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PERSPECTIVES ON WORKERS IN THE INFORMAL ECONOMY IN THE SADC REGION

RÉSUMÉ

Le présent article part du constat que l'économie informelle occupe une place importante dans les pays en développement, et que ce phénomène s'intensifie. Les mesures existantes en matière de protection sociale et de travail ont été conçues pour protéger les personnes engagées dans une relation de travail traditionnelle et ne sont pas adaptées aux travailleurs vulnérables de l'économie informelle. Si le droit du travail ne parvient pas à surmonter cette difficulté, il deviendra inopérant. Si des instruments juridiques ont bien été adoptés à l'échelle internationale, leur taux de ratification demeure toutefois insuffisant. Les travailleurs de l'économie informelle ne jouissent que d'une faible représentation syndicale, et ils doivent impérativement se mobiliser pour améliorer leurs conditions de travail. Il est essentiel, aujourd'hui, d'envisager le recours à différentes formes d'organisation des travailleurs, outre les syndicats, pour satisfaire à leurs besoins.

MOTS CLÉS : *Économie informelle; vulnérabilité; protection sociale et droit du travail; réglementation internationale et régionale; expression et représentation.*

ABSTRACT

This contribution recognizes that the informal economy is growing phenomenon in developing countries and an increasing reality. Labour and social protection measures were designed to protect those in the traditional employment relationship and is inadequate to protect vulnerable workers in the informal economy. If labour law cannot meet this challenge its function and impact will become negligible in the new world of work. International instruments do exist, however low ratification rates remain problematic. Trade union representation of these workers remain low and is of the utmost importance that these workers mobilize to improve their working conditions. It has become necessary to explore various workers organizations, other than trade unions, to facilitate the needs of these workers.

KEY WORDS: *Informal Economy; Vulnerable; Labour and Social Protection; International and Regional Regulation and Voice and Representation.*

Labour law scholars across the world are currently debating the function and the future of labour law and the need to re-evaluate its purpose. Labour law is attacked and discredited for its inability to protect the most vulnerable workers, including workers in the informal economy, and for 'favouring already well-placed employees over less fortunate ones'.¹ Informal employment is now a reality and a growing acknowledgement of this exists.² In South Africa and other developing countries, informal economy workers do not enjoy sufficient protection in terms of labour and social protection measures as labour laws are premised on the traditional employer- employee relationship. The existence of the informal economy cannot be denied and in Sub-Saharan Africa the informal economy constitutes 66% of employment, excluding agriculture.³

These workers are not recognised, regulated or protected by labour legislation or social protection measures and can be characterised by varying degrees of 'dependency' and 'vulnerability'.⁴ The International Labour Organisation (ILO) World Social Protection Report 2014-2015⁵ indicated that 73% of the world's population continue to live without adequate social protection coverage and their fundamental rights are often only partially realised or not at all.

The informal economy in this contribution refers to all economic activities by workers in economic units that are in law or in practice not covered or insufficiently covered by formal arrangements.⁶ Excluded from the scope of this definition and this discussion are all illicit activities.⁷

- 1 G Davidov & B Langille 'Understanding Labour Law: A Timeless Idea, a Time-Out Idea, or an Idea whose Time has now Come?' in G Davidov & B Langille (eds) *The Idea of Labour Law* 2011 1.
- 2 A number of factors contributed to an increase in the recognition of the reality of informal employment, such as the availability of improved statistics, the ILO Decent Work Agenda, the establishment of international and national networks for informal workers, a realization that the majority of such workers are not there by choice, and an emphasis on the important role of social protection in the reduction of their poverty and vulnerability. See also the ILO Social Protection Floors Recommendation of 2012; F Lund 'Extending Social Protection to Informal Workers: Pathways to Inclusive Practices' paper presented at the 2015 ILERA World Congress, Cape Town.
- 3 MA Chen 'The Informal Economy in African Cities: Key to Inclusive and Sustainable and Urban Development 2017 WIEGO. WIEGO <http://www.wiego.org> (accessed on 10 August 2017).
- 4 ILO Resolution Concerning Decent Work and the Informal Economy 2002, conclusion 9.
- 5 ILO World Social Protection Report *Building Economic Recovery and Inclusive Development and Social Justice* 2014-2015.
- 6 Recommendation 204 concerning the Transition from the Informal to the Formal Economy of 2015.
- 7 Illicit activities are defined by Recommendation 204 of 2015 as: 'the provision of services or the production, sale, possession or use of goods forbidden by law, including the illicit production and trafficking of drugs, the illicit manufacturing of and trafficking in firearms, trafficking in persons, and money laundering as defined in international treaties.'

When considering the protection of informal workers it is also important to explore the design and implementation of innovative and tailor-made solutions, considering for example the nature of their work and their workplaces. The importance of voice and representation in the provision of protection to informal workers needs to be highlighted as well as the existence of workers' organisations for informal economy workers, both at national and international levels. These organisations include member-based organisations (MBO), cooperatives, non-governmental organisations (NGOs) and community-based organisations. Linking these networks at both national and international levels can ensure political pressure in promoting the interests of workers. Through innovative approaches and diverse structures these organisations are making their voices heard and improving working conditions of their members. Their ability to bargain collectively to improve their working conditions is extremely important, specifically in countries where the informal economy exists parallel to that of the formal economy.⁸

I - THE WORLD OF WORK IN DEVELOPING COUNTRIES

In developing countries the informal economy is the norm rather than the exception. It is estimated that in developing countries more than 80 % of the working poor is in the informal economy and survives on less than \$2 per day.⁹ Informal employment varies in the different countries in the SADC region and in South Africa informal employment, non-agriculture constitutes 33%, in Namibia 44% and 76% in Tanzania.¹⁰ Studies also indicate that earnings from informal employment has a distinct impact on the poverty reduction of poor households.¹¹ South Africa is one of the countries in the region with a relative small informal economy and earning from informal employment accounts for 14% of income that allows households to exist above the poverty line.¹² The fact that this income contributes to the alleviation of household poverty is particularly important for policy makers as it highlights the value of work in the informal economy. The labour and social protection of these workers is thus of the utmost importance when considering to the high unemployment in South Africa and the alleviation of household poverty.

