to reconcile the potential contradiction between the first objective of decent work, which in rights parlance is tantamount to a right to work, with its other objectives, or how resources are allocated between them. Put differently, it fails to explain how the different indicators should be weighted. This approach also risks focusing on what is supposedly measurable, such as unemployment, and disregarding what is (even) less amenable to measurement, such as inequality.

Crude indicators such as trade union density and collective bargaining coverage illustrate the point. Trade union density tells us little about the relationship between members and their organization, and nothing at all about the relationship between its members and other workers in the same sector or value chain. It is also hazardous for another reason: the appropriate form of organization for workers who are not in a labour relationship may not be trade unions. Collective bargaining coverage tells us nothing about the role in fact plays in a sector or value chain, and whether it ameliorates or exacerbates inequalities in that sector or value chain.

In this paper decent work is conceived as a qualitative concept, in which the workers' own sense of what constitutes decent work should be decisive. Work can only be considered decent where the workers undertaking it are free to articulate their own vision as to what is decent. This necessitates autonomous organisations, not necessarily trade unions, which represent their collective interests, and enable them to negotiate the conditions under which they work. It is immaterial whether or not such negotiations amount to collective bargaining in the traditional sense. What does matter is that such organizations act in solidarity with other workers and worker organisations.

[18] D.Ghai, 2003. Decent work: Concept and indicators. International labour Review, Vol 142, No 2. D. Bescond, A. Chataignier and F. Mehran, 2003. Seven indicators to measure decent work: An international comparison. International labour Review, Vol 142, No 3.

In accordance with the qualitative approach advocated, it is useful to look at case studies that illustrate how, practically, this vision might be realized. The next section, section 3, outlines case studies located in three sectors of the economy, based on research undertaken in 2012. Each is a sector which has been identified in either the NGP or the NDP (or both) as having the potential to create employment. The case studies discussed below are intended to show how radically the structure of employment has changed, albeit in different ways, and to different degrees. The consequence has been inequality in the workplace and the sector. At the same time the case studies suggest that there is no empirical basis for supposing that the sectors in question will be able to generate the jobs they are expected to.

3. Case studies of fragmented workforces

The three sectors of the economy considered are agriculture, manufacturing and local government services. The reason case studies are needed to show how radically employment has changed has already been alluded to. Official statistics seek to capture the number of people who are employed in a sector, based on household survey data. Aside from the rough and ready nature of data collected in this fashion, the difficulty is that the concept of a sector as an indicator of where economic activity is located has itself been eroded as a consequence of the restructuring of employment in the workplace. Reference has already been made to this in the introduction, in the context of platinum mining.

The workplace of the agencies and contractors working on the platinum mines is the workplace of their employer, not the mine. If the employer defines the business as a service, the workers would be deemed to be employed in the services sector, even though this is a service that would not exist but for the mines. In South Africa, a significant portion of the "growth" of services simply represents a re-categorisation of jobs that were formerly regarded as belonging in the manufacturing and mining sectors. However it is only at the level of the workplace that this becomes apparent.

It follows that when defining the sector, it is the economic activity that should be regarded as determinative, not how the employer defines his business. Based on a proper understanding of the sector, it is possible to understand the structure of employment in a sector, and how resources are allocated between different groups or categories. Based on the analysis above, it should be possible to differentiate at least four major categories of workers: workers in standard jobs, workers in non-standard jobs who are nevertheless directly employed; workers in a triangular employment relationship; and workers in the sector who are not in an employment relationship at all.

-**Agriculture**

The fact that agriculture should be regarded as a sector with the potential to create jobs is curious, because commercial or large scale agriculture (LSA) has been shedding jobs for decades. Here, most obviously, the potential for jobs to be created depends on how resources are allocated as between LSA and small scale farming, with the issue of land reform being a wild card. Currently, however, most employment is in LSA.

Three case studies were undertaken within agriculture: Wine and table grapes in Rawsonville and the nearby Hex River valley, in the Western Cape; mixed farming in the environs of Grahamstown, in the

Eastern Cape, facilitated by a labour-oriented NGO, the Eastern Cape Agricultural Research Project (ECARP); and the cultivation of vegetables, in the dense urban townships surrounding Cape Town. The first two belong in the LSA category, although ECARP also organizes small growers who are the beneficiaries of land reform. The last-mentioned is a case study of subsistence farming, under the auspices of an NGO, Abalimi Bezekhaya (Abilimi).

