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The case of the food value chain

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Jan Theron

PLAAS Working Paper 43: Labour regulation and the economy: The case of the food value chain

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Author: Jan Theron, jant@iafrica.com

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African Centre for Cities

Environmental & Geographical Science Building
University of Cape Town
Private Bag X3,
Rondebosch 7701

Tel: +27 21 650 5903 Fax: +27 21 650 2032
Website: www.africancentreforcities.net
E-mail: maryam.waglay@uct.ac.za
Twitter: @UrbanAfricaACC



Labour and Enterprise Policy Research Group (LEP)

Institute of Development and Labour Law
Faculty of Law
University of Cape Town
Private Bag X3
Rondebosch 7701

Tel: +27 (0)21-6505634 Fax: +27 (0)21-6505660
Website: www.idll.uct.ac.za/idll/lep
Email: faldielah.khan@uct.ac.za



Institute for Poverty, Land And Agrarian Studies

Faculty of Economic and Management Sciences
University of the Western Cape
Private Bag X17
Bellville 7535

Tel: +27-(0)21-9593733 Fax: +27(0)21-9593732
Website: www.plaas.org.za Email: info@plaas.org.za
Twitter: @PLAASuwc
Facebook: www.facebook.com/PLAASuwc



DST-NRF Centre of Excellence in Food Security

School of Government Building
University of the Western Cape
Private Bag X17
Bellville 7535

Tel: +27 (0)21-9593817
Website: www.foodsecurity.ac.za Email: coeinfos@gmail.com
Twitter: @FoodSecurity_ZA
Facebook: <https://www.facebook.com/CoEinFS/>



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ABSTRACT

Contrary to a popular narrative which seeks to attribute the country's economic ills to labour legislation, this paper argues that the role of law in relation to the economy is constitutive, and that labour can also not be considered in isolation from other branches of law in this regard. The regime constituted by labour law has also always had a dual character, in which there are 'outsiders' to which certain key provisions – specifically rights to organise and bargain – do not apply. To elaborate this argument, the paper considers the law's role in structuring employment in the food value chain to show how key provisions of labour legislation, and other laws, fail to take into account how employment is increasingly externalised, and how the number of 'outsiders' is growing. The paper also considers the role of worker organisation and collective bargaining, and other regulatory strategies in the food value chain.

Keywords:

Constitutive role of law; labour law; key provisions of labour legislation; externalisation of employment; worker organisation and representation

<p>African Centre for Cities Environmental & Geographical Science Building University of Cape Town Private Bag X3, Rondebosch 7701</p> <p>Tel: +27 21 650 5903 Fax: +27 21 650 2032 Website: www.africancentreforcities.net E-mail: maryam.waqlay@uct.ac.za Twitter: @UrbanAfricaACC</p>	 <p>Labour and Enterprise Policy Research Group (LEP) Institute of Development and Labour Law Faculty of Law University of Cape Town Private Bag X3 Rondebosch 7701</p> <p>Tel: +27 (0)21-6505634 Fax: +27 (0)21-6505660 Website: www.idll.uct.ac.za/idll/lep Email: faldielah.khan@uct.ac.za</p>
<p>Institute for Poverty, Land And Agrarian Studies Faculty of Economic and Management Sciences University of the Western Cape Private Bag X17 Bellville 7535</p> <p>Tel: +27-(0)21-9593733 Fax: +27(0)21-9593732 Website: www.plaas.org.za Email: info@plaas.org.za Twitter: @PLAASuwv Facebook: www.facebook.com/PLAASuwv</p>	 <p>DST-NRF Centre of Excellence in Food Security School of Government Building University of the Western Cape Private Bag X17 Bellville 7535</p> <p>Tel: +27 (0)21-9593817 Website: www.foodsecurity.ac.za Email: coeinfos@gmail.com Twitter: @FoodSecurity_ZA Facebook: https://www.facebook.com/CoEinFS/</p>

ABBREVIATIONS AND ACRONYMS

AgriBEE	AgriBEE Sectoral code for agriculture
BBBEE	Broad-Based Black Economic Empowerment
BCEA	Basic Conditions of Employment Act
CCMA	Commission for Conciliation Mediation and Arbitration
COIDA	Compensation for Occupational Injuries and Diseases Act
DAFF	Department of Agriculture, Forestry and Fisheries
DLA	Department of Land Affairs
DoA	Department of Agriculture
DoL	Department of Labour
DTI	Department of Trade and Industry
ECARP	Eastern Cape Agricultural Research Project
ECC	Employment Conditions Commission
EEA	Employment Equity Act
ESTA	Extension of Security of Tenure Act
ETI	Ethical Trading Initiative
FARE	Future of Agriculture and the Rural Economy
LRA	Labour Relations Act
OHSA	Occupational Health and Safety Act
RSA	Republic of South Africa
SD13	Sectoral Determination for Farmworkers
SDA	Skills Development Act
SDLA	Skills Development Levies Act
SETAs	Sectoral Education and Training Authorities
SEWA	Self-Employed Women's Association
SEWU	Self-Employed Women's Union
SIZA	Sustainability Initiatives of South Africa
TESS	Temporary Employment Services
TNCs	Transnational corporations
UIA	Unemployment Insurance Act
WF	Workplace Forum

African Centre for Cities

Environmental & Geographical Science Building
University of Cape Town
Private Bag X3,
Rondebosch 7701

Tel: +27 21 650 5903 Fax: +27 21 650 2032
Website: www.africancentreforcities.net
E-mail: maryam.waglay@uct.ac.za
Twitter: @UrbanAfricaACC



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Institute of Development and Labour Law
Faculty of Law
University of Cape Town
Private Bag X3
Rondebosch 7701