8 N Smit and E Fourie 'Extending Protection to Atypical Workers in the Informal Economy in Developing Countries 2012 International Journal of Comparative Law 44.

9 M Rogan and P Cichello 'Can Informal Employment Actually Reduce Poverty? 2017 WIEGO.

10 Persons employed in the informal economy include, own account workers, employees in informal businesses, their employees, contributing family members, members of cooperatives and employees who are in informal employment without adequate labour and social protection. Vanek J *et al* 'Statistical on the Informal Economy: definitions, Regional Estimates & Challenges' 2014 WIEGO 5.

11 M Rogan M and P Cichello 'Can Informal Employment Actually Reduce Poverty 2017 WIEGO Empowering Informal Workers, Securing Livelihoods 1.

12 M Rogan and P Cichello 'Can Informal Employment Actually Reduce Poverty? 2017 WIEGO Empowering Informal Workers, Securing Livelihoods 1.

PERSPECTIVES ON WORKERS IN THE INFORMAL ECONOMY

Table 1 provides an overview of the labour force in South Africa from 2017 (Quarter 2)

	Weight			% of Weight		
	Male	Female	Total	Male %	Female %	Total
Formal sector (non-agricultural)	6 494 273	4 803 462	11 297 734	57,4	42,6	100
Informal sector (non-agriculture)	1 759 667	1 049 432	2 809 099	62,8	37,2	100
Agriculture	580 041	264 637	844 678	68,4	31,6	100
Private households	298 065	1 027 935	1 325 999	22,4	77,6	100

Source: Statistics South Africa Labour Force Survey 2017 (Quarter 2)¹³

In 2004 the following key assumptions were published in respect of the linkage between informality, gender and poverty, namely: the poor are more likely to work in the informal economy; more poor women than non-poor women work in the informal economy; and there is a gender gap in the earnings in the informal economy as women earn less than their male counterparts and are less likely to be organised and have social protection.¹⁴ More women than men are in vulnerable employment and in 2013, 60% of women were in vulnerable employment compared to 54% of men.¹⁵ In South Africa and other SADC member states, these vulnerable women are without adequate social security measures as a result of formal economy bias of many existing social security systems in these countries and exclusionary statutory provisions in the regulatory framework.¹⁶

In 2015 the World Economic Forum acknowledged that the working poor need social safety nets to mitigate the effects of external and transitory livelihood shocks, and social insurance to cushion risks associated with ill health, disability, work related injuries and old age.

¹³ SA Stats <http://www.statsa.gov.za> (accessed on 10 August 2017).

¹⁴ M A Chen, J Vanek & M Carr *Mainstreaming Informal Employment and Gender in Poverty Reduction WIEGO* (2004) 30.

¹⁵ United Nations (UN) *The Millennium Development Goals Report* (2014) 11. The largest gender gaps were found in Northern Africa, Sub-Saharan Africa and Western Asia. In Brazil the increase in minimum wages for women workers resulted in a decrease in the gender pay gap. See UN Women *Progress of the World's Women 2015-2016* <http://www.progress.unwomen.org> (accessed on 10 June 2017).

¹⁶ Engendering Social Protection Conference Summary Report International Conference Lusaka, October 22-23 2012 Friedrich Ebert Stiftung 8.

Proper recognition and regulation of sectors in the informal economy would assist in the eradication of poverty amongst such workers. The law on its own cannot achieve decent work, no matter how inclusive labour laws and the extension of social protection measures may be.¹⁷

II - THE INTERNATIONAL LEGAL FRAMEWORK

The ILO has acknowledged the increase in non-standard work and the need for labour and social protection of such work through specific conventions and recommendations pertaining to particular categories of non-standard work, support for micro-enterprises, programmes aimed at the promotion of extension of social protection to informal workers,¹⁸ support for mutual health insurance schemes, and research and investigation into the extension of social protection to non-standard workers.¹⁹ A renewed interest in the informal economy may be due to informal employment amounting to more than half of non-agricultural employment in most developing countries and as high as 82% of non-agricultural employment in Asia; and to the worldwide recognition of the links between informality and growth on the one hand, and informality and poverty and inequality on the other.²⁰

*In South Africa, international labour standards play a particularly important role in the development of labour law and is also a source of customary international law. After 1994, our new constitutional dispensation recognised the importance of international standards as an intrinsic part of a democratic country. South Africa also re-joined the ILO on 26 May 1994 and has since ratified all 8 of the core conventions.*²¹

Most core labour standards apply to all workers or contain provisions for extension to other categories of workers. Furthermore, the ILO has adopted the Declaration on Fundamental Principles and Rights at Work (1998) and in terms of this declaration, member states are required to adopt at least the core rights conventions. Internationally the trend is to extend coverage to include non-standard workers, but the number of countries that have ratified the relevant conventions remains low and often the ratifying countries do not have a high prevalence of non-standard workers. These conventions include the

17 ILO Decent Work Indicators: Concepts and Definitions Report 2012.

18 Strategies and Tools against Social Exclusion and Poverty (STEP).

19 See also ILO Recommendation 204 Concerning the Transition of the Informal to the Formal Economy of 2015 and the Social Protection Floors Recommendation of 2012.

20 M Chen 'The Informal Economy: Definitions, Theories and Policies' WIEGO Working Paper N° 1 2012 2.

21 See also D Du Toit *et al Labour Relations Law A Comprehensive Guide 3rd ed* (South Africa Lexis Nexis) 78-79.

Homework Convention 177 of 1996,²² the Domestic Workers Convention 189 of 2011²³ and the Indigenous and Tribal Peoples Convention 169 of 1989. Therefore the effectiveness of these conventions in protecting non-standard workers is limited.

Social Protection Floors Recommendation 202 of 2012 attempts to provide all workers with a basic level of social security to ensure health and dignity. States are required to provide minimum levels of protection through social protection floors. Basic social security guarantees, such as health care, income security during illness, and unemployment and maternity benefits can ensure some protection for informal economy workers. The recommendation also highlights the value of cooperation of all stakeholders in realising minimum levels of protection.