In LSA most workers are directly employed: a minority on an ongoing (permanent) basis, and the majority only for the season. The indications are that the ratio of permanent to seasonal workers has increased, although it is difficult to know whether this is a general trend. In a recent study it was 20: 80.[19] There are workers in LSA that are employed by service providers, including service providers with specialist skills, and what are commonly referred to as labour brokers (referred to as temporary employment services, in the LRA). However in the Hex River valley, the indications were that the utilization of labour brokers had declined.[20]

As it happened, the Hex River valley was the epicenter of a wave of strikes toward the end of 2012 that seemed to spread from the mines to farms in the Western Cape. On the face of it, the strikes on farms are not as easy to explain as in the case of the mines, since wages in the Western Cape are generally higher than in other parts of the country. Yet inequality was clearly a factor: between workers in permanent jobs, even if they are low paid jobs, and seasonal workers without jobs, or with only the prospect of a seasonal income. Perhaps this is best described as inequality of opportunity. It was compounded by the fact that many who depended on a seasonal income have moved off the farm, to squalid informal settlements in nearby towns.

It is not possible within the scope of this paper to explain how profound the impact of these strikes has been on the sector, and on the labour relations regime. Suffice it to say that it seems to have been a strike by those seeking work more than those at work, and that it assumed the dimensions of a rural uprising. Further, the wage over which the workers were striking was the minimum set by government for the sector.[21] The fact that striking workers were almost entirely unorganized raises questions about the capacity of trade unions, as a form of organization, to operate in agriculture.

At the same time table grapes (and to a lesser extent wine) is a product that is sold to retailers in the global North. The farmer gets a fraction of the price for which it is sold. Accordingly, in a sector which was considered profitable there has been consolidation of farms. The upshot of the strikes has been that government has increased the minimum wage by 52 percent. Since this is a national minimum, it affects the entire country, including sectors that were not considered profitable. Undoubtedly this will lead to further consolidation in agriculture, and with it, further job losses.

[19] See S.Barrientos and M.Visser. 2012. South African Horticulture Value Chains: Opportunities and challenges for economic and social upgrading.

[20] This was possibly due to a high profile campaign by labour federation COSATU to ban labour broking, although farmers may have had other reasons to be wary of the role labour brokers. There are strong indications that competition between labour brokers fuelled the so-called xenophobic conflict in the valley unrest in 2008 and 2009. See J.Theron. 2010. Sour Grapes.

[21] Sectoral Determination No 13.

Consolidation of farms was also evident in the case study of the Eastern Cape. In truth, it seems that LSA has no capacity to generate jobs. If jobs can be created, it is in small scale and subsistence farming. However the small farmers in Eastern Cape work for their own account, without any external support, apart from ECARP, and access to government extension services. Any jobs created will probably not be decent jobs, unless small farmers are better supported.

The obvious way they could support themselves is through co-operating with one another, to reduce the costs of inputs and market products. Co-operatives, in other words, represent a form of organization which could enable small farmers realize decent work objectives. Yet even though government has ostensibly committed itself to promote co-operatives, this commitment is absent in agriculture. This is ironical, given that co-operatives have a proven track record in agriculture.

The case of Abalimi is of particular interest, in that subsistence farming is taking place on unutilized public land. Some might argue that the income it provides is not enough to qualify as decent. Many of the farmers are of retirement age, and also draw an income from social grants. The counter-argument is that it is sustainable employment, because workers themselves control the conditions under which they work. The work they do also contributes to the food security of the community. In a context in which there are insufficient alternatives to dependence on grants, income is therefore not a sufficient criterion for what is decent.

-Manufacturing

In manufacturing, the case of milling and baking in the food manufacturing sector serves as a comparator for the primary case study, focused on clothing manufacture (or apparel) in Cape Town and Newcastle, in KwaZulu Natal. In milling and baking different workforces performing different functions occupy the same physical space, which is the workplace of the mill or bakery, as the case may be. This gives rise to the same kind of inequalities between workers doing equivalent work as in the case of the mines. In the case of clothing manufacture, by way of contrast, some factories make use of service providers to fulfill certain functions. On the whole, however, fragmentation is more pronounced at an industry level, between firms catering for different segments of the clothing market.

