DRAFT BRICS CHAPTER

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INTRODUCTION

This chapter explores the current regulatory challenges in four major countries whose economies have a very significant impact internationally. Those countries are South Africa, India, China, and Brazil – four of the so-called BRICS, the 2010 rephrased acronym used to refer to the emerging market economies of the four of them plus Russia, after South Africa joined in at its III Summit. The original group, named at the time BRIC,[1] had gathered together in 2006 in order to have some common foreign policy guidelines.[2] Unlike many countries in the developing world, these nations have the expertise, and the political and economic capacity, to determine the orientation of their labour laws. In the case of South Africa and China, in particular, they have made use of these circumstances to embark on many significant labour law reforms; unlike the recent experience of southern Europe, these have not been "deregulatory".

Despite the fact that the BRICS constitute a formal grouping, many readers first response may be that this discussion involves a comparison of apples and oranges.[3] Undoubtedly their economies are very differently structured; their political trajectories vary enormously; their legal frameworks have evolved from very different origins. Still, their growing importance in a globalized environment draws everyone's consideration and stimulates a consideration of the nations as a group.

Thus, for all their evident dissimilarities, we sense there is a cluster of similar problems related to labor and employment law among four of the BRICS states[4]. The underlying assumption is that fundamental labor problems prevail in these countries. Although they are hardly unique to the BRICS states, the question at

[1] The acronym BRIC was first used in 2001 by Jim O'Neill in Global Economics Paper no 66 of the Goldman Sachs Economic Research Group. O'Neill discussed the then state of the world economy with particular emphasis on the emerging market economies of four countries: Brazil, Russia, India and China. Cf. O'Neill (2001).

[2] The group trajectory can be retraced at specific webpages for the 2012 and 2013 Summits: Fourth BRICS Summit, http://www.bricsindia.in/india.html and Fifth BRICS Summit, http://www.brics5.co.za/site/about-brics/, both last accessed February 4, 2013.

[3] A Chinese equivalent is 風馬牛不相及 (the lost horse and cow will not meet); a Portuguese one is *misturando alhos com bugalhos* ("mixing nutgalls and garlic"). This is to say taking one thing for another or just establishing confusion.

[4] Excluding Russia, which is covered in a separate chapter in this volume.

stake is whether the fact that these are powerful emerging economies, whose models are drawing a worldwide attention, entail similar regulatory strategies or outcomes.[5] Otherwise stated, can the comparison help in identifying whether the powerful emerging economies share some kind of a common regulatory trajectory, or whether there are many paths and logics to becoming a member of this newly privileged group?

Moreover, examining the BRICS countries might enable us to scrutinize possible relations between labor law and economic development, a correlation that has been mostly forwarded by economists (Glaeser, La Porta, Lopez-de-Silanes, and Shleifer, 2013). Legal scholars are resistant to this kind of approach as it may demand an important amount of empirical work which is usually conceived as something unrelated to legal thinking. Indeed, although legal teaching should no longer be just "legal" and compartmentalized by isolated units and should instead incorporate an impressive amount of economical, sociological, political and management contents, this required openness has not been able to create a friendly environment for empirical legal analysis. This has remained an open field to the work of economists and, every now and then, sociologists and anthropologists. Yet, may the reader be reassured: we do not postulate an economic analysis for our comparison. We do not intend to drown our reader in numbers. Our object remains the legal environment of the four compared countries and our focus will still be in their correspondent law. What may then be different is the effort to overcome the simple contrast in legal regulation and the attempt to relate it to economic development.

It is clearly not possible in a single chapter to embark on a comprehensive analysis of the labour law framework in each country. We have therefore concentrated on issues that have featured in law reform efforts. There is a significant degree of commonality in relation to these issues – especially concerning regulatory responses to informality and the breakdown of the standard employment relationship. The chapter examines these issues firstly in South Africa, then India, China, and Brazil. These discussions are followed by a general conclusion, noting that these states have actively and creatively sought to use legal measures to address the consequences of fragmenting employment forms.

[5] Some related initiatives in the academic world can be found at the BRICS Policy Center, a conjoint initiative of Pontíficia Universidade Católica do Rio de Janeiro (PUC-RIO) and Rio de Janeiro City Hall (available at http://bricspolicycenter.org/homolog/, last accessed February 4, 2013), and BRICLAB, a forum animated by the School of International and Public Affairs in Columbia University, USA (available at http://www.sipa.columbia.edu/briclab/index.html, last accessed February 4, 2013). For a related examination of China, India and Indonesia (a potential BRICS member), see S Cooney, P Gahan, P Mahy and R Mitchell, The Evolution Of Labour Law In Three Asian Nations: An Introductory Comparative Study, *Comparative Labor Law and Policy Journal* (forthcoming).

1. SOUTH AFRICA

South Africa is a constitutional state with an entrenched Bill of Rights, including extensive labour rights.[6] Most of these rights are given legislative expression in the Labour Relations Act (LRA)[7] and the Basic Conditions of Employment Act BCEA).[8] This framework was the outcome of lengthy and at times acrimonious negotiations between the social partners.

The LRA, representing a complete overhaul of its predecessor,[9] was drafted by a team of experts with technical support from the ILO and international labour law experts. Replacing the judge-made 'duty to bargain' with a system of voluntary collective bargaining based on majoritarian principles, the new Act recognised that South Africa's re-entry into the global economy presented challenges relating to productivity, flexibility and (as promised by the new Government of National Unity)[10] workplace empowerment. To this end the concept of workplace forums, which promoted a form of consultation and joint decision-making resembling that of German works councils, was introduced.[11] The final product was supported by organised labour as being consistent with the promises made in the 1994 election manifesto of the ANC.[12]

The South African labour market has undergone extensive changes since then, with growing numbers of workers performing what is termed "non-standard" work[13] and over 30% of all working South Africans earning a livelihood through informal work.[14] Yet the labour relations system, Theron argues, has remained informed by "social and economic assumptions that prevailed when the primary and secondary sectors were seen as the engines of the economy."[15] This refers in particular to the assumptions that (a) the workplace is

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[6] Chapter Two, Constitution of the Republic of South Africa, 1996. Section 23 is the 'labour clause', which includes a right to 'fair labour practices' as well as the right to join and form a trade union or employers' organisation, to engage in collective bargaining and to strike.

[7] Act 66 of 1995

[8] Act 55 of 1998

[9] I.e., the Labour Relations Act 28 of 1956.See Explanatory Memorandum (1995) *Industrial Law Journal* (South Africa; hereafter *ILJ*) 278 at 279-280.

[10] A coalition of the African National Congress (ANC) which had led the liberation struggle, the National Party which had ruled apartheid South Africa, and the Zulu-based Inkatha Freedom Party (IFP), which governed South Africa from 1994 to 1997. The IFP retained a presence in the cabinet until 2004.

[11] Due to the antagonistic labour relations climate inherited from the apartheid past, however, very few workplace forums were established and adversarial collective bargaining remained the rule.

[12] The ANC has since the early 1990s operated in an extra-parliamentary 'Triple Alliance' with the Congress of South African Trade Unions (COSATU) and the South African Communist Party, with some robust debate among the partners around policy choices.

[13] I.e., temporary, part-time and agency work (or "triangular employment") in particular: see fn 10 below. In general, see Paul Benjamin "Decent work and non-standard employees: Options for legislative reform in South Africa: A discussion document" (2010) 31 *ILJ* 845.

[14] Paul Benjamin *Informal work and labour rights in South Africa* (2008) 29 *ILJ* 1579.

[15] Jan Theron "The shift to services and triangular employment: Implications for labour market reform" (2008) 29 *ILJ* 1 at 4. "Triangular employment" work done by employees for a third party to whom their

the place where workers actually work (b) employment is a binary relationship between employer and employee, with a clear distinction between employment and self-employment (c) the centrality of industrial bargaining, and (d) the employment relationship is indefinite or of long term duration. Indeed, unlike in Europe and elsewhere, virtually no provision was made in labour legislation for non-standard forms of employment; as discussed below, amendments to this end were enacted only in 2014. The effect is that an increasing number of South African workers have up to the present performed work that largely fell beyond the reach of labour law[16] and, in the process, new tensions accumulated.

THE SOUTH AFRICAN LABOUR MARKET

The transformation of South Africa between 1990 and 1994, from a racist state hovering on the edge of civil war to a turbulent but vibrant constitutional democracy, is regarded as one of the greatest political success stories of the late 20th century. Political transformation, however, can do no more than set the scene for social change. Overcoming the economic and social inequalities created during 350 years of minority rule and cheap labour was always going to be a difficult process. Twenty years on it has become clear, to widespread dismay, that inequality has deepened rather than diminished.

On the surface much has changed. In terms of numbers the black middle class had overtaken the white middle class by 2006.[17] Yet the gap between rich and poor has widened. The Gini coefficient[18] for South Africa, reaching 63.1 in 2009, is the highest among the BRICS countries and one of the highest in the world.[19]

This stark statistic reflects a volatile combination of factors. Although South Africa is classified as an upper middle income country, this is not based on the living standards of the majority of workers. In line with trends across both advanced and developing economies, the share of wages in GDP in South Africa dropped from 57% to 51% between 1994 and 2012[20] while both pre-tax and post-tax profits increased over

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employer provides their labour or services, also referred to as "agency work". The LRA uses the term "temporary employment services" while trade unions and employers often speak of "labour brokers".

[16] Benjamin (fn 9 above) at 1583.

[17] Statistics South Africa *Profiling South African middle-class households, 1998–2006* (2009) http://www.statssa.gov.za/publications/Report-03-03-01/Report-03-03-01.pdf (accessed 3 February 2014) Figures 11, 12.

[18] The Gini coefficient is a ratio between 1 and 0, where 0 shows perfect equality and 100 shows perfect inequality.

[19] World Bank *Data: Gini Index* at http://data.worldbank.org/indicator/SI.POV.GINI?order=wbapi_data_value_2012+wbapi_data_value+wbapi_data_value-last&sort=asc (accessed 19 January 2014). The figures for Brazil, Russia, China and India were 54.7, 40.1, 42.1 and 33.9 respectively (*ibid*).

[20] Niall Reddy *Wages, profits and unemployment in post-apartheid South Africa 2014* (Alternative Information Development Centre (AIDC) 2014) at 24-26.

the same period.[21] In addition, the labour market is skewed by high and rapidly growing income levels at the top end while "less skilled workers continue to earn more or less the same wages that they earned towards the end of Apartheid".[22] The historical 'apartheid wage gap' thus remains firmly in place.

It is also relevant to note that, while some 63% of the total work force are employed on a 'permanent' or indefinite basis,[23] only 29% have their wage increments determined by means of collective bargaining, either directly between an employer and a trade union or at sectoral level.[24] As in many countries, sectoral agreements may be extended to non-parties, although provision is made for non-party employers to apply for exemption from extended agreements. In fact, only 2.9% of the total work force are covered by extended agreements.[25] In addition, some 34% of the total workforce are covered by sectoral determinations.[26] This suggests that well over a third of all workers are not in 'permanent' employment, while about the same percentage fall beyond the coverage of wage regulatory mechanisms. Indeed, a 2007 study indicated that informal (i.e., unregulated) jobs represented 22.8% of total employment.[27] While this figure may reflect a lower rate of informality than countries such as Brazil, Mexico, Indonesia or the Philippines, where informal employment is above 50%,[28] it is nevertheless substantial enough to exert downward pressure on wages and working conditions in a number of sectors.