The ILO has adopted the concept of 'decent work', which has set four objectives for member states namely: employment opportunities, workers' rights, social protection, and representation. This concept of decent work could be used to provide impetus to the improvement of the precarious position of workers in the informal economy. It is important to link decent work initiatives with other labour and social protection initiatives. The ILO is committed to making decent work a reality for all and this is clearly illustrated by the recent adoption of the ILO Convention concerning Decent Work for Domestic Workers 189 of 2011 and the supporting recommendation.

A - THE ILO AND THE INFORMAL ECONOMY

The ILO used the term "informal sector" for the first time 43 years ago.²⁴ This term was then used to describe the "activities" of the poor who were unregulated and without labour and social protection. At this stage the ILO already recognised the importance of a comprehensive and integrated approach to provide adequate protection to these workers. In 2002, the ILO referred to the informal economy as more "complex and much larger in magnitude" and that it is not a temporary or residual phenomenon.²⁵ The ILO in its 2010 Report on Extending the Scope of Application of Labour Laws to the Informal Economy, highlighted the following causes of informality, namely, weak governance, and inappropriate and ineffective designed or implemented social policies.²⁶

22 Only ten countries have ratified this convention. ILO NORMLEX <http://www.ilo.org/dyn/normlex> (accessed on 23 October 2017).

23 This convention has been ratified by twenty four countries. ILO NORMLEX <http://www.ilo.org/dyn/normlex> (accessed on 23 October 2017).
This convention has been ratified by twenty four conventions. ILO NORMLEX <http://www.ilo.org/dyn/normlex> (accessed on 23 October 2017).

24 ILO 2002 *Decent Work and the Informal Economy* International Labour Conference 90th Session 1.

25 ILO 2002 *Decent Work and the Informal Economy* International Labour Conference 90th Session 1.
In developing countries the informal economy is often where employment opportunities exist.

26 See p 6 of the report.

The inadequacies of the term “informal sector” was realised and the term informal economy was used instead and currently the ILO *Recommendation (2015) (No 204) concerning the Transition from the Informal to the Formal Economy* contains a comprehensive definition.²⁷ A comprehensive definition poses many challenges due to the diverse and heterogeneous aspects of the informal economy and the needs of the different categories of workers. Characteristics that these workers share include that they are without labour and social protection or adequate protection and display high degrees of vulnerability

Recommendation 204 concerning the Transition from the Informal Economy to the Formal Economy of 2015 was adopted in June 2015 and sets out important strategies for consideration when facilitating the transition from the informal economy to the formal economy. These strategies include the:

- (a) diversity of characteristics of the informal economy;²⁸
- (b) circumstances and the needs of specific workers in the informal economy;²⁹
- (c) necessity to address diversity through tailored approaches;³⁰
- (d) effective promotion and protection of human rights;³¹
- (e) fulfilment of decent work for all; and
- (f) promotion of gender equality and non-discrimination and the need to pay special attention to specific vulnerable groups such as women, the youth, migrants and older people.

27 The informal economy is defined as: all economic activities by workers and economic units that are in law or in practice not covered or insufficiently covered by formal arrangements; and does not cover illicit activities, in particular the provision of services or the production, sale, possession or use of goods forbidden by law, including the illicit production and trafficking of drugs, the illicit manufacturing of and trafficking in firearms, trafficking in persons and money laundering as defined in relevant international treaties .

28 This strategy recognises the heterogeneity of the informal economy.

29 The diverse nature of the informal economy means that policies and strategies will have to address the needs of specific groups in the informal economy. The needs of domestic workers may for example differ from the needs of informal street traders.

30 This strategy recognises that measures applicable to those in formal employment will often not be suitable for those employed in the informal economy. In many countries social insurance schemes were designed for those in formal employment and the lack of an employer-employee relationship in the informal economy could mean that the worker must contribute double the rate to a scheme. Due to the low income and irregularity of income of many informal economy workers, their contributory capacity will be low. See also G Mpedi ‘Informal Sector: Introduction’ in U Becker, F Penning & T Dijkhoff (eds) *International Standard-Setting and Innovations in Social Security* (Kluwer) (2013) 289. In Zambia only 10% of the population work in the formal economy. However their social security coverage is based on a social insurance model, excluding a large percentage of workers in the informal economy. Tailor-made approaches will be better suited to accommodate the specific needs of these diverse groups E Kalula, N Okorafor & P Bamu ‘Towards an Effective Regulatory Framework for Labour Rights and Social Protection in South Africa’ in Banik D *Legal Empowerment Agenda, Poverty, Labour and the Informal Economy in Africa* (Ashgate UK) 2011.

31 An important component of legal empowerment entails that these workers can exercise their human rights.

The recommendation can be a valuable tool during the transition process as it specifically takes note of the diverse nature of the informal economy and the importance of innovative and tailor-made solutions when considering the extension of protection to informal workers. It recognises that member states should pay particular attention to the needs and circumstances of those in the informal economy when building and maintaining national social protection floors. The recommendation may constitute an important tool when transition from the informal to the formal economy is possible and desired. This recommendation does not mean that the informal economy will disappear into the formal economy, but where possible the recommendation will provide appropriate measures to enable the transition.

The following table includes international instruments applicable to workers in the informal economy, with reference to labour protection other than the 8 core conventions.³²

32 The Freedom of Association and the Right to Organize Convention 87 of 1945, the Right to Organize and Collective Bargaining Convention 98 of 1949 and the Discrimination (Employment and Occupation) Convention 111 of 1958 have been ratified by all the SADC countries. The Equal Remuneration Convention 100 of 1951 has been ratified by Angola, Botswana, DR Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe.