Historically, clothing manufacture has been an important employer in Cape Town and Kwazulu Natal. It is a shadow of its former self nowadays, due both to competition from countries like China and Bangladesh and the government's enthusiastic embrace of trade liberalization. Even so, it is still the major employer of women in manufacturing. In the urban areas, wages and conditions of work in the industry has long been regulated by a bargaining council agreement. However an informal industry has existed alongside the formal industry, consisting of home-based CMTs (cut-make-and-trim) and sweat-shops operating beneath the radar of the bargaining council's inspectorate. These informal operators undertake contracts for intermediaries and are paid per piece produced.

In Cape Town, the formal industry employs a permanent workforce, producing higher value items of clothing for the domestic and global market. But in peripheral areas such as Newcastle, and also across the borders of South Africa, in Lesotho and Swaziland, manufacturers produce lower value items, and are competing directly with other low-wage countries where clothing is manufactured. The case of clothing thus also illustrates the necessity, in the case of a globalized industry, to develop a regional

approach to decent work.[22] It also exemplifies how large South African retailers, through intermediaries that are nowadays described as "suppliers", determine both the profit margins of the manufacturers and which amongst them are awarded contracts.

Newcastle has also been the site of a highly publicized stand-off over minimum wages, between certain small manufacturers, on the one hand, and the National Bargaining Council for the Clothing Industry and the trade union SACTWU, on the other. This stand-off, and the accompanying threat by the National Bargaining Council to shut-down non-compliant firms, exemplifies the potential contradiction between the first and second objective of decent work. A recent study suggests that the bargaining council, trade union and government are in effect conniving to stifle the potential of low wage manufacturing to create jobs.[23] At the same time, manufacturers have been conniving to form "worker cooperatives", as a strategy to avoid compliance with the bargaining council agreement.[24]

This in turn has highlighted the inability of government's Department of Trade and Industry to administer its own legislation, and differentiate between bogus and genuine co-operatives. Given the role co-operatives could play in realising decent work objectives, this is unfortunate, to say the least.

-Municipal services

Local government adopted policies of privatization at about the same time as government was embracing policies of trade liberalization. The consequences are evident in the two case studies considered, in the City of Cape Town (the City).

The first case study concerns waste management and recycling. Although waste management is indubitably a municipal function, a variety of services are rendered by a variety of private contractors. These range from the collection of waste from so-called informal settlements by "labour only" contractors fulfilling essentially the same function as a labour broker, to sophisticated conglomerates managing hazardous substances. Although the City regards recycling as a separate function best rendered by the private sector, it performs some recycling functions itself. Most importantly, it controls the flow of recyclables through a system of depots. Some of these depots are managed by private contractors engaged by the City to do so. One of the depots in this case study was managed by a (genuine) worker co-operative.

The workforce engaged in waste management and recycling comprises workers employed directly by the City, workers employed by contractors engaged by the City, and self-employed workers. Some of the self-employed workers have formed their own enterprise (the co-operative). There are also others operating individually, as waste-pickers. Of those workers employed directly by the City, most will be employed on a permanent basis. The trade unions have been particularly exercised about the utilization

[22]Many of the clothing firms operating in both Swaziland and Lesotho are South African. They are able to do so by virtue of a regional trade regime (in the case of Lesotho and Swaziland, the customs union agreement these countries are part of, together with South Africa, Botswana and Namibia).

[23] J. Seekings and N.Natrass, 2013. Job destruction in the SA clothing industry. CDE Focus: Centre for Development and Enterprise.

[24] In terms of the Co-operatives Act (Act 14 of 2005), a worker co-operative that complies with certain requirements of the Act is not obliged to comply with the LRA.

of labour brokers by the City. However the same trade unions have not been as exercised about the workers employed by private contractors to collect waste, all of whom will be temporary.

The other municipal case study focused on the provision of crèches and child care facilities (which corresponds with what the government calls Early Childhood Development, or ECD). These are privately owned and operated. However they provide an important public service, which enables women in particular to seek and obtain work. The position taken here is that this is as much a municipal service as waste collection. What gives further weight to this argument is that until recently crèches and child care facilities were provided by the City in historically coloured, working class communities. Although reliable data are lacking, these enterprises employ a significant number of workers, almost all of whom are women.