The second major feature of the South African labour market is the exceptionally high rate of unemployment. The official figure (including discouraged work-seekers) stood at 36.7% in the third quarter of 2013[29] while, according to the International Labour Organisation (ILO), more than 50% of youth aged between 15 and 24 are unemployed.[30] Government initiatives to relieve unemployment include interventions

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[21] Ibid at 17-18.
[22] Ibid at 16. The mean wage of "highly skilled workers", over the same period, increased by 67%: ibid.
[23] Statistics South Africa *Quarterly Labour Force Survey* (Quarter 3, 2013) (hereafter 'LFS') at 38.
[24] Ibid at 39. Sectoral bargaining council agreements covered 20.3% of the total work force in 2004: Godfrey *et al Collective Bargaining in South Africa* 114.
[25] Godfrey *et al* ibid.
[26] I.e., issued by the Minister of Labour in terms of Chapter 8 of the BCEA to set minimum wages and conditions for workers in unorganised sectors. For statistics, see Development Policy Research Unit *Minimum Wages, Employment and Household Poverty: Investigating the Impact of Sectoral Determinations* (University of Cape Town, 2008) Table 1 at http://www.labour.gov.za/DOL/downloads/documents/research-documents/ Sectoral%20determinations%20POLICY%20VERSION%20v4.pdf (accessed 6 February 2014).
[27] Paul Benjamin *Informal work and labour rights in South Africa* (2008) 29 *ILJ* 1579 at 1583.
[28] Ibid. The LFS records that 15.56% of the total employed population fell within its definition of "informal" employment in the third quarter of 2013: LFS iv Table A.
[29] LFS Table 2.
[30] This is more than double the youth unemployment rate in North African countries and four times that in sub-Saharan Africa as a whole; on a global scale, only Greece and Spain record worse figures: see International Labour Organisation *Global Employment Trends for Youth 2013: A generation at risk* (ILO, Geneva 2013) 19-20, 10; available at http://www.ilo.org/wcmsp5/groups/public/---dgreports/dcomm/documents/publication/ wcms_212423.pdf (accessed 3 February 2013). According to Statistics South Africa the number of youth not in employment, education or training was 31.7%: LFS xiii.

aimed at promoting job creation,[31] improvements in education and skills development[32] and, more controversially, the Employment Tax Incentive Act[33] whereby employers will be encouraged to employ young people by means of tax incentives for up to two years.

UPDATING LABOUR LEGISLATION

These themes –extreme inequality, the plight of the most vulnerable workers, mass unemployment– and the conflict generated by these conditions have dominated the discourse on labour law in South Africa for some time. Pressure from trade unions for labour market reform and greater protection for workers has been sharpened by pressure on union leaders by their members and intensive debate about the economic policies of the ANC government, described by critics on the left as "neo-liberal". Particular opposition was aroused by the growing use of agency workers at the expense of secure employment, resulting in widespread union demands for the prohibition of "labour broking". Employers, employers' organisations and lobby groups such as the Free Market Foundation (FMF),[34] on the other hand, have persistently argued that "over-regulation" and "rigidity" of the labour market, exacerbated by increasing industrial unrest, are at the root of the country's inability to create sufficient jobs.

In the aftermath of the global economic crisis of 2008, with slow and uncertain recovery on a global scale and high-growth economies like India, China and Brazil performing below expectations,[35] these debates became more intractable than ever. Faced with these pressures government in 2010 – for the second time in a decade[36] – proposed significant amendments to the country's main labour statutes.[37] A central objective was to regulate non-standard employment and agency work in particular. Another objective was to address the problem of non-compliance by employers with minimum employment standards. On the other hand, government also set out to clarify the law relating to dismissals and to curb unprocedural industrial action.

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[31] In particular, through the Expanded Public Works Programme for creating temporary jobs in the public sector and non-profit organisations: see http://www.epwp.gov.za/ (accessed 3 February 2013).

[32] Medium Term Budget Policy Statement 2013, National Treasury Republic of South Africa, October 2013 at 9.

[33] Act 26 of 2013. Trade unions fear that will encourage employers to replace workers in indefinite employment with "cheap youth labour". Section 5 of the Act sets out to penalise this.

[34] According to its website, the Free Market Foundation is an "(i)ndependent public benefit organisation founded in 1975 to promote and foster an open society, the rule of law, personal liberty, and economic and press freedom as fundamental components of its advocacy of human rights and democracy based on classical liberal principles. It is financed by membership subscriptions, donations and sponsorships": http://www.freemarketfoundation.com/about/who-we-are (accessed 4 February 2014).

[35] Medium Term Expenditure Framework Guidelines, National Treasury, August 2012 at 2.

[36] The previous amendments, enacted in 2002, had on balance been favourable to labour: Du Toit *et al Labour Relations Law* 38-43.

[37] I.e., the Labour Relations Amendment Bill, the Basic Conditions of Employment Amendment Bill, the Employment Equity Amendment Bill and the Employment Services Bill.

The draft Bills were met with considerable criticism from employers and others, not least because of their technical shortcomings, and were withdrawn. In 2012 the redrafted Bills were submitted to Cabinet and, after extensive deliberations and further amendment, completed their passage through Parliament by early 2014. The debate surrounding these Bills largely encapsulated the contestation of the previous decade and a half, and the final text is a good measure of government's policy stance as well as the compromise reached between organised business and labour. The main themes of the debate outlined above will be looked at in this context.

Is the South African labour market over-regulated?

Employers have consistently argued for greater flexibility as a pre-condition for economic growth in South Africa, in the context of a world order characterised by growing trade liberalisation.[38] Andrew Kenny, a zealous exponent of employers' interests, expresses the free market view in perhaps its purest form:

"Between our catastrophic levels of unemployment and the prospect of an economy with full employment stands the impenetrable barrier of our labour laws. These wicked laws are not only throwing millions of our people into the dustbin of joblessness, not only crippling our economy, not only the cause of hideous poverty and humiliation, not only a primary reason for SA being about the most unequal society on the planet, but they are a violation of human rights. Our labour laws deny South Africans a fundamental human right: the right to work."[39]

Evidence to substantiate this view, however, is elusive. In essence it represents an assumption that "[o]ur onerous labour laws make the cost of employment so high and the difficulties of getting rid of lazy or delinquent workers … so great that employers are loathe to employ",[40] based on episodic examples of difficulties experienced by employers allegedly due to inflexible legal requirements, combined with a zero-sum theory that job creation depends on lower wages.[41] In fact, a study commissioned by the Organisation for Economic Co-operation and Development (OECD) found minimal evidence of the restrictiveness of South African labour law and, on the contrary, rated South Africa fifth in a scale of 39 countries with the most liberal employment protection legislation.[42] Russia, Brazil, India and China (in that order) were all rated

[38] Jan Theron, The shifts to services and triangular employment : Implications for labour market reform (2008) 29 ILJ 1 at 1.
[39] A Kenny, " 'Wicked' labour laws deny basic human right to work" *Business Day* 19 April 2011; republished at http://www.bdlive.co.za/articles/2011/04/19/andrew-kenny-employment;jsessionid=2624B8DD4C5ABFEEC370D579EBCD44FF.present1.bdfm (accessed 4 February 2014).
[40] Ibid.
[41] For more in-depth discussion, see Maree in Godfrey *et al* (fn xx above).
[42] OECD (2013), OECD Economic Surveys: South Africa 2013, OECD Publishing, 32 Figure 18 at http://www.treasury.gov.za/publications/other/OECD%20Economic%20Surveys%20South%20Africa%202013

as having more restrictive laws than South Africa. From a trade union perspective, various areas remained where regulation was inadequate and needed to be tightened.

THE CURRENT AMENDMENTS

Inevitably, the long process of amending the LRA and BCEA from 2010 to 2014 reignited the debate about the alleged over-regulation of the South African labour market.[43] In its submissions to Parliament, Business Unity South Africa (BUSA)[44] declared that the amendments, viewed as a whole, would "increase both the cost and complexity of doing business" and, while tackling "the abuse of vulnerable workers employed in atypical employment", did so "in an overly complex legalistic manner". If enacted, it was claimed, the Bills would "destroy a very significant number of jobs" and undermine the objectives of the National Development Plan.[45] For their part the trade unions concentrated largely on the demand for the prohibition of agency work.[46]

Against this background the new provisions for the protection of non-standard workers are of special interest. While no detailed discussion is possible within the scope of this chapter, the measures in many ways resemble those found in other jurisdictions in Europe and elsewhere.[47] However, two provisions which perhaps aroused the strongest opposition deserve to be looked at more closely.

The first is a provision seeking to ensure that the "temporary" employment of agency workers by clients is indeed temporary and does not serve as a disguise for indefinite employment under unacceptable conditions (as alluded to in the BUSA submission, cited above).[48] It does this by placing a three-month limit on the placement of agency workers with clients, after which the worker is deemed to be employed by the

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.pdf (accessed 4 February 2013). See Bob Hepple "Is South African labour law fit for the global economy? "in Rochelle Le Roux and Alan Rycroft (eds) *Reinventing labour Law - Reflecting on the first 15 years of the Labour Relations Act and future challenges* (2012) at 2-3. Hepple goes on to conclude that, on an analysis of World Bank indicators, it is "no more difficult or expensive on the whole for an employer in South Africa to make a worker redundant" than in the United Kingdom, China or South Korea: ibid 3-7.

[43] For an index to the debate from 2010 to 2013 plus government statements and articles on line, see SabinetLaw *Labour Relations Amendment 2012* at http://www.sabinetlaw.co.za/labour/legislation/labour-relations-amendment-2012 (accessed 4 February 2014).

[44] BUSA is the principal confederation of employers' organisations in South Africa.

[45] Submission by BUSA to the Parliamentary Portfolio Committee on Labour regarding the Labour Relations Amendment Bill and the Basic Conditions of Employment Amendment Bill, 28 June 2012; at www.pmg.org.za/files/docs/120725busa.doc (accessed 4 February 2014).

[46] See Paul Benjamin "To regulate or to ban? Controversies over temporary employment agencies in South Africa and Namibia" in K. Malherbe and J. Sloth-Nielsen (eds)*Labour Law into the Future*(Juta, 2013) 189.

[47] See Craig Bosch "The Proposed 2012 Amendments Relating to Non-standard Employment: What Will the New Regime Be?" (2013) 34 *Industrial Law Journal* (South Africa) 1631, who concludes that the new protection is "arguably no more than is fairly obviously due" (at 1644).

[48] LRA, s 198A read with s 198.

client.[49] However, it excludes workers earning above a prescribed income threshold[50] as well as those working as substitutes for employees who are temporarily absent, regardless of the length of their placement. The three-month limit and the application of the provision may also be varied by sectoral collective agreement or by Ministerial notice, on which the Minister must invite public comment and consult with organised business and labour.[51]

The second provision is aimed at the practice of evading the consequences of indefinite employment by appointing workers on a series of temporary contracts. It places a three-month limit on all temporary employment contracts, but proceeds to exclude all cases where an employer may have a legitimate reason for entering into a temporary contract.[52]

Thus, the provision does not apply to workers earning above the aforesaid income threshold or to employers with fewer than 10 employees, or with fewer than 50 employees who have been in business for less than two years, or to contracts permitted by collective agreement, or to any other situation where a fixed-term contract is "justified".[53]

In the context of South African labour relations, it is submitted, it is inappropriate to describe the careful attention to detail reflected in the above provisions as "overly legalistic". Rather, it may be seen as illustrative of the finely-balanced negotiations which led to their adoption and necessary in seeking a sustainable balance between the highly polarised positions of business and labour.