International Instruments and workers in the informal economy	Ratification rates of member states ³⁴	Ratifications by SADC member states
<p>Declaration on Fundamental Principles and Rights at Work of 1998</p> <p>The declaration calls for the universal application of core rights and recognises the vulnerable position of workers in the informal economy</p>	Not subject to ratification	n/a
<p>Employment Relations Recommendation 198 of 2006</p> <p>The recommendation provides guidance with reference to disguised employment. Workers in the informal economy, such as homeworkers are often located in such relationships.</p>	Not subject to ratification	n/a
<p>Homework Convention 177 of 1996</p> <p>This is an international instrument that focusses specifically on a category of workers in the informal economy and promotes equality.</p>	10	Not yet ratified by any SADC member state.
<p>Domestic Workers Convention 189 of 2011 (See also Recommendation 201 of 2011)</p> <p>This convention aims to provide decent work for the more than 67 million domestic workers in the world. This is also an example of a convention that specifically provides standards for a group of workers in the informal economy.</p>	24	Mauritius and South Africa have ratified this convention, however South Africa does not comply with all its international obligations in this regard as these workers do not enjoy adequate protection as they are still excluded from compensation with reference to occupational injuries. In Mauritius the ratification of this Convention led to the 50 000 domestic workers receiving access to the National Pension Fund and unemployment benefits. ³⁵
<p>Workers with Family Responsibilities 156 of 1981 (See also Recommendation 165 of 1981)</p> <p>This convention applies to all workers, including workers in the informal economy.</p>	44	Mauritius
<p>Rural Workers' Organisations Convention 141 of 1975</p> <p>(See Recommendation 149 of 1975)</p> <p>This convention encourages rural workers to establish organisations that can protect and promote their interests.</p>	40	Zambia
<p>Indigenous and Tribal People's Convention 169 of 1989</p> <p>Informal economy workers are included as indigenous and tribal people are often engaged in activities in this sector</p>	22	
<p>Labour Inspection Convention 81 of 1947 (see also Recommendation 81 of 1947)</p> <p>Labour inspection is important for enforcement purpose with reference to workers in the informal economy such as domestic workers</p>	145	<p>South Africa, Angola, the Democratic Republic of Congo, Lesotho, Madagascar, Mauritius, Mozambique, Malawi, Seychelles, Tanzania, Zambia and Zimbabwe.</p> <p>Although many SADC countries have ratified this convention, enforcement remains problematic due to lack of training and an insufficient number of inspectors in these countries.</p>

33 ILO <http://www.ilo.org.dyn/normlex> (accessed on 4 September 2017)

34 WIEGO <http://www.wiego.org> (accessed on 4 September 2017).

B - THE ILO, SOCIAL SECURITY AND THE INFORMAL ECONOMY

In 1999, the Decent Work Report highlighted the large number of workers who remain without social security in a global economy and a campaign to extend coverage also to developing countries was initiated. In 2001, embedded in the decent work concept, the International Labour Conference prioritised the extension of social security coverage and emphasised the importance of national strategies to include employment and social policies.³⁵

In 2011, two main problems were identified with existing social security instruments, namely that certain provisions are outdated and that existing instruments are not in line with the ILO's objective of providing social security to all as a large number of workers in the informal economy are excluded as many social security provisions were based on the traditional full-time employment paradigm.³⁶

The exclusion of those outside the formal economy who continued to live in poverty without adequate social protection placed the extension of coverage to these workers at the "heart of the ILO's mandate and mission."³⁷ The Social Protection Report 2014-2015³⁸ indicated that 73% of the world's population continue to live without adequate social protection coverage and their fundamental rights are often only partially realised or not at all. The ILO recognised that social protection includes social security, conditions at work, occupational safety, and labour migration.³⁹ Social protection floors are defined as sets of basic social security guarantees which secure protection aimed at prevention or alleviating poverty, vulnerability and social exclusion.⁴⁰ Extending social protection to workers is vital in realising the fundamental right to social security. The limited scope of social protection schemes and the specific exclusion of workers in the informal economy can often be ascribed to factors such as, the formal sector bias of social insurance schemes, the existence of an employer-employee relationship, the low contributory capacity and incompatibility priority needs.⁴¹

35 ILO 2011 *General Survey concerning Social Security Instruments in the Light of the 2008 Declaration on Social Justice for a Fair Globalization* International Labour Conference, 100th session 7.

36 International Labour Conference 100th Session *General Survey concerning Social Security Instruments in the light of the 2008 Declaration on Social Justice for a fair Globalization* (2011) 19. U Becker, F Pennings and T Dijkhoff (eds) *International Standard Setting and Innovations in Social Security* (The Netherlands, Kluwer Law International) 2013 26.

37 ILO 2011 *General Survey concerning Social Security Instruments in the Light of the 2008 Declaration on Social Justice for a Fair Globalization* International Labour Conference, 100th Session 13.

38 *Building Economic Recovery and Inclusive Development and Social Justice* 2014-2015.

39 ILO Social Protection (Caribbean) www.ilo.org/Caribbean/areas_of_work/social_protection (Accessed 23 October 2017).

40 G Rodgers, E Lee, L Swepsten and J Van Deale *The International Labour Organization and the Quest for Social Justice* 2009 ILO (Geneva). The preamble to the ILO's *Constitution* recognised the need to improve labour conditions through the prevention of unemployment and the protection of workers against sickness, disease and occupational injuries and provision of old age. The *Declaration of Philadelphia* recognised social security as a fundamental principle for work. ILO 2011 *General Survey concerning Social Security Instruments in the Light of the 2008 Declaration on Social Justice for a Fair Globalization* International Labour Conference, 100th Session 8.

41 G Mpedi "Informal Sector' Introduction" 289-290 in U Becker, F Penning & T Dijkhoff (eds) *International Standard-Setting and Innovations in Social Security* (The Netherlands, Kluwer Law International) (2013)

The ILO's strategy to social security coverage for all, included a horizontal dimension, to extend a set of core social security guarantees by establishing a social protection floor and a vertical dimension that seeks the provision of a wider range of benefits and extension of coverage in line with the existing social security conventions, through a gradual approach.⁴²

This led to the adoption of the *Social Protection Floors Recommendation (2012) (No 202)* and this is an important instrument when considering the extension of social protection to vulnerable women workers in the informal economy. This was considered a better approach to the extension of social security for all and a more realistic approach for developing countries as the recommendation provides guidance to member states to establish and maintain social protection floors.⁴³ The preamble recognises the value of social security as tool in the prevention and reduction, of poverty, inequality, social exclusions, social insecurity, and the promotion of gender and racial equality and in support of the transition from informal to formal employment. This is pertinent to women workers in the informal economy as they are often excluded from coverage and face discrimination on multiple grounds such as, race and gender. The preamble also undeniable recognises the link the between sustainable social security systems and the transition to formal employment. Article 3 recommends that member states apply important principles such as non-discrimination, gender equality and demonstrates a responsiveness to special needs. This is an important principle for these workers as it has been highlighted that specific groups of workers in the informal economy, such as domestic workers and home workers have very specific needs in respect of social protection.