The provision of crèches and child care facilities is also a service that depends in its current form on subsidies and support from government. The subsidies are provided by the Department of Social Welfare, a national department. The City provides support by facilitating access to the subsidy, by establishing a network of forums where it supposedly engages with the proprietors of these facilities. However the policy biases of both local and national government are to formalize the facilities, and to professionalise ECD. Crèches in poorer areas, which are invariably home-based, can often not afford the costs associated with formalization. Accordingly, many choose to operate without a subsidy. At the same time, the forums established by the City represent an undemocratic and top-down structure. While there are obvious benefits for crèches from co-operating with one another, the City has not encouraged this.

4. Different legal regimes constitute different tiers

The object of this section is to establish on what basis rights that currently protect workers in a labour relationship, and benefit mainly workers in standard jobs, can be extended to other workers. First and foremost this entails establishing what legal regime applies. This can best be illustrated with reference to the case of local government.

It is clear what legal regime applies in the case workers who are directly employed by the City. They are regarded as municipal employees, and are covered by the bargaining council agreement negotiated at national level. This agreement is in turn governed by the LRA, and other labour laws. The same is true of non-standard workers that are directly employed by the City, although it is debatable whether these workers are as effectively protected as those in standard jobs. There are, however, amendments to the LRA that have been tabled, and that will address some of the deficiencies in the way in which the legislation treats temporary as well as part-time employment.[25]

The same amendments also address the situation of temporary workers employed by labour brokers. This has been the most notorious example of a triangular employment relationship, both in the context of local government and more generally. However the amendments will not benefit workers employed

[25]Labour Relations Amendment Bill, 2012.

by private contractors to collect waste in the slightest. This is despite the fact that the work they do is equivalent in all respect to what a recognized municipal employee does. Although these workers are in a labour relationship that, in form, is regulated by labour law, labour law is in important respects a dead letter so far as they are concerned. In material respects their employment is governed by the contract between the City and the contractor or service provider concerned. The legal regime can be depicted as an amalgam of contract and labour law.

Where employment has been externalized in this way, a demand that the City directly employ the workers seems logical. However, neither the trade unions nor the City even knows how many workers are employed by private contractors, although the City is obviously in a position to find out. Further, the fiscal implications of employing all these workers directly would be massive. According to one estimate, as many as fifty percent of the workers employed collecting waste in one of the City's four sub-regions were employed by private contractors. All indications are they earn less than fifty percent of the bargaining council rates.[26]

In these circumstances it seems appropriate to depict the municipal workforce as a hierarchy, comprising different tiers, in which each tier denotes a different legal regime. Recognised municipal employees constitute the top tier. The second tier comprises workers employed by contractors engaged by the City. Some of them, it should be noted, fall within the scope of another much less advantageous bargaining council agreement (from the workers point of view). Workers in the third tier include self-employed waste pickers, and the members of the cooperative.

Labour law is expressly excluded in this tier, on the basis that such workers are independent contractors, or autonomous. The only basis on which labour legislation might yet be applicable is where it can be alleged a contract designating such a worker an independent contractor is a sham: this is what the ILO would term disguised employment. Yet workers in this category also a comprise a spectrum, ranging from the genuinely independent to the genuinely dependent.

At the same time it would be far-fetched to suggest all genuinely dependent workers are employees. The increasingly number of small growers in agriculture that are contracted to supply large corporations is an important example, in an African context. Although arguably in need of protection, by virtue of the unequal relationship between small grower and large corporation, it would probably not be possible to protect small growers in exactly the same way as employees are protected, or to the same extent. Again, the most effective way to do so might well be for small growers to co-operate, and form an organization to defend their interests.

5. Reconceptualising rights at work

[26] In a 2009 study, the lowest paid general worker employed by a contractor engaged by the City to collect waste earned 34 percent of what the lowest paid municipal worker earned in terms of the bargaining council agreement. The highest paid general worker interviewed by a contractor earned 67 percent of what a worker doing equivalent work would earn in terms of the collective agreement, but this differential would have been greater if the social wage was taken into account. See J.Theron and M.Visser. 2010.

Given the primacy accorded to organization in this analysis, there are three categories of rights at work that need to be re-conceptualised as a priority. These are rights relating to job security, organization and collective bargaining.

- **Job security, and the question of viability**

The significance of job security in an analysis of decent work is that it is very difficult to exercise organizational rights or bargain without it. That is presumably why, post 1994, South Africa allocated considerable resources to a dispute resolution system largely focused on establishing a right not to be unfairly dismissed. This is the system administered by the CCMA, a quasi-independent body.