THE ATTACK ON THE EXTENSION OF SECTORAL AGREEMENTS

The collective bargaining provisions of the LRA and, more specifically, the power vested in the Minister of Labour to extend bargaining council collective agreements to non-party employers and workers in the sector,[54] have been a bone of contention for a decade and a half[55] and are currently the subject of a constitutional challenge by the Free Market Foundation.[56]

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[49] LRA, s 198A(1) and (3).

[50] Expected to be set at R193 805 (approximately US$16 000) per year. With the median earnings of South African workers in formal employment at R3 683 in 2010, the effect would be to exclude approximately the top 10% of wage and salary-earners: Statistics SA *Monthly earnings of South Africans, 2010* Table 5 at http://www.statssa.gov.za/publications2/P02112/P021122010.pdf (accessed 7 February 2014).

[51] That is, in the tripartite National Economic Development and Labour Council: LRA, s 198A(1), (6) and (7).

[52] LRA, s 198B.

[53] LRA, s 198B(2), (3). Section 198B(4) lists nine specific cases where temporary contracts will be justified which, for practical purposes, cover every situation where an employer's operational requirements may call for a temporary appointment.

[54] LRA, s 32.

[55] The time scale is significant, given that the system for extending sectoral agreements to non-parties has been in place since 1924 when it was established by South Africa's first national labour stature, In Industrial

There are two principal legal grounds for the challenge. The first is that the parties to bargaining councils are private actors to whom, in effect, the power of legislation which is vested in the state has improperly been delegated by permitting the extension of their agreement to non-parties. The second is that the technical prerequisites for extension do not guarantee that the process will necessarily be supported by unions and employers respectively organising and employing a majority of workers in the sector.

Space does not allow any detailed discussion of the merits of these arguments.[57] In summary it may be said that the sectoral bargaining model adopted in South Africa is essentially no more inclusive or restrictive than those existing in many other countries and less so than the *erga omnes* systems found in certain countries. The legitimacy of centralised bargaining as a form of collective bargaining, and the case for the extension of collective agreements as a necessary component of centralised bargaining, have long been argued[58] and are reflected in the relevant ILO Conventions.[59] De Vos is no doubt accurate in his conclusion that, in essence, the Free Market Foundation is "aggrieved by the policy choices made by the legislature [for] protecting collective bargaining agreements" rather than seriously asserting the unconstitutionality of those choices.[60]

If this is so, it is the broader political context of the issue rather than its legal merits that is significant for present purposes. The action by the FMF has certainly had a polarising effect. The Congress of South African Trade Unions(COSATU)[61] has condemned it as part of a "coherent, deliberately orchestrated and socio-economically and politically right-wing funded campaign to weaken and ultimately dismantle our democratically legislated labour relations dispensation, especially its collective bargaining machinery",[62] which will serve to "deepen poverty amongst the employed and further worsen income inequalities whilst

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Conciliation Act 11 of 1924. Opposition to centralised bargaining only started emerging in the era of globalisation: Du Toit *et al* 20-21.

[56] See fn 29 above. The case is *Free Market Foundation v Minister of Labour and others* (Gauteng North High Court, Case No 13762/2013). Fifty bargaining councils are cited as respondents. For comment by a constitutional lawyer, see Pierre de Vos "The Free Market Foundation's quixotic venture" *Constitutionally Speaking* (7 March 2013) at http://constitutionallyspeaking.co.za/2013/03/07/ (accessed 5 February 2014).

[57] For an overview, see Darcy du Toit "The implications for collective bargaining of a successful attack on extension of collective agreements: Some thoughts" (South African Society for Labour Law discussion paper, April 2013) at http://www.saslaw.org.za/papers/gtg/SASLAW%20debate%20contribution.docx (accessed 6 February 2013).

[58] See, for example, L. Hamburger "The Extension of Collective Agreements to cover Entire Trades and Industries" *International Labour Review* (vol XL, no 2, Aug 1939) 153 at 156-157.

[59] That is, Conventions 98 (on Right to Organise and Collective Bargaining, 1949)and 154 (on Collective Bargaining, 1981), read with Recommendation 163 of 1981.

[60] Indeed, as an alternative remedy the FMF asks that the Minister of Labour be required to exercise discretion in extending an agreement rather than being bound to do so if certain conditions (which the FMF also seeks to amend) are met.

[61] COSATU is the country's largest trade federation, with more than 2 million members.

[62] Special Declaration adopted by the 2013 COSATU Collective Bargaining, Organising and Campaigns Conference.

bosses will even make more obscene profits".[63] For its part, government has responded by including no fewer than six amendments to the provisions for the extension of collective agreements that are aimed at facilitating the process of applying for exemption.[64]

This, too, may be seen as part of the ongoing process of crafting and recasting the legal framework in response to the volatile and ever-shifting relations between South African business and labour, without reflecting any particular policy trend.

TURMOIL IN THE TRADE UNION MOVEMENT

As noted above, increasing industrial militancy among workers is seen by employers as yet another factor inhibiting economic growth. There has undoubtedly been an upturn in strike action since 2009. The Department of Labour's most recent summary reads as follows:

"A total of 99 strike incidents were recorded in 2012 as compared to 67 in 2011, 74 in 2010, 51 in 2009 and 57 in 2008. Working days lost were during 2012 amounted to 3.3 million … (involving 241 391 employees) as compared to 2.8 million … in 2011 (involving 203 138 employees)."[65]

At the same time, there has been a long-term decline in the number of strikes from 1 324 in 1997 to 51 in 2009 before rising again to 99 in 2012.[66] The overall picture has thus been one of fewer but bigger strikes, many of them in the public sector.

2012 is seen as a watershed year. 58% of the workers taking part in industrial action in 2012 were in the mining sector, which was racked by violent and often unprocedural strikes, brought to a macabre climax on 16 August 2012when police opened fire on striking workers at the Marikana platinum mine,[67] killing 34 and wounding 78.[68] Industrial action continued at high levels in 2013, with the number of workdays lost rising

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[63] Ibid.

[64] See LRA, s 32 subsections (3)(dA) and (e), (3A), (5)(c) and (d), and (11). Significantly, s 32(5) requires the Minister to call for public comment and consider it before extending an agreement, thus building in an element of discretion as called for by the FMF.

[65] Department of Labour *Industrial action report 2012*at http://www.labour.gov.za/DOL/media-desk/media-statements/2013/industrial-action-report-2012 (accessed 5 February 2014).

[66] Darcy du Toit and Roger Ronnie "The necessary evolution of strike law" in in Rochelle le Roux & Alan Rycroft (eds) *Reinventing Labour Law* (Juta, Cape Town, 2012; also published in (2012) *Acta Juridica* 195. The figure of 99 strikes in 2012 marks a return to the level of 2006.

[67] The mine is owned by the British multinational Lonmin plc.

[68] See Mark Anstey "Marikana – and the push for a new South African pact" (2013) 37 *South African Journal of Labour Relations* 133; Tembeka Ngcukaitobi "Strike Law, Structural Violence and Inequality in the Platinum Hills of Marikana" (2013) 34 *ILJ* 836; Gavin Hartford "The mining industry strike wave: what are the causes and what are the solutions?" (*Groundup*, 10 October 2012)http://groundup.org.za/content/mining-industry-strike-wave-what-are-causes-and-what-are-solutions (accessed 5 February 2014).

from 1,6 million in January-September 2012 to 4,7 million in January-September 2013[69] – almost 50% up on the total for 2012 – although the intensity and duration of the strikes levelled off in comparison with 2012 and unprocedural ("wildcat") action declined.[70] But, with economic growth remaining sluggish,[71] industrial action was inevitably identified from the side of business and the media as a key reason for poor economic performance.

Notably, the Department of Labour responded by seeking to introduce a number of direct and indirect limitations on the right to strike in the amendments to the LRA.[72] These were, however, progressively abandoned in the course of negotiations in the face of questions about the practicality of some restrictions and the constitutionality of others. It could also not be denied that economic performance was negatively affected by a range of factors other than industrial action, ranging from poor harvests caused by drought to "lustreless export markets and domestic supply-side constraints".[73] Most importantly, of course, it may also have reflected some understanding that industrial conflict is not caused solely by trade unions but is also influenced by employer conduct and by broader social conditions.

The Marikana massacre offered a tragic but salutary object lesson. It prompted national soul-searching about 'what had gone wrong', why the machinery created by the LRA had failed to resolve the dispute and, above all, the underlying causes of the disaster.[74] Hartford observes that "[t]here is no doubt that the gross poverty and inequality in SA … provides the social and economic context to heightened expectations of wage increases", but also that the explanation for the breakdown in the LRA processes at Marikana must be sought in more specific causes.[75] These, he argues, can be found in the persistence of the migrant labour system, dire living conditions experienced by workers with no improvement in sight and, above all, neglect of the rock-drill operators' demands by the majority union, the National Union of Mineworkers (NUM), accompanied by what was perceived an excessively cosy relationship between NUM full-time shop stewards and mine management. Aggravating factors were the considerable privileges enjoyed by full-time shop stewards and the exclusion, due to the majoritarian system embodied by the LRA, of the rival Association of

[69] South African Reserve Bank *Quarterly Bulletin*(December 2013) 19 at http://www.resbank.co.za/Lists/News%20and%20Publications/Attachments/6007/01Full%20Quarterly%20Bulletin%20%E2%80%93%20December%202013.pdf(accessed 5 February 2014).
[70] See, in general, Department of Labour *Annual Labour Market Bulletin 2012/13* at http://www.gov.za/documents/index.php?term=labour+market&dfrom=&dto=&yr=0&subjs%5B%5D=0 (accessed 5 February 2013).
[71] Growth slowed from 3.2% year-on-year in the second quarter of 2013 to 0.7% in the third quarter: SARB *Quarterly Bulletin* (n 64 above) 5.
[72] Including the requirement of a compulsory strike ballot, the power of the CCMA to suspend a strike "in the public interest", and the power of the Labour Court to prohibit a strike under certain circumstances.
[73]SARB *Quarterly Bulletin* (n 64 above) 2, 5.
[74] A commission of inquiry headed by a retired judge of the Supreme Court of Appeal, Mr Justice Farlam, to investigate legal accountability for the police action is still in session a year and a half after the event.
[75] Hartford, op cit (n 63 above).

Mining and Construction Union (AMCU) from the collective bargaining process. The result, after a long period of deepening frustration, was a spontaneous rebellion by rock-drill operators, led by a workers' committee.

At a legal level, the amendments to the LRA include some relaxation of its majoritarian bias by opening more space for non-majority unions to obtain organisational rights.[76] Many have recognised, however, that the real challenges lie deeper, on the one hand in the extreme contrast between poverty and wealth in South Africa and, on the other, in the need for greater political will on the part of all key role-players to seek durable solutions in the tradition of the mid-1990s.[77]

Since Marikana disaffection has spread further through COSATU and, to a less visible extent, the ANC. Though finding expression in conflicts among leaders of different schools of thought in the movement, there can be little doubt that dissatisfaction with the economic policies of the current ANC administration, seen by many as favouring employers and the new black elite at the expense of workers and the poor, are a major driving force. There can be equally little doubt that the incoming administration, following the April 2014 elections, will be faced with the challenge of reconciling these differences.