Social protection floors should include basic social security guarantees, including, essential health care and encompassing maternity care, basic income security for children, including access to nutrition, education and care, income security for persons who are unable to earn sufficient income,⁴⁴ and a basic income for older persons.⁴⁵ When extending social protection to these workers consideration must be given to their diverse working circumstances and different needs in this regard, hence consideration of this diversity should include a diverse methods and approaches in respect of financing mechanisms and delivery systems.⁴⁶ Article 15 specifically mentions the social inclusion of persons in the informal economy. The recommendation calls for social security strategies to support the growth of formal employment and the reduction of informality. Member states are responsible for monitoring and limited scope is provided for supervisory bodies to monitor progress.⁴⁷ Through technical assistance the ILO has supported development of social protection floors in a number of countries.⁴⁸

42 ILO 2011 *General Survey concerning Social Security Instruments in the Light of the 2008 Declaration on Social Justice for a Fair Globalization* International Labour Conference, 100th Session 124.

43 See article 1.

44 This includes persons in active age who are unable to earn an income as a result of sickness, unemployment, maternity and disability. Article 5.

45 See article 5.

46 See article 3.

47 U Becker, F Pennings and T Dijkhoff (eds) *International Standard Setting and Innovations in Social Security* (The Netherlands, Kluwer Law International) 2013 28.

48 The ILO has supported social protection floors in more than 136 countries, including a national social protection scheme in Columbia, a non-contributory pension scheme in Peru, extension of health, pension and child benefits in Uruguay and a universal child benefit scheme in Argentina. ILO <http://www.ilo.org> (accessed 10 June 2017).

The recommendation, even without the binding nature of a convention, has led to a number of important initiatives in the extension of social protection to those previously excluded. These initiatives include the following, a pilot maternity benefit's scheme for women in the informal economy in Ghana,⁴⁹ India considers a social security package with a basic set of guarantees for all, Lesotho considers national health care (*National Health Insurance Bill*), Madagascar have initiated a project to extend coverage to workers and their families in agriculture and fisheries in the informal economy by extending coverage in respect of unemployment and sickness and in Namibia the establishment of basic guarantees for income security and access to health care for all is considered.⁵⁰ Other SADC countries that considers legal measure to extend protection include, the United Republic of Tanzania⁵¹ and Zimbabwe.⁵² These examples highlight that health care is an important consideration for these countries in endeavours to extend protection to all and often a starting point in the extension of social protection.

In the ILO's quest to adopt a document that is flexible and will appeal to developing countries, they have neglected to provide general criteria to evaluate progress and monitoring and there is no obligation to report on this to the ILO.⁵³ Trying to find a balance between flexibility and minimum standards, means that the effect of the recommendation on the extension of social protection to all, remains questionable, however it certainly illustrates the predicament in which the ILO finds itself when balancing the various interests of member's states and vulnerable workers in setting international standards. In countries, like South Africa where the Constitution⁵⁴ provides imperatives for the consideration and application of international law, international social security instruments are more effective.

In addition to the international instruments, international social security agreements, both bilateral and multilateral do also exist. Often the aim of these agreements are to extend coverage to non-citizens and fundamental principles of equality of treatment, maintenance of acquired rights, payment of benefits abroad, determination of acquired rights, and maintenance of rights in the course of acquisition and reciprocity are found in these agreements.⁵⁵

49 This is high priority to Ghana as in 2005, the World Health Report indicated that 75 % of all neonatal deaths could be prevented if women and children were receiving adequate care during pregnancy, childbirth and thereafter. The extension of social protection measures to the most vulnerable in Ghana is characterised by the involvement of member-based organisations and other international organisations such as the Rockefeller Foundation. ILO <http://www.ilo.org> (accessed 10 June 2017).

50 ILO 2011 *General Survey concerning Social Security Instruments in the Light of the 2008 Declaration on Social Justice for a Fair Globalization* International Labour Conference, 100th Session 125-128.

51 Introduction of a universal old age pension scheme and access to medical care for all is considered. ILO 2011 *General Survey concerning Social Security Instruments in the Light of the 2008 Declaration on Social Justice for a Fair Globalization* International Labour Conference, 100th Session 128.

52 The introduction of a universal health scheme is considered. ILO 2011 *General Survey concerning Social Security Instruments in the Light of the 2008 Declaration on Social Justice for a Fair Globalization* International Labour Conference, 100th Session 128.

53 U Becker, F Pennings and T Dijkhoff (eds) *International Standard Setting and Innovations in Social Security* (The Netherlands, Kluwer Law International) 2013 28.

54 See sections 39(1), 232 and 233 of the Constitution of the Republic of South Africa, 1996.

55 G Mpedi "Introduction" 5 in U Becker, F Pennings and T Dijkhoff (eds) *International Standard Setting and Innovations in Social Security*.

Key social security instrument for workers in the informal economy include: Social Security (Minimum Standards) 102 of 1952; Maternity Protection Convention 183 of 2000 and the Occupational Health and Safety Convention 155 of 1981. The ratification of these conventions by SADC countries remain low.

The implementation of ILO standards for workers may be more problematic in developing countries as they may be unable to fulfil the obligations placed on them. However, governments can start by removing all obstacles to the free organisation of these workers.⁵⁶ Certain ILO conventions allow ratifying countries to enact standards in a manner applicable to national conditions. The ILO extends coverage to non-standard workers through specific conventions for the general acceptance, promotion and extension of protection to these workers. The ILO should prioritise a campaign focussing on encouraging developing countries where the informal economy is prevalent to ratify social protection conventions.⁵⁷ Through assistance provided to country offices, the ILO can encourage compliance with these conventions. The international standards can serve as a roadmap to direct policy and legislative responses.