The system the CCMA administers is generally regarded as providing an effective remedy for violations of this right, and has been subjected to very little critical scrutiny. This is arguably because it has been responsive as an institution, and operates relatively efficiently on its own terms. These are to settle disputes that are referred to it, if possible, and if they cannot be settled, to arbitrate them. However the system has failed to achieve its primary legislative objective, which is reinstatement.[27]

As a consequence, the remedy for unfair dismissal is almost invariably compensation. This represents a direct cost for the employer, on top of the indirect costs associated with defending against the risk of an adverse finding at the CCMA. These are not inconsiderable costs, particularly for small firms. Moreover there is evidence that smaller firms, which are operating at the margins, are more at risk of having an adverse finding against them than larger firms with labour relations expertise at their command.

The proposition that logically flows from the above analysis is that the risk of an adverse finding, and the costs that finding might entail, provide a significant incentive for employers to restructure employment, so as to minimize this risk. This is, of course, particularly the case for employers at the margins. The obvious way to do so is to externalize employment, so as to minimize the extent to which the employer may be held accountable when jobs are terminated. At the same time, of course, the employer concerned is also minimizing the extent to which it is vulnerable to trade union organization, and collective bargaining.

Workers in the top tier who are in permanent positions obviously benefit from this right. Indeed, they benefit disproportionately to other workers. In local government, for example, the collective agreement provides for a formal hearing before anyone can be dismissed. There is recourse to the bargaining council if a dismissal is alleged to be unfair, and the bargaining council is accredited to fulfill the same function as the CCMA. Although empirical data is lacking, anecdotal evidence suggests that the higher up in the municipal hierarchy, the better protected an employee is. Cases of employees who are suspended pending disciplinary hearings for periods exceeding one year are public knowledge.

[27] Section 193(2), LRA (Act 66 of 1995). Assessments of CCMA performance are generally based on data regarding the impressive case-load it handles, the percentage of cases it has settled, and the percentage it has arbitrated. Data concerning the outcome of arbitrations is harder to come by, but it widely accepted that very few disputes referred to it result in the reinstatement of the workers concerned.

It is a different matter for non-standard workers in the top tier. In agriculture, for example, it is the seasonal workers that are most affected by the lack of job security. As with any other temporary worker whose contract has expired, they have no remedy if, at the start of a new season, they are not taken on by the farmer, in circumstances in which they have worked for the same farmer before. The same is true of the contractor providing services to the City. At the expiry of the contract, the local authority is under no obligation to renew, even though hundreds of workers might lose their jobs.

There may be sound commercial reasons for this, but for workers in the second tier, it undoubtedly serves as a deterrent. Even if their employer has no objection to their joining a trade union, the City might. Why else, after all, would the City not employ them directly? Accordingly, there is a veneer of protection in the second tier. Workers have a right to institute a claim for unfair dismissal against their legal employer, but this employer might be a proverbial "man of straw". Even if this is not the case, a right not to be unfairly dismissed would be of no avail against the City.

A right not to be unfairly dismissed is of course of no avail in the third tier. Here, most obviously, job security depends on the sustainability of the enterprise or activity. It is also through creating more sustainable enterprises that the rights at work of those who work for the small grower are most likely to be addressed. The sustainability of the enterprise is probably also the primary issue for the workers in a home-based CMT in Mitchell's Plain, as much as in a Newcastle clothing factory. One could easily envisage, therefore, re-conceptualising a right to not to be unfairly dismissed as a right not to have one's work or livelihood arbitrarily terminated. The problem would be how to enforce it.

-Organizational rights and collective bargaining

Collective bargaining is a right that the ILO regards as fundamental. However it is premised, firstly, on workers (and to a lesser extent, employers) exercising their freedom of association, by forming organisations that represent their interests. Less clearly, in terms of what the ILO considers fundamental, it is premised on the workers' organisations having organizational rights. These are rights exercised at the workplace, which enable the organization to consolidate itself, or function effectively.

In the context of South Africa, everyone has the constitutional right to freedom of association. However, organizational rights only apply to trade unions, in terms of the LRA. These trade unions have to be "sufficiently representative" of workers employed by the same employer in the workplace, in order to qualify for these rights. Because the workplace is defined as it is, workers of other employers who actually work in the same workplace are not able to exercise all these rights.