THE OUTLOOK: SOUTH AFRICA

To sum up: inequality and mass unemployment are abiding realities casting their shadow over every facet of South African society and the labour market. In a sense, the endemic strife between employers and labour can be explained by conflicting responses to these realities. From a free market perspective the answer must be of a deregulatory nature, liberating employers from legal constraints on the assumption that this will enable them to create jobs and new wealth. From a trade union perspective the way forward lies in organising working people to struggle for more inclusive policies and a more egalitarian distribution of social wealth. However, nothing remains static. The question is how these differences will evolve.

Some improvement is expected globally and South Africa's growth rate is expected to rise over the next two years.[78] The National Development Plan, seen by government as being consistent with South Africa's membership of BRICS,[79] was described in 2013 as a framework for accelerated growth and the reduction of

[76] See the new sections 21(8A)-(8D), LRA.
[77] See the articles cited in fn 63 above.
[78] United Nations *World situation and economic prospects 2014* at 2.
[79] President Jacob Zuma was quoted on the eve of the 5th BRICS Summit held in Durban in March 2013 as saying that being a BRICS member 'fits in well with our NDP objectives of raising employment through faster economic growth, improving quality of education, skills development and innovation, as well as building the capacity of the state to play a developmental, transformative role': http://www.sanews.gov.za/world/brics-fits-well-sa%E2%80%99s-national-development-plan-zuma (accessed 6 February 2013).

inequality.[80] But, against the background sketched above, this in itself is highly unlikely to offer a solution. Growth would need to take place at unprecedented rates and would need to be sustained over a prolonged period to overcome the social chasm. Moreover, the proceeds of growth would need to be applied towards social need rather than individual enrichment. These challenges go well beyond the traditional terrain of labour law, raising issues relating to the realisation of workers' basic rights both inside and outside the workplace, under widely divergent conditions, to create conditions under which they can be met. But, from a labour law perspective, the workplace is where the process must begin.

It seems likely that Department of Labour's regulatory philosophy of 'regulated flexibility' will be tested to the utmost. Based on the ILO's approach to flexibility, which factors in employers' interest in flexibility as well as employee interest in job security, this concept has informed the drafting of the post-1994 labour law dispensation.[81] By creating different forms and levels of flexibility and security, however, it goes beyond a simple balance between competing interests by seeking to create a framework within which the balance can be struck and constantly adjusted.[82] But "flexibility" has thus far been "narrowly circumscribed, aimed at enabling employers to vary minimum employment standards rather than addressing the divergent conditions prevailing in different sectors, and non-industrial sectors in particular."[83] It is arguable that a broader concept of flexibility, not confined to employers' operational requirements but seeking to address the needs of workers as well as employers in different sectors, will need to be developed if sustainable solutions are to be found.[84] This, in turn, may well be the key to unlocking the growth and productive potential of the South African economy.

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[80] At http://www.npconline.co.za/MediaLib/Downloads/Downloads/Executive%20Summary-NDP%202030%20-%20Our%20future%20-%20make%20it%20work.pdf (accessed 3 February 2013).

[81] Halton Cheadle *Regulated flexibility: Revisiting the LRA and the BCEA* (2006) 27 *ILJ* 663 at 668. Cheadle provides a comprehensive review of the origins of the LRA and why the objectives of regulated flexibility have not come to fruition.

[82] Ibid at 668.

[83] Darcy Du Toit and Roger Ronnie *Regulating the informal economy: Unpacking the oxymoron - From worker protection to worker empowerment*(paper presented at Regulating for Decent Work conference, ILO, Geneva, 3-5 July 2013). See, for example, sections 14 and 15 of the BCEA providing for variations of daily or weekly working hours. Flexibility in such forms addresses the needs of large employers rather than seeking to promote more appropriate forms of protection for workers in non-standard jobs.

[84] See I Ayres & J Braithwaite *Responsive Regulation: Transcending the Deregulation Debate* (New York: Oxford University Press, 1992); abstract available at http://islandia.law.yale.edu/ayres/respons.htm (accessed 5 February 2014). In response to the programme of deregulation associated with the 'Washington consensus 'the authors proposed that regulation should be capable of responding to the realities of different sectors, workplaces and work processes. The implication is that regulatory processes should be decentralised in order to allow workers and employers to formulate the rules by which their relationship is governed in their specific environment, whether by means of collective bargaining or other appropriate mechanisms. See also Hepple's analysis of "meaningful engagement" in Bob Hepple 'Negotiating social change in the shadow of the law' (2012) *South African Law Journal* 248.

2. INDIA

India, billed as one of the 'emerging' economies of the South, has enjoyed a rate of growth of over 8 percent in the first decade of this century. The growth rate for 2013 however fell to around 5 percent. This slow-down has been accompanied by a decrease in investments, casting doubts over the sustainability of the higher rates of growth experienced over the past couple of decades, a period that coincided with the 'opening up' of the economy.

Maintaining a high growth rate has been a matter of critical concern given the sheer enormity of the population and the work force in India.

Employment, which was 457 million in 2004-05 reached almost 480 million in 2011-12. (Unemployment figures in India have always been relatively low, at around 11 million - around 2.2% - in the same period.) The bulk of this employment has been in the informal economy, which accounts for over 80 per cent of all employment in India. The quality of work available in the informal economy and the need to formalize the informal in order to achieve decent work goals and to enable enterprises to become more productive is currently a matter of much discussion within the ILO and India.

According to the ILO, "The informal economy is marked by acute decent work deficits and a disproportionate share of the working poor."[85] The ILO in 2002 had characterized the informal economy as covering "all economic activities by workers and economic units that are – in law or in practice – not covered or insufficiently covered by formal arrangements. Their activities are not included in the law, which means that they are operating outside the formal reach of the law; or they are not covered in practice, which means that – although they are operating within the formal reach of the law, the law is not applied or not enforced; or the law discourages compliance because it is inappropriate, burdensome, or imposes excessive costs". Informality, thus, is inextricably linked to how the law, and therefore the right to social security/decent work is structured and enforced.

This part of this four-country chapter examines some aspects of the informal economy in India and highlights the case of those employed through intermediaries (contract labour) which is a growing segment of employment in India to understand the key challenges that informality in employment poses to labour law and the trajectory of development in this region.

[85] ILO, *Transitioning from the Informal to the Formal Economy*, Report V(1), International Labour Conference, 2014 (2013).

THE INFORMAL ECONOMY IN INDIA

India perhaps has the largest numbers of persons employed in the informal economy.[86] Despite conventional wisdom, the high rates of growth experienced by India during the past decade or so have not resulted in any reduction in the proportion of persons working in the informal economy. On the contrary, the informal economy has emerged as a "shock absorber" for creating bare livelihood option during the periodic down turns and crises in the formal sector, as well as regularly providing a "safety net" for those who are unemployed and under employed.

In terms of the nature of employment, the share of regular wage and salaried workers has been just 17.9 % of total employment, and the figures for women workers is far lower at 12.7%. In terms of the sector where persons were employed, in 2011-12 around 82.2% of those working were in the informal sector. There has been a gradual increase in the share of workers employed in the formal sector in the last decade, growing from 13.7 % in 2004-05 to 17.8 % in 2011-12. Much of this increase has been in informal jobs in the formal sector.[87]

Far from dying out, the informal economy has been thriving and growing in India. The formal and informal parts of the economy appear to be inextricably entwined.[88] The contribution of the informal economy to the GDP is significant. A government appointed commission in India assessed its contribution to be around 55% of India's GDP in 2008.[89] Many of the economic activities of the enterprises in the informal economy i.e. enterprises not covered by the regulatory framework, are often economically linked to the formal part of the economy. Home-based workers who carry out part of the manufacture within their homes are one example of such linkages. The manufacturer saves on the costs associated with employing workers and supervising their work on his/her premises. Workers working on a casual basis, without regular jobs, are a large category of informal workers. Self-employment has emerged as the largest segment within informality in India, and this consists mainly of own-account workers carrying out economic activities; these household enterprises as well as those who work there often fall outside the scope of legal regulation. Often, such own-account workers rely on family members to eke out a living, and such contributing family workers are not recognised as workers under labour law. Street vendors, waste-pickers, individual landholders working on their piece of land, fisher folk, village artisans etc. are examples of such survival activities carried on by

[86] The terms 'unorganized'/'organised' rather than 'informal'/'formal' are used in official India documents.
[87] Figures mentioned here are drawn from the ILO, India Labour Market Update, December 2013, ILO Country Office for India. The terms 'organised/unorganised' used in India have been replaced with 'formal/informal'.
[88] Diyendu Maiti and Kunal Sen, 'The Informal Sector in India: A Means of Exploitation or Accumulation?', *Journal of South Asian Development* 5:1 (2010): 1-13.
[89] NCEUS, *Report on Conditions of Work and Promotion of Livelihoods in the Unorganised Sector*, New Delhi, Government of India, 2007; KP Kannan and TS Papola, 'Workers in the informal sector: Initiatives by India's National Commission for Enterprises in the Unorganized Sector' (NCEUS) *International Labour Review*, Vol 146, Nos 3-4 , 2007.

such households. (India has recently enacted a new law that provides for the regulation of street vending and protects street vendors from harassment, eviction and confiscation of their property.)[90] Whether these tiny, household-based 'enterprises' can scale up to become enterprises subject to various regulations or are a 'cushion' to allow households to eke out a livelihood is a matter of debate presently within the ILO which is considering adopting an instrument pertaining to the informal economy in the International Labour Conference in 2014.[91]

Another example of informal employment arises where the workers are employed in an enterprise which is otherwise covered by the labour but where the duration of employment is irregular or intermittent or else is mediated through a contractor/intermediary and the eventual employer/user enterprise/principal employer is not treated as the employer of such workers.

Indian law considers the informal economy as comprising all those working in the informal sector (broadly speaking, enterprises below a certain employment threshold where most of the labour laws relating to regulation of work or social security do not apply) as well as those working in large enterprises where such protection exists but where the nature of employment of informal workers is such that they are excluded from social security protection. This latter limb captures a process of *informalisation* where, due to reasons such as the short duration of their contract of employment, or nature of work, or mode of employment such as via intermediaries, such employees fall outside of protection. The Unorganised Workers Social Security Act enacted in 2008 captures this broad-based method of defining the sector and the workers involved.

> S. 2 (l) states: "unorganised sector" means an enterprise owned by individuals or self-employed workers and engaged in the production or sale of goods or providing service of any kind whatsoever, and where the enterprise employs workers, the number of such workers is less than ten
>
> S. 2 (m) states: "unorganised worker" means a home-based worker, self-employed worker or a wage worker in the unorganised sector and includes a worker in the organised sector who is not covered by any of the Acts mentioned in Schedule II to this Act.

In short, informality can occur in both the formal and informal sectors, as the focus is worker-centric and not enterprise-centric. The size of the enterprise, the nature of work performed as well as the coverage under social security benefits determine if a worker is working in conditions of informality. I examine below one example of informality dealing with contractulaisation, i.e. the employment of an example of informal

[90] The Street Vendors (Protection of Livelihood and Regulation of Street Vending) Act, 2014.
[91] See for instance, ILO, Sixth Supplementary Report: *Report of the Tripartite Meeting of Experts on Facilitating Transitions from the Informal Economy to the Formal Economy* (Geneva, 16–20 September 2013)
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workers in formal enterprises that has been steadily growing in recent years in India and how this impacts the development of the Indian economy.