III - REGIONAL INSTRUMENTS: THE SOUTH AFRICAN DEVELOPMENT COMMUNITY (SADC)

In 1992, state leaders agreed to transform the then SADCC into the SADC with a core focus on integration of economic development.⁵⁸ The vision, based on common values and principles, is one of a regional community, the improvement of standards of living, the alleviation of poverty, freedom and social justice, and peace and security for all people. Article 3 of the *SADC Treaty* (1992) affords the SADC legal personality and provides that the SADC is an international organisation.⁵⁹ Signatories of the Treaty undertake to harmonise policies, take initiatives to develop ties across the region and to join in the implementation of all programmes and projects of the community. Article 5 provides for important objectives, including the alleviation of poverty and the enhancement of that standard and quality of life of the people as well as support for the socially disadvantaged in the region through integration.⁶⁰ Areas of cooperation in the area include social welfare, social and human development and special programmes that are crucial for the extension of social

56 The Bangladesh government placed unnecessary obstacles in the way of free organisation by requiring that 30% of workers in an establishment join a union before registration by the government - Human Rights Watch <https://www.Hrw.org/news/2013/Bangladesh>. Considering the many obstacles that informal economy workers face when organising, requirements that hinder their organisation should be removed by governments in their endeavours to comply with their international obligations.

57 George Mpedi 'Informal Sector: Introduction' 44 in U Becker, F Pennings and T Dijkhoff (eds) *International Standard Setting and Innovations in Social Security* (The Netherlands, Kluwer Law International) 2013.

58 The following member states are part of the SADC community, namely, Angola, Botswana, Democratic Republic of Congo, Lesotho, Madagascar, Malawi, Mauritius, Mozambique, Namibia, Seychelles, South Africa, Swaziland, United Republic of Tanzania, Zambia and Zimbabwe. The total SADC population is 277 million. SADC <http://www.sadc.int> (Accessed 10 July 2017)

59 See articles 3(1) and (2).

60 See article 5(1).

protection to vulnerable workers.⁶¹ Article 4 of the *SADC Treaty* provides that member states shall act in accordance with sovereign equality of all, therefore programmes adopted are not automatically applicable in member states and member states cannot be forced to implement objectives in their region.⁶² Article 5 lists mechanisms through which member states must achieve the objectives. These mechanisms include harmonisation of policies, development of policies and the promotion of development of various areas to enable member states to reach their objectives. Article 21(1) places an obligation on member states to cooperate in all areas to foster regional integration and development. When considering the plight of informal economy workers in the region it is important to note that article 21(3)(f) states that one of these areas that require cooperation is social welfare and this certainly embraces the notions of social protection and decent work for all and social integration in the region.⁶³ To achieve this objective, member states will have to cooperate in respect of an appropriate legal framework, the undertaking of an institutional framework and the implementation of a programmatic framework.⁶⁴

SADC countries are to a certain extent interdependent, and are linked by incidents of migration.⁶⁵ Important the fact that the majority of workers are to be found in the informal economy, often outside the scope of labour and social protection. The region is also characterised with one of the highest HIV and AIDS prevalence in the world with factors that contribute to this pandemic such as, extreme poverty and income inequalities, mobility of migrant labour, gender dynamics and gender-based violence.⁶⁶ In June 2016, the SADC secretariat announced that an estimated 41 million people in the region are food insecure.⁶⁷ This highlights the plight of the particular vulnerable groups in the region, such as people living with HIV and AIDS.

Regional instruments in the SADC community can play an important role in the extension of labour and social protection to workers in the informal economy. Instruments that impact on the social and labour protection of workers include the *SADC Treaty*,⁶⁸

61 The *SADC Treaty Amendment* in 2009 provided for the following institutional framework: Summit of Heads of State; Organ on Politics, Defence and Security Co-operation; Council of Ministers; a Secretariat; a Tribunal; the Troika, Standing Committee of Officials and the SADC National Committee. See article 9. It must be noted that in 2010, the tribunal, after several judgments SADC <http://www.sadc.int> (accessed 10 June 2017).

62 G Mpedi and M Nyenti "Perspectives towards the Development of the Social Protection Dimension of the SADC Regional Integration Agenda" *SADC Law Journal* 2012 166.

63 G Mpedi and M Nyenti "Perspectives towards the Development of the Social Protection Dimension of the SADC Regional Integration Agenda" *SADC Law Journal* 2012 167.

64 G Mpedi and Nyenti "Perspectives towards the Development of the Social Protection Dimension of the SADC Regional Integration Agenda" *SADC Law Journal* 2012 165.

65 M Olivier and E Kalula "Regional Social Security" 660-661 in MP Olivier, N Smit and ER Kalula *Social Security A Legal Analysis* (South Africa LexisNexis) 2003.

66 SADC <http://www.sadc.int> (accessed 10 March 2017).

67 SADC <http://www.sadc.int> (accessed 10 March 2017).

68 (1992).

Charter of Fundamental Social Rights,⁶⁹ the *Code on Social Security*,⁷⁰ the *Draft Protocol on the Facilitation of Movement of Persons*,⁷¹ *Declaration on Gender and Development*,⁷² the *Protocol on Health*,⁷³ the *Code on HIV and AIDS and Employment in SADC*⁷⁴ and the *Protocol on Education and Training*.⁷⁵

IV - VOICE AND REPRESENTATION

The 2002 ILO Resolution Concerning Decent Work and the Informal Economy recognised that workers in the informal economy, both wage earners and own account workers, have the same rights as formal economy workers to decent work and representation and that governments must provide an enabling framework at national and local levels to support their right to representation. Conclusion 9 emphasises that since these workers are normally not organised, they lack collective representation 'vis-à-vis employers or public authorities'.

Reaching workers in the informal economy poses a major challenge to unions; however it is a pressing challenge that cannot be ignored. Unions need to engage in social and political bargaining with public authorities and legislative bodies. Current legislative provisions generally provide structures and processes for collective bargaining based on the traditional employment relationship. However, informal economy workers often face different bargaining entities, such as municipalities, government officials and other policymaking bodies that impact directly on their livelihood. Challenges that unions face include political and conceptual challenges, lack of resources and experience, and perhaps the political will to organise informal economy workers.