Although there may be a reluctance on the part of organized labour to acknowledge that other forms of organization might have a valid role to play in furthering worker interests, there is no reason why other forms of organization should not be able to exercise the same or equivalent rights, even at the same workplace. An example might be a savings and credit co-operative wishing to deduct members' subscriptions, or hold meetings, or elect representatives.

In absence of organizational rights, the capacity of organisations to bargain is limited. The capacity of organizations to bargain is also limited where the person who is accountable for the conditions under which they work is not party to the process. In the case of workers in the second tier, that is because the person for whom they work is not their employer. In the case of clothing, however, it is that the manufacturer is beholden to the retailer. In a scenario where the retailer makes more from a garments than the supplier, the manufacturer and the workers combined, collective bargaining becomes a bit like fighting over scraps.

There is no ready solution for this situation, particular where the retailer is in the global North. In order to look for solutions, however, better information is needed. One of the justifications for a right to information is for the purposes of collective bargaining. Certainly the composition of the sector or value chain, and the mark-ups made along the chain, is relevant information. Undoubtedly employers will resist providing any information they are able to label confidential. But in the case of local government, at least, information as to the contractor they engage, the number of workers the employ, and what they earn, should be in the public interest.

It is important in this regard not to regard collective bargaining uncritically. Perhaps some collective bargaining is always better than none. Although collective bargaining in agriculture in most cases is a challenge for logistical and other reasons, it should have been possible in the Hex River, had trade unions been sufficiently organized. Had there been bargaining, arguably the strikes might not have happened. More tellingly, and most ironically, it is inconceivable that collective bargaining would have resulted in a 52 percent increase.

Collective bargaining can also serve to allocate resources to workers in the top tier, at the expense of workers in the other tiers, and aggravate inequities in the workplace. The clearest example of this is in local government, where it is likely collective bargaining has contributed to widening existing differentials. One way the trade unions could begin to ameliorate this situation is to demand the establishment of forums where all workers providing municipal services could be represented, including workers in the third tier. It is true that the LRA does not make provision for such a structure, but nothing in the law precludes it, and the re-conceptualization of collective bargaining will necessarily be an exploratory process. A forum such as proposed would mean, perhaps for the first time, subjecting the situation of workers providing municipal services in the second and third tiers to wider scrutiny.

It is in the third tier that the relevance of forms of organization other than trade unions is clearest. Workers engaged in activities like recycling, or operating crèches, or small farmers, all have better prospects of sustainable employment operating collectively, and as already indicated, of realizing the objectives of decent work as well. There ought to be no conflict between trade unions and co-operatives, or associations of self-employed workers, or small enterprises such as crèches. On the contrary, the relationship ought to be a mutually supportive one.

It is therefore especially unfortunate that the so-called “worker co-operatives” established in KwaZulu Natal have given co-operatives a bad name. At the instigation of trade unions, amendments to the Co-operatives Act have now being adopted to close what is perceived to be a loop-hole. However this may

be a case of throwing the baby out with the bathwater. It also represents what is characterized in the section that follows, section 6, as regulation from above.

The blatant abuse of the Co-operatives Act in Newcastle is no different from any other violation of rights at work. It is first and foremost an issue of compliance. Lack of compliance is indicative of organisational failure. This failure, when all is said and done, must be laid at the door of both the trade union and bargaining council concerned. Regulation from below was called for.

3. Re-regulation, from above or below?

It would be naïve to suppose that any attempt to re-regulate the labour market, or to re-conceptualise any of the rights or systems or institutions that protect workers at work, will not be contested. It will be contested by organized labour, where it is seen to prejudice the interests of its members. These are, overwhelmingly, workers in standard jobs. It will be contested by big business, to the extent that there is any attempt to reverse the gains it has made over the last twenty years or so. One of the most notable gains big business has made has been to insulate itself against claims by organized labour, through externalization. This has limited the ambit of labour regulation (so far as it is concerned) to the fraction of the workforce it directly employs.

The notion of corporate social responsibility and the adoption of ethical trade codes need to be evaluated in this context. Corporate social responsibility and ethical trade codes embody standards imposed either by the corporate powers-that-be or by non-governmental organizations. Even where, in the case of ethical trade codes, there is some form of consultation with organised labour regarding their provisions, the norms and standards on which the codes are based are not negotiated, still less do they emanate from organizations representing workers. They exemplify regulation from above.[28]

The ethical trade codes considered in the case studies related to wine and table grapes. Undoubtedly workers on farms accredited in terms of those codes benefited from certain of their provisions, as did the farmers. However these were primarily workers on larger farms, that could afford the considerable cost of compliance with these codes. They represent "winners", in a sector in which many farms are marginal. There was no clear evidence that such codes benefited the sector as a whole.