"CONTRACTUALISATION" AS A GROWING FORM OF INFORMALITY IN EMPLOYMENT

In 1997, the ILO considered a draft instrument dealing with contract labour. It was perhaps the only instances where an instrument that was proposed at the International Labour Conference was not adopted for lack of the necessary consensus.[92] One of the reasons for this was a bitter debate over the role of intermediaries, and their role and liability in the employment relationship. The expression contract labour used by the ILO was one familiar to Indian law which has grappled with whether the employment relationship traditionally envisaged as a bilateral relationship between employer and employee could also extend to triangular relations, and whether such contract labour (i.e. a person engaged via a contractor, rather than a person employed on a fixed term contract) could correctly be treated to be an en employee of the user enterprise.

India has seen a tremendous spurt in the use of contract labour in recent times. Some estimates suggest that around 30 % of all employment in the manufacturing sector could be such contract labour. Contract labour is not only used for "low end" activities such as cleaning services, security services, but they are also to be found on the shop floor working along-side regular workers but earning a fraction of that earned by permanent regular workers directly employed by the user enterprise. The biggest Indian auto manufacturer, for instance, employs 70 % of its workers not directly but through a contractor and work along-side regular workers.

The Indian law governing such triangular relationships is the Contract Labour (Regulation and Abolition) Act, 1970. The principal employer is ultimately responsible for payment of wages and other social security benefits but in the first instance such liability is cast upon the intermediary, the contractor.

FORMALISING THE INFORMAL

The current ILO focus has been on 'formalising' the 'informal'. The strategy has been to formalise enterprises by bringing them under legal frameworks that regulate their business, financial and property rights aspects. The effects of the over-regulation of enterprises in the informal sector have been highlighted, such as, for instance, a reduction in their capacity to absorb surplus labour, which would result in enormous social exclusion with its related social and political costs. The need to 'manage' regulation in a manner such

[92] See for instance, Leah F Vosko, Gender, Precarious Work, and the International Labour code: The Ghost in the ILO Closet in Judy Fudge and Rosemary Owens, *Precarious Work, Women, and the New Economy: The Challenge to Legal Norms* (Oxford. Hart Publishing, 2006).

that such enterprises serve as sites for skill development, incubating entrepreneurship, employment generation or livelihood creation is often underscored.[93] What is interesting is that the debates, at least in countries such as India, around the regulation of the informal enterprises seek to pay attention to the viability of the enterprise alongside their financial capacity to deliver decent work goals. Thus, minimum wage laws, laws relating to regulating conditions of work or inspection services do not extend to such enterprises for fear of harassment or adding to their transaction costs. This is somewhat in contrast to the debates that have surrounded the 'labour law regulation versus economic development' debates of the last century in India where inability to pay the minimum wages or bear the costs of regulation has not been a ground for stake holders to permit any flexibility or dilution of such standards in the formal enterprises.

The focus of formalising the informal in India has been largely worker-centric, and aimed at ensuring that informal workers get some modicum of social protection, even if it be at levels lower than formal workers, either in the same enterprise or in informal enterprises. The strategy has been for the labour law to "formalise" such an informal worker by providing limited social security benefits (albeit at levels different and lower than those enjoyed by formal sector workers). The labour law has chosen a trajectory of reform different from that traditionally used in the formals sector. Instead, under the UWSSA, the employer is not a contributor to the new social insurance schemes covering informal workers. The Government has instead set up a new social security fund which Form a traditional employer-liability focus, social protection schemes in The financial burden for such formalisation is borne by the Government, which has created a fund.

The challenge of formalising the informal *enterprises* rather than the informal worker has been more contentious. A government-appointed commission (the NCEUS) chose a worker-centric strategy and focused on providing a social security net instead as regulating other conditions of work within such enterprises could adversely affect their sustainability. The trade-off between the sustainability of such enterprises post regulation and their usefulness in providing social inclusion and viable options for those outside the formal sector is a matter that can only be determined on a case-by-case basis as the Indian example indicates.

The Outlook: India

This part of the chapter has focused on one aspect of the Indian economy, viz. the informal economy to demonstrate the kinds of challenges labour law and development face in emerging economies such as India. A trajectory of development and, in turn, the future of labour law in countries such as India has necessarily to address key concerns of a post-Fordist economy and manage the formal and informal challenges simultaneously.

[93] See for instance ILO, *Transitioning from the Informal to the Formal Economy* (2013).

3. China

Regulating the Chinese labour market

Over the last thirty years, China has grown to become the world's second largest economy, and has overtaken the United States as the world's largest manufacturing power.[94] It has the world's largest workforce[95] and plays a pivotal role in the global trading regime. Unlike several of the other BRICS, China's high economic growth rate has not as yet faltered – for more than twenty years, it has continued to attain annual GDP growth well in excess of seven percent.[96]

This high rate of growth has coincided with a massive influx of labour from agriculture into the industry and service sectors, although migrating rural workers continue to encounter discriminatory treatment in relation to benefits enjoyed by many urban workers.[97] In contrast to the experience of South Africa, unemployment has remained quite low in China, even in the wake of the global financial crisis.[98] Indeed, several parts of the country, especially along the coast, have experienced labour shortages in recent years.[99] China's low birth rate, which is partly a function of the one child policy, means that as long as the economy continues its rapid expansion, these shortages are likely to continue.

Unlike India, South Africa and Brazil, China is an authoritarian one party state in which constitutional rights cannot be enforced by judicial review.[100] Freedom of association – and in particular the right to organise – is curtailed in that the only legitimate trade unions are those which are controlled by the Chinese Communist Party.[101] The state also has a pervasive role in the economy; although foreign invested and private enterprises now account for the majority of output and employment in the manufacturing sector, state

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[94] 'The End of Cheap China'. *The Economist*, 10th March 2012.

[95] At the end of 2012, according to official Chinese statistics from the Ministry of Human Resources and Social Security, the total workforce was 767 million. 371 million or 48% were defined as being in the urban workforce (working in cities and townships); this proportion has been steadily increasing. 33.6% of the workforce was engaged in primary production, 30.3% in secondary industry (including manufacturing) and 36.1 % in tertiary industry (including the service sector): 2012 年度人力资源和社会保障事业发展统计公报.

[96] See World Bank historical data on GDP growth (annual)

[97] This is a consequence of the internal migration controls known as hukou (household registration).

[98] According to the government's Xinhua news agency, the official urban rate of unemployment in early 2014 was 4.1%: China's 2013 urban unemployment rate at 4.1 pct, available at http://news.xinhuanet.com/english/china/2014-01/24/c_133071541.htm. See also 2012 年度人力资源和社会保障事业发展统计公报.

[99] 'Dangerous Curve Ahead, the IMF Warns China', *Wall Street Journal* 31st January, 2013.

[100] Chen, J. (2008) *Chinese law: context and transformation*, The Hague: Martinus Nijhoff.

[101] See, e.g. Pringle T and Clarke S (2011) *The Challenge of Transition: Trade Unions in Russia, China and Vietnam*, Basingstoke, Palgrave McMillan; Friedman, E. and Lee, C.K. (2010) 'Remaking the world of Chinese labour: a 30 year retrospective', *British journal of Industrial Relations*, 48: 507–33.

enterprises continue to dominate in strategic sectors ranging from energy to telecommunications and banking.[102]

The Chinese party-state continues to maintain features of central planning, including overarching economic strategies and industry policies. The current Five Year Plan (2011-2015) proposes to rebalance the economy, which has hitherto been dependent on export-led growth and state investment, by promoting consumption and the service sector.[103] One aspect of this has been a shift from a policy of containing wage growth to attract investment to one of encouraging rapid wage rises. Minimum wages, which are locally determined, have risen extraordinarily in recent years, well in excess of 10% annual in many cases.[104]

Collective contracting has also been heavily promoted as a means of driving up wage growth for workers already above the minimum wage.[105] Most of the resulting agreements are concluded by enterprise heads and state-controlled union officials with little real bargaining. However, there are increasing instances of multi-firm and regional negotiation with the support of the state-sanctioned trade union movement. There are also many reported cases of workers taking industrial action in support of wage claims; such strikes are usually illegal but are often tolerated if they make no political demands or attempt to set up rival unions.[106]

Apart from these initiatives around remuneration, China has undertaken a number of significant reforms to labour laws since the mid-2000s. In contrast to the stagnation of federal labour law in the United States[107] or India, China's law-makers have been prompted to fundamentally reshape key labour statutes by both economic drivers (as mentioned, raising consumption) and - perhaps more significantly - fear of social instability.[108] The new statutes, which have included the *Labour Contract Law*, the *Labour Disputes Mediation and Arbitration Law*, and the *Social Security Law* have been developed after very extensive consideration

[102] Around 65 million urban workers are engaged in state owned enterprises; this figure has remained static in recent years but as a proportion of total urban employment, employment in state owned enterprises has fallen from 90% in the 1990s to less than one quarter. Around 60 million are engaged in urban large private enterprises (such as domestic corporation and foreign firms), a figure which has been rapidly increasing. Around 100 million are self-employed or engaged in small firms. China Labour Statistical Yearbook 2011 Table 1.7. It should be noted that the ownership status of employers engaging some 100 million urban is not accounted for in official statistics.

[103] The original Chinese version is available at http://news.sina.com.cn/c/2011-03-17/055622129864.shtml. For an English translation of the Plan, see http://www.britishchamber.cn/content/chinas-twelfth-five-year-plan-2011-2015-full-english-version.

[104] 'China pushes minimum wage rises', Financial Times, 4th January, 2012.

[105] Biddulph, S. (2012), 'Responding to Industrial Unrest in China: Prospects for Strengthening the Role of Collective Bargaining', *Sydney University Law Review* , 34(1), 35-63.

[106] See, e.g. Chan, Chris King-Chi; Hui, Elaine Sio-Ieng. *Journal of Industrial Relations.* Nov2012, Vol. 54 Issue 5, p653-668.

[107] Estlund, C. (2002) 'The ossification of American labor law', *Columbia Law Review*, 102: 1527–612.

[108] Biddulph, S. and Cooney, S. (2012) 'Rule of law with Chinese characteristics: the role of campaigns in law-making and enforcement' *Law and Policy* Volume 34, Issue 4, pages 373–401, October 2012.

and debate about appropriate forms of work regulation in the contemporary Chinese economy.[109] These laws have been directed at issues of formalization, agency work, wage protection, access to arbitration and the courts, social security payments and anti-discrimination. Initial empirical work has suggested that these measures have had significant impact on workplaces.

At first glance, then, China appears to be moving along quite a positive trajectory as far as work regulation is concerned. In marked contrast to the position in the 1990s and early 2000s, there is a reasonably effective and comprehensive regulatory framework in place. This operates in a context of relatively low unemployment in international terms, and rapidly rising wages.

There are, indeed, serious doubts as to whether this growth pattern is economically and environmentally sustainable.[110] There is increasing concern that this growth reflects unsustainable debt levels, particularly in relation to construction projects in the provinces and municipalities. Furthermore, the regulatory strategies China uses to deal with economic and social difficulties are highly party-state dependent.[111] This seriously constrains the mechanisms for responding to crisis – there is little scope for private and community sector organisations to contribute to governance. Nonetheless, for the moment, the conditions of work for many Chinese are steadily improving, without the obvious problems of high unemployment (as in the case of South Africa), pervasive informality (as is the case in India) or life cost (as it is the case in Brazil).

On the other hand, Chinese work regulation does face some similar challenges to counterparts in India and South Africa. We can focus on two here: precarious work and agency work (which is often seen as a form of precarious work, but which will be treated in particular detail here).