An important lesson to be learnt from the Self Employed Women's Association (SEWA) in India is that the lack of a distinct employer and employee relationship that is often evident in the informal economy means that formal workplace strategies will not be effective when organising workers in the informal economy.⁷⁶ Challenges require innovative solutions, such as new organising strategies, tailor-made benefits, new structures, innovative communication tools, and effective collective methods. Through NGO's and other civil

69 (2003). A key objective of the charter is the harmonisation of legal, economic and social policies and programmes and the establishment and harmonisation of social security schemes. The Charter recognises basic human rights, equality for all, and that specific vulnerable groups need protection. Article 10 of this Charter requires member states to create an enabling environment to provide every worker with adequate social protection, regardless of their status.

70 (2007). This code refers to lawfully employed immigrants and requires their protection. The scope is extended to self-employed migrants. This code also provides guidelines for the development, coordination and consolidation of social security.

71 (2005).

72 (1997).

73 (1999).

74 (1997).

75 (1997).

76 L Vryenhoek 'Headstrong: A Profile of a Headloader in Ahmedabad, India' WIEGO Workers' Lives 2 (2012) 3.

society bodies these workers could be reached. Sustainable organisations for such workers require the support of political structures and policies that recognise the important contribution of the working poor.⁷⁷

Domestic workers in South Africa enjoy the right to freedom of association⁷⁸ and the South African Domestic Service and Allied Workers Union (SADSAWU)⁷⁹ currently represent domestic workers in cities such as Cape Town, Johannesburg and Durban and is the largest trade union for domestic workers in South Africa.⁸⁰ This union was formed in 2000, its predecessor, the South African Domestic Workers Association (SADWU) was established in 1986. The chairperson of SADSAWU, Myrtle Witbooi, was a domestic worker during the apartheid regime. In respect of mobilisation and labour activism certain important historic events must be considered. In 1955 the Congress of South African Trade Unions was established and in 1960 the then government banned political organisations. Although women protested pass laws in 1956, specifically for domestic workers, all black women were compelled to carry passes in 1964. From 1973 onwards trade union strikes marked political resistance as a powerful tool against the political regime. As early as 1980, domestic workers started campaigning for education and decent work conditions. SADSAWU also provides support to employers to enable them to comply with legislative provisions.

Different social, cultural, religious and political contexts can impact on the mobilisation of informal women workers. In India women workers have been shown to have resisted collective action because of fatigue, victimisation and the burden of family responsibilities.⁸¹ Within their communities they are often socially conditioned not to be assertive due to gender stereotyping and unequal paternalistic attitudes and are often victimised and experience gender based violence.⁸²

Trade unions and workers' organisations can play an important role in the extending protection to informal women workers via existing legislative provisions and/or the design of innovative and tailor-made solutions. It is also evident that for unions successfully to organise women workers in the informal economy they will have to support a holistic approach and their engagement with other stakeholders should thus also focus on other fundamental rights to ensure adequate protection. However, this means that the role of unions must evolve not only to cover wage negotiations with the employer but also

77 C Mather 'Informal Worker Organizing' WIEGO Research Report (2012) 12.

78 Section 4. Section 23(2), (3) and (4) of the Constitution provides for the fundamental rights of workers form and join trade unions, strike, and take part in their activities and sub section (5) provides for the right to engage in collective bargaining. These rights are supported by the fundamental rights in section 17 to assembly, demonstration, picket and petition in a peaceful manner and section 18 that provides for freedom of association.

79 SADSAWU <http://www.sadsawu.com> (accessed 10 June 2017).

80 In Tanzania, domestic workers also belong to a wider trade union, namely the Conservation, the union focuses on the empowerment of these workers through capacity building. N Vanqa, Y Wiid, D Du Toit 'Organizing for Empowerment' 283 in D du Toit (eds) *Exploited, Undervalued and Essential Domestic Workers and the Realisation of their Rights* (South Africa, Pretoria University Law Press) 2013.

81 J Jenkins 'Organizing "Spaces of Hope": Union Formation by Indian Garment Workers' *BJIR* (2013) 633.

82 J Jenkins 'Organizing "Spaces of Hope": Union Formation by Indian Garment Workers' *BJIR* (2013) 633.

engagement in social and political bargaining with public authorities and legislative bodies as well. Informal economy workers often face different bargaining entities, such as municipalities, government officials and other policymaking bodies that impact directly on their livelihood. This requires that bargaining partners must be identified and that a relationship must be established with a long-term vision. Through innovative practices, new organisational strategies, and the co-operation of workers' organisations and community-based organisations, informal women workers may gain better representation and improve their working conditions and change their lives. Statutory provisions could be extended to provide structures to accommodate the needs of these workers, including a specifically designed dispute resolution process.

Providing for fundamental rights is not enough: government should engage with trade unions and workers' organisations that represent these workers and provide innovative measures to accommodate their specific needs. Governments should, for example, provide for simple, less expensive and speedy registration procedures for such organisations. Existing unions can strive to provide and accommodate workers in the rising informal economy, but independent unions formed by such workers will focus on issues most relevant to them. Good governance, which excludes the practices of harassment, bribery and extortion by corrupt officials, is essential to enable informal economy workers to access resources, information, markets, public infrastructure, technology and other social protection measures.

V - EXAMPLES OF LEGISLATIVE MEASURES TO EXTEND PROTECTION TO WORKERS IN THE INFORMAL ECONOMY

A - SOUTH AFRICA

Domestic workers are now included in almost all labour laws in South Africa, through a sectoral determination issued by the Minister in terms of section 51 of the Basic Conditions of Employment Act 75 of 19. This determination applies to all domestic workers in South Africa including independent contractors and employees provided through employment services.⁸³ The determination regulates wages, hours of work, leave and the termination of employment and thus extends the BCEA provisions to domestic workers. Excluded from the scope are domestic workers employed on farms performing agricultural work or domestic workers covered by another determination, such as farmworkers or those workers covered by a Bargaining Council Agreement. Clause 2 and 3 of the determination regulate wages and wage increases and these are the only two clause applicable to domestic

83 Clause 1. Domestic workers in Philippines also covered by a sectoral determination that sets minimum wages with reference to workplace regions. In Brazil domestic workers are included in the regulation of a national minimum wage. In India, the various states have a discretion whether to include domestic workers within minimum wage floor, as the Minimum Wage Act does not list domestic work specifically. ILO Report 2015 Domestic Work, Wages, and Gender Equality: Lessons from Developing Countries Working Paper no 7, 11.