It may be that in the absence any other effective form of regulation, this is better than nothing. The case studies are intended to provide a context in which to assess to what extent this might be true. It seems inherently improbable, however, that regulation from above can jeopardize the gains big business has made to any significant extent, let alone that it will lead to a reversal of such gains. By the same token, it is difficult to see how regulation from above can lead to a re-conceptualisation of existing rights or systems or institutions, so as to make decent work a meaningful concept for workers who are not employees, or for workers in non-standard employment.

By contrast, there is regulation from below where it emerges following a process of engagement with workers' organisations, or better still, as the outcome of collective bargaining. The critical question, if there is to be re-regulation from below, is what organisations exist representing workers in the second and third tier, not excluding non-standard workers in the top tier that are unorganised.

[28] J.Theron, 2012. Prisoners of a Paradidigm: Labour broking, the "new services" and non-standard employment. In Reinventing Labour Law, R. Le Roux and A.Rycroft (eds), Juta.

Unfortunately the case studies go to show how limited the impact of trade union organization has been, beyond its comfort zone, amongst workers in standard jobs in the top tier. There were few exceptions. In agriculture one trade union had made a concerted attempt to organize seasonal workers. This had given rise to the bizarre situation on one farm, where the seasonal workers (who were all women) belonged to this union, while the permanent workers belonged to another.

In contrast to the failure of trade unions to organize farm workers in the Western Cape, ECARP had established an impressive network of committees elected not only from amongst the permanent workers, but all "dwellers" on the farm. The committees in turn form part of a regional and district structures which, while they do not bargain in the traditional sense, are effective in addressing a range of issues on farms. These include access to health facilities, housing and what may be described as service delivery issues.

8. Conclusions

One of the consequences of the elusiveness of the concept of decent work is that it is susceptible to misuse. For example, where only a section of the workforce is organised, the concept of decent work may be appropriated to legitimate their claims. This has in fact happened in South Africa. Trade unions representing workers in standard jobs tend to equate decent work with employment in a standard job.

If decent work is indeed equated with employment in a standard job, and the rights at work it envisages in terms of its second objective are no different from the rights at work applicable to standard jobs, then it becomes a meaningless mantra. The alternative is that decent work stimulates a careful examination of how resources are allocated between different categories of workers, and a re-conceptualisation of rights.

In this paper the focus has been on job security, organizational and bargaining rights because without these, attempts to re-conceptualise rights at work, and re-regulate the labour market, will at best be partial and ineffective. Attempts to extend rights at work in a simplistic fashion will not result in decent work. Neither will attempts to harness legal techniques to hold accountable what in the value chain literature are depicted as lead firms, without effective organization of the workers concerned.

This is both an indication of the enormity of the task of re-regulation, and also what the priorities should be. Better information is needed. Labour law needs to jettison the collusive role it currently plays, and to peel away the veneer of protection labour regulation ostensibly provided to workers in the second tier. In conjunction with social scientists, it needs to deploy a right to information to establish the extent to which workers in the third tier can no longer be regarded as autonomous.

It will also need to fashion a solution to the potential contradiction between the first objective of decent work, and its other objectives. It remains unclear whether it will be politically possible to overcome this contradiction, either in the decent work country programmes the ILO has been developing, or at the international level, because of vested interests in maintaining the status quo. Perhaps a more promising

avenue to explore would involve developing the concept of the right to work, which is already recognized in a number of international human rights instruments.

This would be a very different conception of the right from that which was invoked in the New Deal era. It would not be founded on an assumption that the market create jobs, but rather that state intervention is needed to address unemployment, and that civil society needs to be mobilized to the same end. How this is done, this analysis suggests, will involve a range of policy interventions. These include, in addition to those explicitly related to the labour market, industrial policy, trade policy, land reform, competition policy and policy toward not-for-profit enterprises such as cooperatives, making up what is sometimes termed the solidarity economy.

Above all, what is needed is a wholistic approach that privileges the provision of work. A right to work might provide a legal lens through which the inter-relationship of these policies is scrutinized, as well as their efficacy in ameliorating inequality in the workplace and the labour market at large.