Precarious work

The 1990s and early 2000s saw rising informality, in the sense of precarious work with little or no effective regulation by labour statutes.[112] Until the late 1980s, the core of the industrial workforce in China's socialised economy had enjoyed extensive job security and a privileged economic position.[113] However, factors such as the restructuring of state owned sector, the rapid expansion of the private sector and the replacement of

[109] See, e.g. Gallagher M.E. and Baohua D., 'Legislating Harmony: Law Reform in Contemporary China' in Kuruvilla S, Lee C K and Gallagher M (2011) *From Iron Rice Bowl to Informalization: Markets, Workers and the State in a Changing China*, Cornell, Cornell University Press .
[110] China's exports plunge as fears of credit crisis grow, *The Telegraph*, 8th March 2014; Most Chinese Cities Fail Minimum Air Quality Standards, Study Says, *New York Times*, 27th March 2014.
[111] Lieberthal, K. (2004) *Governing China: from revolution through reform*, 2nd ed, New York: W.W. Norton.
[112] Park A. and Cai F. (2011), 'The Informalization of the Chinese Labor Market' in Kuruvilla S, Lee C K and Gallagher M (2011) *From Iron Rice Bowl to Informalization: Markets, workers and the state in a changing China*, Cornell, Cornell University Press.
[113] It should be emphasised that the vast majority of the workforce at that time enjoyed the much less privileged conditions of rural and village areas.

administrative regulation by contracting saw increasing numbers of workers placed in a precarious situation. Three different instance of precarious work can be mentioned. First, there were a large number of people who lacked written evidence of a labour relationship (although they were in one). They were unable to claim entitlements they had been denied in legal proceedings.[114]

Second, the rapid introduction of the contract system across the Chinese economic meant that by the early 2000s, a large majority of the employed workforce was engaged on rolling fixed term contracts, of increasingly short duration.[115] Not only could these employees could be terminated readily - including in the event of a dispute about entitlements - but they also faced obstacles in accruing employment benefits under labour and social security laws.

Third, there were – and are - many workers beyond the scope of labour regulation. This is generally the case if the nature of their work relationship means that they are not 'labourers' engaged by a 'work unit'. Such people cannot invoke labour law standards law or labour dispute resolution institutions. Where they attempt to do so, those institutions will deny jurisdiction. For example, interns, dependent contractors, people employed by individuals rather than registered entities and domestic workers have not been covered by Chinese labour law.[116]

The Labour Contract Law and allied reforms made significant inroads in addressing the first two of these problems.[117] Employment contracts, other than casual contracts, must now be in writing, with very significant penalties (such as a doubling of pay obligations) for employers who fail to comply. Again, modifications to the rules of fixed term contracting have attempted to reverse the trend towards ever shorter periods of engagement. There are two important aspects to Labour Contract Law rules. On the one hand, substantial severance payments must be made upon the termination of a fixed term contract (articles 46(4) and 47). As these severance entitlements are payable each time a contract is terminated, but are not payable if the contract is renewed on equal or better terms, they constitute a significant financial penalty for engaging workers on a short term basis. On the other hand, to curb rolling contracts, there is now a provision (article 14(3)) stipulating that where a worker has been twice engaged on fixed term contracts, the third engagement must be ongoing. Empirical research since the passage of the Law has tended to suggest that

[114] See, in particular Halegua, A. (2008) 'Getting paid: processing the labor disputes of China's migrant workers', *Berkeley Journal of International Law*, 26: 254–322.
[115] Gallagher, M.E. (2007) *Contagious Capitalism: globalization and the politics of labor in China*, Princeton: Princeton University Press, 76-82.
[116] S. Cooney, Biddulph S., and Zhu Y, *Law and Fair Work in China*, Routledge, London (2013), 53-54. Ye J. (叶静漪) (2007) 劳动合同法十二讲 (Twelve Lectures on the Labour Contract Law), Beijing, 中国法制出版社 (China Legal Publishing), Zheng S. and Li K. (郑尚元，李坤刚)(2010) 劳动和社会保障法学 (*Labour and Social Security Law*)，Beijing, 北京师范大学出版集团 (Beijing Normal University Publishing Group), 53-55; Dong B. (董保华) (ed.) (2005) 劳动合同研究 (*Research on Labour Contracts*), Beijing: 中国劳动社会保障出版社 (China Labour and Social Security Publishing), 54-77.
[117] Id 86-107.

these measures have been effective in increasing the proportion of the workforce covered by written contracts, and in lengthening contract terms.[118]

Despite these measures, there are still important categories of disadvantaged workers. First, the provisions in the Labour Contract Law dealing with casual workers are mostly concerned with denying them entitlements enjoyed by workers on permanent or fixed term contracts. Contracts with casual workers (who are defined as 'part-time' workers engaged on average for less than 24 hours per week and four hours per day) do not have to be in writing (article 69), their engagement can be terminated at will (article 71) and they are not entitled to termination payments (article 71). Because of the nature of their engagement, casual workers are unlikely to receive pay for overtime, or premium rates for work at unsociable hours, or paid leave (although work statutes are silent on whether there is at least an in-principle entitlement).[119]

Failure to create clear limits around casual workers risks undermining the legal entitlements of more secure forms of employment by encouraging employers to resort to casualisation in order to escape the obligations associated with fixed and ongoing positions. Moreover, overuse of casual category detracts from the formalization of labour relations that the Labour Contract Law was intended to achieve.

Furthermore, the Labour Contract Law did not expand the scope of work regulation to cover categories such as agricultural workers, dependent contractors and interns. This means that as much as half the workforce lies outside formal labour law. While coverage compares favourably to countries such as India, there are still many vulnerable workers without recourse to labour standards and labour dispute resolution mechanisms.

AGENCY WORK

As is clear from the other contributions to this chapter, agency work (also called labour hire or dispatch work) has become widespread in many labour markets, not least because the costs to the end user of using hired labour are often less than those of direct employment.

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[118] See, e.g. Gallagher, Mary; Giles, John; Park, Albert; Wang, Meiyan， China's 2008 labor contract law : implementation and implications for China's workers， World Bank Policy Research Paper 6542, July 2013; Zhiming Cheng, Russell Smyth and Fei Guo, The Impact of China's New Labour Contract Law onn Socioeconomic Outcomes for Migrant and Urban Workers, Monash University Department of Economics, Discussion Paper 51/13; Freeman, R. & Li, X. (2013). How Does China's New Labor Contract Law Affect Floating Workers? NBER Working Paper 19254. Official Chinese statistics put the rate of written contracts in enterprises at 88.4%, without explaining how this figure is derived: 2012年度人力资源和社会保障事业发展统计公报.

[119] On the other hand, they do have some legal rights. They are entitled to be paid at least the hourly rate of the minimum wage applicable in the location in which they work. They must be paid within 15 days and they are entitled to access the labour dispute resolution system.

Agency work creates a split between the entity which uses the workers and the entity which is their formal employer for the purposes of work regulation.[120] The end user can, in some cases, deny responsibility for the employment entitlements of the hired labour notwithstanding the fact that that the hired labour may be quite integrated into the end user's business, working direct employees for lengthy periods. As is the case with South Africa and India, agency work has posed a major challenge to traditional work law in China;[121] on some estimates there are as many as 60 million agency workers, three times the number of recorded in the 1990s.[122]

While agency worker in China are likely to be engaged under worse conditions than their direct counterparts, Chinese work law has attempted to ensure some baseline protections. In 2008, the Labour Contract Law[123] introduced minimum capitalization requirements for labour hire firms. It attempted to provide for equal treatment between the hired labour and an end user's direct employee (article 63). The Law also required labour hire firms to engaged agency workers on fixed term contracts of at least two years' duration (article 58). Finally, the Law specified that agency workers should be engaged 'generally for temporary, auxiliary or substitute jobs' (article 66).

These measures encountered legal and practical obstacles and must be counted among the less successful initiatives in the Labour Contract Law.[124] Judges found the 'equal treatment' provision difficult to apply because the referent was unclear. And the attempt to confine agency workers to temporary positions was widely ignored. The number of agency workers both in absolute terms and as a proportion of the total workforce has dramatically risen over the last decade[125] and the 2008 Labour Contract Law provisions appears to have had little impact on this. Accordingly, the central government has enacted further restrictions to prevent agency workers from becoming the dominant form of contracting, undermining direct employment.

In late 2012, the Standing committee of the National People's Congress amended the Labour Contract Law[126] to strengthen the limits on agency work. The minimum capital requirement for labour hire agencies was quadrupled to two million yuan (amended art. 57) and stipulating a licensing requirement. The equal

[120] See David Weil's discussion of fissuring in Weil, D. (2008) 'A strategic approach to labour inspection', *International Labour Review*, 147: 349–75.
[121] Zhou, C. (周长征), ed.(2007) 劳动派遣的发展与法律规制 (*The Development and Legal Regulation of Labor Dispatch*), Beijing: 中国劳动社会保障出版社 (China Labour and Social Security Publishing).
[122] Dong Baohua, 董保华， 论劳务派遣立法中的思维定势.
[123] Chapter 5 Section 2
[124] Zhu L. (2011) (朱丽君)《劳动合同法》实施中遇到的困境：以未签书面劳动合同问题和劳务派遣问题为例，22法治论坛68-73.
[125] In many Chinese firms,between one third and one half of the workforce are agency workers: ' China tightens loophole on hiring temporary workers', Reuters, Friday 28th December 2012: http://www.reuters.com/article/2012/12/28/us-china-labor-idUSBRE8BR04120121228.
[126] 全国人大常委会关于修改《中华人民共和国劳动合同法》的贵定, promulgate 28th December 2012

treatment provision was clarified to require employers to use the system payment distribution methods for its own employees and for agency workers (amended art 63). Further, article 66, which as indicated above, originally provided that agency work would be used 'generally for temporary, auxiliary or substitute jobs' was amended to provide as follows:

The employment contract is the basic form through which Chinese enterprises engage workers. 'Labour dispatch (agency work) is a supplementary form and may only be used for temporary, auxiliary or substitutive positions'.

Each of the three kinds of positions is now clearly defined in the same article.

The most far reaching innovation was a provision (also in article 66) that enabled the relevant ministry (the Ministry of Human Resources and Social Security) to cap the number of agency workers at a certain proportion of a firm's total employers. This cap was implemented in 2014 in the Interim Provisions on Labour Dispatch issued by the Ministry.[127] They stipulate that the number of agency workers shall not exceed ten percent of the total number of a firm's workers (article 4). There is a two year phase in period, but firms cannot engage new agency workers unless they reduce the number of previously engaged agency workers below the requisite percentage (article 28). [128]

Whether these new measures will be strictly enforced is unclear. Many local governments may be resistant to implementing them, as they control entities which frequently engage agency workers, including public sector entities such as hospitals.[129] However, since the enactment of the Labour Contract Law and the Labour Disputes Mediation and Arbitration Law, Chinese workers' consciousness of their legal entitlements has grown and they have proved quite litigious. This may mean they create ongoing pressure for enforcement.[130]

THE OUTLOOK: CHINA

In comparative terms, China is remarkable for its preparedness to resort to increasingly strict labour market regulation, combined with improved dispute resolution structures, to deal with erosion of the 'standard employment relationship', attempting to curb undocumented, short term and agency work. It has had some success so far. As the South African experience shows, such measures are, in many countries, strongly opposed by business groups and some governmental organisations as limiting labour market flexibility.