workers who work less than 24 hours for an employer. This is problematic and not in line with the constitutional advancement of social justice or our international obligations in respect of decent work for all. Domestic workers will often work for a number of different employer for less than 24 hours a month. These provisions mean that these workers are excluded from labour protection and there is no obligation on the employers to contribute to unemployment insurance. This exclusion potentially allows for exploitation of vulnerable workers, as employers may deliberately employ workers for less than the 24 hours to avoid compliance. This exclusion thus defeats the very purpose of the law to protect vulnerable workers in this regard.⁸⁴ From 2003, domestic workers were included in the scope of the Unemployment Insurance Act⁸⁵ (that is, the UIA) and the Unemployment Insurance Contributions Act⁸⁶ (hereafter UICA). Employers and employees are mandated to make contributions and the determination of the contribution to be made is one per cent of the remuneration that an employee receives on a monthly basis.⁸⁷ By contributing, employees who become unemployed are entitled to a range of benefits which are listed in section 12 of the UIA, namely unemployment benefits,⁸⁸ illness benefits,⁸⁹ maternity benefits,⁹⁰ adoption benefits,⁹¹ and dependent's benefits.⁹² The act makes specific provision for domestic worker who work for multiple employers and provides that in instances of dismissal by one employer, the workers is entitled to benefits, despite still being employed by other employers.⁹³

84 D Du Toit and E Huysamen "Implementing Domestic Workers' Labour Rights in a Framework of Transformative Constitutionalism" 83 in D du Toit (eds) *Exploited, Undervalued and Essential Domestic Workers and the Realisation of their Rights* (South Africa, Pretoria University Law Press) 2013.

85 63 of 2001.

86 4 of 2002. In terms of the act: Domestic worker means an employee who performs domestic work in the home of her employer, and includes a- (a) gardener; (b) persons employed by a household as a driver of a motor vehicle; and (c) person who takes care of any person in that home. The same definition appears in the Unemployment Insurance Act 63 of 2001, section 1.

87 Section 6 in the UICA.

88 Section 12(1)(a). A contributor is entitled to unemployment benefits when the reason of unemployment, include, the termination of a fixed contact, dismissal or insolvency. Section 16 (a).

89 Section 12(1)(b). In terms of section 20, the entitlement to these benefits include instance where the contributor is unable to work, because of illness. The duration of the illness must not be less than seven days. See section 20.

90 Section 12(1)(c). The maternity leave period is 17,32 weeks. Special provision is made for cases of miscarriage or still born children during the third trimester.

91 Section 12(1)(d). Adoptions must occur in terms of the Child Care Act 74 of 1983.

92 Section 12(1)(e). This includes the surviving spouse or a life partner and the dependent child if there is no surviving spouse or life partner. Section 30.

93 Section 12 (1A).

B - ZAMBIA⁹⁴

The country's Social Cash Transfer programme has 242,000 beneficiaries. The current social security system is fragmented and the government is currently developing a comprehensive national social security system. The government committed itself to a comprehensive social protection scheme in a policy document in 2014. The legal framework of this system will be based on the Social Protection Bill. This bill will provide for the gradual extension of social protection measures to workers who are currently excluded from protection. The bill envisages a flexible system that endeavors to meet the divers characteristics of workers currently excluded. Challenges in extending social protection measures to workers in the informal economy have been identified and include; irregular and low income; lack of trust in the institutional framework; lack of knowledge about existing provision, institutions and procedures; absent or weak worker's organizations, isolation and fragmentation and current exclusion from systems. The governments display a political willingness to establish a single social protection authority to provide comprehensive benefits to all. With reference to workers in the informal economy, a national approach is envisaged that can be adapted to tailored needs of categories of informal workers, such as self-employed or domestic workers. A unique benefits package is proposed based on a unified contribution. In recognition of the challenges that these workers face and that immediate risks are often prioritized, immediate expenditures can be realized. The labour mobility of many workers in the informal economy will ensure that portability of benefits in the new proposed system. The system aims to overcome the challenges with reference to contribution by introducing a flat rate contribution for the self-employed based on the number of household member. With reference to workers in the informal economy with irregular incomes, strategies are proposed that will introduce a levy on a specific job or project. The system will allow for monthly and other periodical contribution depending on the capacity of the specific category of workers. The introduction of this comprehensive social protection system will be accompanied by empowerment programmes and advocacy campaigns. Specific incentive measures will be introduces for household employing domestic workers and for own account and small businesses. The government aims to implement a national Maternity protection programme by 2018. It is also important to note that in line with the policy document they are committed to a situational analysis of the informal economy to determine best practices in respect of the extension of social security measures. The comprehensive social protection programme envisaged by the state is based on values of equality and human dignity. National Social Protection Policy Minister of Community Development, Mother and Child health Republic of Zambia, 2014 28.

CONCLUSION

There is no instant solution to the problem of providing adequate labour and social protection to vulnerable women workers. The informal economy is expanding and in developing countries a high participation rate in the informal economy is the norm. Informal economy workers are vulnerable and without the legal protection that they deserve as they are often excluded from the scope and coverage of existing legislative

94 MP Goursat and L Pelterano ILO 2016 Extension of Social Protection to Workers in the Informal Economy in Zambia Lessons Learnt from Field Research on Domestic Workers, Small Scale Farmers and Construction Workers. 1-41.

provisions. Though the ILO recognises new forms of work in its standard setting, ratification of applicable conventions remains low and the implementation of ILO standards for workers in developing countries remains problematic. Workers in the informal economy need to organise to improve and change their lives. However, unions face many challenges in organising the informal economy. Governments should create an enabling framework to support informal economy policies and programmes and other institutions, such as MBOs, cooperatives, NGOs, and community-based organisations can provide links at national and international level and can assist in promoting the interests of workers. It is thus argued that the informal economy will not disappear or be absorbed by the formal economy, however constantly increasing in developing countries is providing employment to the poor and alleviating household poverty. International and regional standards must be promoted, governments must provide support and enabling frameworks and infra-structural support to workers in the informal economy.

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