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[127] 劳务派遣暂行规定， issued 24th January 2014.
[128] Another significant provision is article 18, which is directed at ensuring that agency workers sent into a different locality are not denied social security benefits.
[129] Gallagher at al, above, at 32.
[130] Data on labour disputes is available in the China Labour Statistics Yearbooks at Table 9.1 (中国劳动 中国劳动统计年鉴统计年鉴)

There is certainly contestation around the new initiatives in China.[131] Indeed, one prominent labour law professor critical of the wave of new laws has complained of a 'vicious cycle' in which tighter government rules encourage employer evasion which then leads to further tighter rules.[132] He suggests that business will now shift from agency work to contractors.

However such criticisms have not, as yet, provided much of a break on the direction of regulatory reform. There are a number of factors that may account for this. Until recently, the reforms have been instituted from a comparatively low regulatory base, with minimal restraint on non-standard work forms. Further, the preparedness of workers to protest through both legitimate and illegitimate channels places the government (which still, at least rhetorically, adheres to socialist ideology) under continual pressure to provide solutions to labour market problems. And unlike in the democratic states, the Chinese central government has a relatively free hand in implementing reforms, although local governments can notoriously resist central measures, not least because they generally control enforcement and dispute resolution bodies. Perhaps even more significantly, macroeconomic circumstances have been favourable over the recent reform period, so that unemployment has remained low. This has so far helped to deflect a critique that the measures are pricing people out of jobs. Whether this current approach to labour market regulation is sustainable may depend on China avoiding a major economic crisis, which is by no means assured.

4. Brazil

Although the rhythm has slowed down in the last few years, since 2004 Brazil has known a period of unprecedented economic growth that combined with a strong policy of direct money transfer to the poorest people has contributed to a reshaping of the country. Brazilian economic figures are well under these presented by China and India, but do not differ greatly from those presented by Russia and South Africa. Formal employment has been on the rise and wages have increased as a real gain over inflation has been accorded to the national minimum wage as a governmental policy.[133] For a country that three decades

[131] See, e.g. Karindi, L. (2008) 'The making of China's new Labour Contract Law', *China Analysis 66*, Trier University, Germany, November 2008.

[132] See Dong Baohua, 董保华， 论劳务派遣立法中的思维定势，2013 (3) 苏州大学学报 50-60; compare 王全兴;杨浩楠, 试论劳务派遣中的同工同酬——兼评 2012 年《劳动合同法修正案》 and 沈同仙, 论我国劳务派遣适用范围的法律规制 in the same issue at 61 and 70 respectively.

[133] Cf. José Dari Krein; Anselmo Luis dos Santos. *La formalización del trabajo en Brasil. El crecimiento económico y los efectos de las políticas laborales*. 239 Nueva Sociedad 90-101 (2012) (available at http://www.nuso.org/upload/articulos/3849_1.pdf, last accessed May 16, 2014). For the Portuguese version, cf. *A formalização do trabalho: crescimento econômico e efeitos da política laboral no Brasil*. Nueva Sociedad especial em português 60-73 (2012) (available at http://www.nuso.org/upload/articulos/3860_1.pdf, last accessed May 16, 2014).

ago was struggling with hyperinflation,[134] uncontrolled public expenditures, IMF negotiations, a gigantic external debt and very low international credibility, things have definitely changed. This positive economic environment has contributed to the emergence of a new middle class which is the basis for the growing mass of new consumers that suggests a possible link between consumption and citizenship.

Nevertheless, social rights remain at the core of Brazilian citizenship.[135] Of course, civil and political rights also constitute an important dimension of citizenship[136] and this is not different in the Brazilian context. Yet, although the electoral body has grown over the years and is now composed of almost 141 million voters, the building of a democratic society in which equal opportunity is available to everyone remains as a challenge for the country. Likewise, the question of property remains as an overwhelming defy for civil rights. As Brazilian citizenship has thus strongly relied on social rights for its development, labor rights gained an important prominence which may be acknowledged by the *Consolidação das Leis do Trabalho* (CLT) [labor code]'s perennity. Since its edition in 1943, Brazil has undergone an authoritarian military period (1964-1985) and has known three different constitutions (1946, 1967 and 1988), the last one being a symbol of the country's redemocratization. As if it was immune to all these transformations, the labor code has resisted and remained almost unchanged. Even more, whenever talks about its need to be reformed and adapted to the country new economic circumstances arise, especially forwarding the urge of according preference to parties' negotiations over legislative settings, resistance steps up and blocks the debate.[137] Still, such preference for a legislative approach does not eliminate the quest for social rights' effectiveness.[138] Engraving social (and labor) rights in the constitution (as well as in the labor code) is not enough to inscribe them in the workplace which remains an extremely conflictive space. Labor courts have therefore an

[134] By March 1990, the monthly inflation rate had reached 84,32%. Cf. Luis Carlos Bresser-Pereira, *Da Inflação à Hiperinflação: uma abordagem estruturalista*, in INFLAÇÃO E HIPERINFLAÇÃO – INTERPRETAÇÕES E RETÓRICA 7-28 (J. M. Rego ed. 1990) (available at http://www.bresserpereira.org.br/papers/1990/86.DaInflacaoAHiperinflacao.pdf, last accessed May 16, 2014); Luis Carlos Bresser-Pereira, Yoshiaki Nakano, Hiperinflação e Estabilização no Brasil: o primeiro Plano Collor, 11 Revista de Economia Política 89-114 (1991) (available at http://www.rep.org.br/PDF/44-6.PDF, last accessed May 16, 2014).

[135] Cf. WANDERLEY GUILHERME DOS SANTOS, CIDADANIA E JUSTIÇA: A POLÍTICA SOCIAL NA ORDEM BRASILEIRA (1979); JOSÉ MURILO DE CARVALHO, CIDADANIA NO BRASIL: O LONGO CAMINHO (2001).

[136] Cf. MARSHALL, T. H., CIDADANIA, CLASSE SOCIAL E STATUS (1967).

[137] Cf. *Entidades repudiam acordo coletivo como base das relações trabalhistas*, in SENADO FEDERAL, http://www12.senado.gov.br/noticias/materias/2012/11/22/entidades-repudiam-acordo-coletivo-como-base-das-relacoes-trabalhistas, last accessed November 28, 2012.

[138] Cf. Roberto Fragale Filho, *Cidadania & Trabalho: fios de uma mesma fibra, constitucional?*, in CONSTITUCIONALIZANDO DIREITOS: 15 ANOS DA CONSTITUIÇÃO BRASILEIRA DE 1988 443-475 (Fernando Facury Scaff ed. 2001).

important role for implementing labor rights whose previous inscription in statute seems not to suffice to make them effective.[139]

Though Brazilian labor regulation does not have a specific statute that sets a minimum for employment conditions, it is all about statute. As it has already been said, Brazilian labor world is drowning in laws.[140] Labor regulation spreads out from the constitution to administrative ordinances issued by the Labor Ministry and it includes the labor code and several federal acts. It is a real normative labyrinth whose extension continuously grows due to an incredible legislative inflation.[141] As it is almost impossible to sum up this wide legal scenario, one might concentrate its exam to the labor code (hereinafter, CLT).

CLT dates back from 1943 and remains valid in every aspect which is not contrary to the constitutional regulation. Back in the 1940's João Dirceu Mota, founder and president of the construction workers union of Quaraí in the State of Rio Grande do Sul, used to refer to it as "this is my bible". He used to wander around carrying his CLT booklet as a rampart to employers' abuses, suggesting that all do's and don'ts of the execution of a labor contract would be inscribed in it. Exploring workers' legal consciousness, French (2004) argues that they looked at it simultaneously as fraud and as hope. Indeed, on one hand, reality on the working floor seemed not to correspond to what was inscribed into the law, while, on other hand, the law prescriptions seemed to establish a desired scenario in which workers' rights would be fully respected. Thus labor law was not just a simple instrument of domination as ideological and institutional analysis usually point out but it was mobilized by workers to transform an ideal situation into a real setting. In other words, CLT reached the workers' imaginary as the inevitable framework for a better circumstance on labor relations. Struggle for better working conditions would therefore also be a quest for labor law effectiveness and so it remains despite of the new constitutional status of social rights.

This almost septuagenarian body of labor law remains a controversial one. Uncritically and mostly perceived as a "mythical gift" of authoritarian President Getúlio Vargas despite of other also available interpretations,[142] discussions over its reform have been on the public and legislative agenda almost permanently. Back in the 1960's, the core of the debate was related to the stability system of employment protection that assured tenure for employees after ten years working for the same employer.[143] Then, in the late 1970's during the military authoritarian period, unions' organization became the central issue of dispute.[144] More recently,

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[139] This and the following three paragraphs have been previously published in Roberto Fragale Filho, *Resolving Disputes over Employment Rights in Brazil*, 34 COMPARATIVE LABOR LAW & POLICY JOURNAL 929-948 (2013).

[140] Cf. JOHN FRENCH, DROWNING IN LAWS: LABOR LAW AND BRAZILIAN POLITICAL CULTURE (2004).

[141] Cf. JOSÉ EDUARDO FARIA, DIREITO E CONJUNTURA (2009).

[142] Cf. LUIS WERNECK VIANNA, LIBERALISMO E SINDICATO NO BRASIL (1976); ADALBERTO PARANHOS, O ROUBO DA FALA (1999).

[143] Cf. VERA LÚCIA FERRANTE, FGTS: IDEOLOGIA E REPRESSÃO (1978).

[144] Cf. IRAM JÁCOME RODRIGUES, O NOVO SINDICALISMO: VINTE ANOS DEPOIS (1999).

throughout of the 1990's, in tune with international debate, flexibility came to be the main question as opposed to CLT's rigidity.[145] As Luiz Inácio Lula da Silva, a former union leader in São Paulo, became Brazil's President in 2003, expectations over a new turn on this debate were on its highest point.[146] Yet, despite some fragmented and circumstantial changes, one may say that CLT succeed to resist to most of its reform attempts. It persists as the main framework to regulate labor relations and its dispositions might be enhanced through negotiation.

ALWAYS A MATTER OF FLEXIBILITY

Notwithstanding CLT's durability, the debate over its impact on Brazilian economy has always been a cleavage between rigidity and flexibility. One may actually claim that flexibility has been a major issue in Brazilian labour relations over the last 50 years. Dispute over its pertinence as a tool for competitiveness has certainly grown in recent years. Yet this is definitely not a new debate. Actually, it is not hard to postulate it is an old debate over flexibility that has been repaginated under new economic circumstances mostly related to global competition. Back in the 1960's, when the law provided for tenure after 10 years of work in a single labour contract, employers used to argue that such circumstance deeply affected employee's productivity and encouraged employers to circumvent the law as the cost of employee's discharge enhanced enormously. Differently put, employers would sustain they were economically incentivized (or compelled) to break the law as to reduce expenses because employees would become lazy and unproductive after tenure. Such never-proved argument was forwarded to justify the approval of Federal Act 5,107/1966 creating the *Fundo de Garantia de Tempo de Serviço* (FGTS), a time service fund made available to every employee in the case of an unfair dismissal that in practice ended up with the tenure regime that would be completely revoked only by the Federal Constitution in 1988.

Back in the 1970's, when the new syndicalism from where later to be President Lula emerged, the union structure forwarded by CLT was criticized by union leaders such as himself allegedly because its rigidity would not allow them to freely organize and to adequately represent employees. A new turnaround came by in the 1990's, when Brazil's political and economic agendas were closer to the hegemonic neoliberal perspective and labor regulation was mainly criticized as being an obstacle to the country's economic development. Flexibility was then praised as a tool to improve the country's economic figures and employability was in the order of the day. Criticism over CLT's allegedly rigidity echoed on law reform proposals concerning unemployment benefits and the access to FGTS. Alongside this debate focused on

[145] Cf. JOSÉ MÁRCIO CAMARGO (ed.), FLEXIBILIDADE DO MERCADO DE TRABALHO NO BRASIL (1999); ADALBERTO MOREIRA CARDOSO, SINDICATOS, TRABALHADORES E A COQUELUCHE NEOLIBERAL. A ERA VARGAS ACABOU? (1999).
[146] Cf. Roberto Fragale Filho, *Flexibilização e reforma da CLT: mais do mesmo?*, 10 REVISTA TRABALHISTA 221-232 (2004).

individual labor relations, flexibility pushed the discussion over outsourcing to the front of the scene. No one wanted no longer to be an employer. Workers were then been hired to work through contractors, temporary agencies and even cooperatives.

Flexibility and Labour Courts

Outsourcing in the beginning of the 1990's became a critical problem for labour relations. As flexibility and employability became the order of the day, no one wanted to be no longer an employer. Long before David Weil's description of the fissured workplace,[147] Brazil became an intense laboratory for this kind of fragmented work environment. Lack of legislative response was then circumvented by labour courts, especially the highest one, the *Tribunal Superior do Trabalho* (TST), whose jurisprudence on the matter dated from September 1986. This prior jurisprudence was inscribed in *súmula* 256 which only admitted outsourcing in the restricted cases of temporary work and private security, which were both regulated by statute, respectively Federal Act 6,019/1974 and Federal Act 7,102/1983).[148] Clearly, the court's jurisprudence embraced a very restricted vision of outsourcing which required legal authorization and, in the case of temporary work, was limited to two circumstances (momentary replacement and exceptional increase of work) and to a period of three months.

As economic conditions changed in the beginning of the 1990's and outsourcing became a major phenomenon in Brazilian labour relations, hundreds of thousands of cases came to the labour judicial system: between 1988 and 1994, the annual amount of new cases doubled as it went from 1,044,469 to 2,048,944.[149] As labour courts were then offering a wide set of different decisions concerning this supposedly new labour relations reality, in December 1993, TST finally reviewed its *súmula* 256 and edited its *súmula* 331 setting the new jurisprudence on the matter. The newly edited *súmula* reaffirmed outsourcing possibilities related to temporary work and private security and extended it to maintenance and cleaning services as well as established that it would be legal for the end user to outsource the jobs related to its activities-means, as long as personal identity and subordination are not present. This newly introduced part created an unlikely and undefined conceptual distinction between activities-end and activities-means

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[147] Cf. David Weil, The Fissured Workplace. Why Work Became So Bad for So Many and What Can Be Done to Improve It (2014).

[148] "In Portuguese, the word 'súmula' comes from the Latin word *summula*, which means brief, restricted, abstract. It is a synthesis of all similar cases, decided in the same way, put through a direct and clear proposition." Cf. Supremo Tribunal Federal, Legal Glossary, available at http://www2.stf.jus.br/portalStfInternacional/cms/verGlossario.php?sigla=portalStfGlossario_en_us&indice=S&verbete=196031, last accessed May 16, 2014.

[149] For 2013, the annual amount of new cases has reached 3,643,885. Actually, exception made to the first five years of the 2000's, when the number of new cases stabilized around 2,200,000, statistics have shown a continuous tendency for growth. Cf. Tribunal Superior do Trabalho, Série Histórica da Movimentação Processual 1941-2014, available at http://www.tst.jus.br/justica-do-trabalho2, last accessed May 16, 2014.

assuming that the former is related to the core activity of the end user and the latter does not have such characteristic.[150] A good example for such a conceptual distinction would be the call-centre of an automobile company: apparently, it would undoubtedly correspond to an activities-mean. Yet, this is a very subtle and difficult distinction that does not necessarily solve the problem. Another important innovation created by the *súmula* was the subsidiary responsibility of the end user in case of lack of compliance of labour standards by the labour supplier provided that the end user simultaneously has taken part in the judicial claim and appears in the judicial executive title.

Legislative response to this labour jurisprudence resulted in the Federal Act 8,494/1994 which established that "whatever the field of activity of a cooperative society, there is no employment relationship between it and its members or between them and the end user of the labour services provided by the cooperative society". This response was an attempt to make outsourcing easier whenever it was done with a cooperative society. Once again, the problem remained as CLT establishes that all acts aiming to undermine, prevent or circumvent the application of its precepts are full-fledged null. The dispute remained therefore over the conceptual matter of activities-end and activities-means.

Later on, as the *Supremo Tribunal Federal* (STF), the Brazilian Supreme Court, held the constitutionality of article 71 of Federal Act 8,666/1993 that exempts Public Administration from any responsibility on labour, social security, tax and business duties of contractors hired through a public bidding, TST reviewed *súmula* 331 to indicate that the Public Administration's subsidiary responsibility can be recognized whenever it can be proved that it has failed to supervise that the labour provider complies with all the required labour standards.

Differently from South Africa, India and China, in Brazil, as pointed out before, labour courts became the arena where flexibility gained a legal recognition. But the court's jurisprudence was not intended to give outsourcing a free pass as it introduced a conceptual difference between activities-end and activities-means and invented a subsidiary responsibility unknown to the law. Controversy, still framed by the ideological criticism of a rigid regulation and its impact on economic development, has then moved to the legislative field.

Reforming the law

As the debate moved to Congress, Bill Proposition 4,330 which was introduced originally in 2004, regained the scene. The bill aimed to regulate outsourcing practices arguing that it has become a reality that can be no longer ignored: "trying, in a myopic way, to protect workers simply ignoring outsourcing, Brazilian

[150] Cf. Karen Artur, O TST e os doutrinadores jurídicos como agentes de novas noções contratuais do trabalho: um estudo sobre a terceirização (2004).

legislation managed to leave Brazilian workers under such type of contract more vulnerable." The bill acknowledges the inexistence of an employment relationship between the end user and the workers hired by the provider or its partners. Basically, the bill allows outsourcing of any activity eliminating the court distinction between activities-end and activities-means. Textually, it establishes that "the contract for the provision of services may relate to the development of activities inherent, ancillary or complementary to the economic activity of the user end."[151] Needless to say that TST clearly reacted against the bill as nineteen of its 26 members signed a public petition stating that its approval would result in a severe harm to labour and social security rights of Brazilian workers.[152] The reaction was not limited to TST but also came from the *Associação Nacional dos Magistrados do Trabalho* (ANAMATRA), the national labour judge's association, which released an open letter claiming congressmen and political parties to refuse its adoption[153] and released together with the NGO *Movimento Humanos Direitos* a series of videos casting well-known TV actors speaking against outsourcing.[154] Although the bill was not voted, the debate has not come to an end and outsourcing still is mainly regulated by the jurisprudence of labour courts.

Reforming the law seems to be extremely difficult in the Brazilian context where social rights are perceived as central to citizenship and most of the recent legal reform comes mostly to incorporate new rights or new workers to the labour standards provided by CLT. Evidence of such circumstance may be found in the debate over the incorporation of CLT provisions to domestic workers, which became a reality with Constitutional Amendment 72, approved in April 2013. Labour rights such as extra payment for overtime, indemnities due to unfair dismissal, FGTS, unemployment benefits were then extended to domestic workers, still pending up to now its regulation.

THE OUTLOOK: BRAZIL

Brazil's labour regulation as expressed in CLT dates back to 1943. Ever since the debate has always evolved around its rigidity and how it slows down economic development, although no consistent empirical

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[151] The bill is available at http://www.camara.gov.br/proposicoesWeb/prop_mostrarintegra;jsessionid=FC16E50E8BBCA91A5B71ABDF6C1BD820.proposicoesWeb1?codteor=246979&filename=PL+4330/2004, last accessed May 16, 2014.

[152] Cf. *Ministros do TST condenam PL da terceirização*, in CONSULTOR JURÍDICO, http://www.conjur.com.br/2013-set-03/maioria-ministros-tst-condena-pl-libera-terceirizacao. The petition is available at http://s.conjur.com.br/dl/oficio-tst-terceirizacao.pdf, both last accessed May 16, 2014.

[153] The open letter is available at http://s.conjur.com.br/dl/carta-aberta-anamatra.pdf, last accessed May 16, 2004.

[154] Cf. ASSOCIAÇÃO NACIONAL DOS MAGISTRADOS DO TRABALHO, TODOS CONTRA A TERCEIRIZAÇÃO, available at http://www.youtube.com/watch?v=ajDjKK2Q9kA&list=UUBkzIMln4tENJ71oPcHCTdw (video 1), http://www.youtube.com/watch?v=tybXNwLfMco&list=UUBkzIMln4tENJ71oPcHCTdw (video 2), and http://www.youtube.com/watch?v=QfHdC0d1ZTg&list=UUBkzIMln4tENJ71oPcHCTdw (video 3), last accessed May 16, 2014.

evidence of such has been provided. Unlike South Africa, India and China, labour courts and judges have played a critical role in Brazil both enhancing flexibility (as to make possible outsourcing of activities-means) and resisting a complete labour market flexibility (as to condemn outsourcing of activities-end). The debate is far from an end and it has recently turned to in a more expressive way to law reform. Even though most of the recent legal reform has mostly been done to enhance labour rights (and social rights) and to include a greater amount of workers under its application, general claims from the business world ask for greater flexibility in labour relations. Relating lesser costs to competitiveness, they cry out for flexibility.

This scenario does not seem to be unknown to the other BRICS examined countries even if they do not present identical policies for the matter. Actually, similarities do not translate into common answers. For that matter, Brazil does not seem to draw any policy from its BRICS partners but relies essentially in its legal history and on the general perception that whatever flexibility may be provided it will always remain a matter of incorporating more and more workers to the ideal conditions provided for the minimum labour standards.

GENERAL CONCLUSION

The recent experience of the developed world, especially in several of the member states of the European Union may create a general impression that labour law is in a phase of retrenchment. Whether this is in fact a correct impression may be debatable, but it is clear that, as far as the BRICS are concerned, no such simple conclusion can be drawn. We have in this chapter examples of major recent initiatives from each of the countries studied. There are striking similaries between law reforms in South Africa and China which have been implemented in 2013 and 2014. Amendments to the Labour Relations Act and the Basic Conditions of Employment Act in South Africa and the Labour Contract Law in China have targeted agency work in particular. While India has not taken similar measures as yet, there has been the important development of the Unorganised Workers Social Security Act in 2008.

These measures have been controversial, with opponents criticising their alleged rigidity. Whether these criticisms are well founded may soon become apparent – although earlier initiatives in China's Labour Contract Law have not, on current empirical evidence, led to widespread counterproductive effects.

We conclude this chapter by raising the issue of the influence of the BRICS countries on regional and indeed global labour law. During the twentieth century, the international study of labour law was overwhelmingly directed to the advanced economies of Europe, North America, Australasia and Japan. These countries constituted the 'core' of labour law, with other nations, despite their huge workforces, relegated to neglect at the periphery. With many of the advanced systems sclerotic, in the process of being dismantled, or at

least in gradual decline, it may be that the edge has moved to the centre, and vitality, innovation and experimentation are more likely to be located in Asia, South America and Africa.