Tel: +27 (0)21-6505634 Fax: +27 (0)21-6505660
Website: www.idll.uct.ac.za/idll/lep
Email: faldielah.khan@uct.ac.za



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University of the Western Cape
Private Bag X17
Bellville 7535

Tel: +27-(0)21-9593733 Fax: +27(0)21-9593732
Website: www.plaas.org.za Email: info@plaas.org.za
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School of Government Building
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Private Bag X17
Bellville 7535

Tel: +27 (0)21-9593817
Website: www.foodsecurity.ac.za Email: coeinfs@gmail.com
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<p>African Centre for Cities Environmental & Geographical Science Building University of Cape Town Private Bag X3, Rondebosch 7701</p> <p>Tel: +27 21 650 5903 Fax: +27 21 650 2032 Website: www.africancentreforcities.net E-mail: maryam.waglay@uct.ac.za Twitter: @UrbanAfricaACC</p>	 <p><small>AFRICAN CENTRE FOR CITIES urbanism from an African perspective</small></p>	<p>Labour and Enterprise Policy Research Group (LEP) Institute of Development and Labour Law Faculty of Law University of Cape Town Private Bag X3 Rondebosch 7701</p> <p>Tel: +27 (0)21-6505634 Fax: +27 (0)21-6505660 Website: www.idll.uct.ac.za/idll/lep Email: faldielah.khan@uct.ac.za</p>	
<p>Institute for Poverty, Land And Agrarian Studies Faculty of Economic and Management Sciences University of the Western Cape Private Bag X17 Bellville 7535</p> <p>Tel: +27-(0)21-9593733 Fax: +27(0)21-9593732 Website: www.plaas.org.za Email: info@plaas.org.za Twitter: @PLAASuwc Facebook: www.facebook.com/PLAASuwc</p>		<p>DST-NRF Centre of Excellence in Food Security School of Government Building University of the Western Cape Private Bag X17 Bellville 7535</p> <p>Tel: +27 (0)21-9593817 Website: www.foodsecurity.ac.za Email: coeinfs@gmail.com Twitter: @FoodSecurity_ZA Facebook: https://www.facebook.com/CoEinFS/</p>	 <p><small>DST-NRF Centre of Excellence in Food Security</small></p>

1. INTRODUCTION

The role of law in relation to economics, I would argue, is constitutive. In other words, legal rules constitute space(s) within which national and global economies function, and close spaces considered dysfunctional. What is considered functional or dysfunctional represents the legal status quo, which in the case of labour law emerged from contestation between employers wishing to use the labour power of others for their own gain, and worker organisations on the other.

Were it not for labour law, the status quo would be that employment is a contract like any other. Even if a worker is paid a pittance, the argument goes, he or she has exercised a choice by accepting employment on these terms. By the same token, a worker is always able to resign his or her employment. The counter-argument, articulated by worker organisations, is that most workers are not free to resign, because it is not obvious how else they could survive. For the same reason it is a fiction to suggest an individual worker is able to bargain the terms of his or her employment contract.

In response to the gains made by worker organisations in industrialised countries, labour law constituted spaces in which certain workers – employees, as defined – have rights of one kind or another to organise and bargain. However, the scope of these rights was always contested, and is generally narrower than certain other labour laws: laws regulating occupational health and safety, for example. This is easily explained. Whilst there is a degree of consensus that regulating health and safety is functional to the economy because of the dire social consequences of failing to do so, the same cannot be said about promoting workers organisations or bargaining.¹

In response to worker organisation in South Africa in the first phase of its industrialisation, labour law in the 1920s developed a system in terms of which ‘employees’ had the right to organise and bargain. Although African workers were notoriously excluded from the definition of an employee, laws regulating occupational health and safety (among others) were broadly defined to apply to all workers. Legislation also set the basic conditions applicable to workers in key sectors (notably manufacturing and mining) and also provided an administrative determination of a minimum wage for specific ‘industries’.² Labour law could therefore be regarded as constituting a dual regime, in which the right of ‘insiders’ to organise and bargain was protected but other rights applied to ‘outsiders’ (employees in unorganised sectors, and workers who were not employees, as defined).

However this regime was not constituted only by labour law. In the case of African workers, influx control and the use of fixed-term contracts ensured that most were excluded from the right to organise and bargain, and also were not (in today’s parlance) in ‘standard’ jobs.³ The first moves to extend the organising and bargaining rights to African workers occurred when influx control was dismantled, creating the illusion that every worker could aspire to a ‘standard’ job, although it would

¹ A current manifestation of opposition to collective bargaining relates to the extension of bargaining council agreements to non-parties, which has been a feature of labour legislation since the 1920s, and was recently the subject of a constitutional challenge brought by the Free Market Foundation.

² The definition of employee in the Industrial Conciliation Act excluded African workers (initially referred to as ‘natives’ and later ‘blacks’) was contained. The first version of this statute (Act 11 of 1924) was adopted in 1924 and the last version in 1956 (Act 28 of 1956). Occupational health and safety was covered by the Factories, Machinery and Building Works Act (the Factories Act 22 of 1941) and its predecessors, which also set basic conditions of work. The occupational health and safety provisions of the Machinery and Occupational Safety Act (Act 6 of 1983) replaced the Factories Act, while basic conditions provisions were replaced by the Basic Conditions of Employment Act (Act 3 of 1983). The Wage Act (5 of 1957) – which set minimum wages and basic conditions of employment for specific industries – remained in force until repealed by the new Basic Conditions of Employment Act (Act 75 of 1997).

³ In this paper, a ‘standard job’ or ‘standard employment’ can be regarded as full-time employment for an indefinite period.

remain necessary to employ temporary workers in certain industries (e.g. horticulture) or part-time workers where there was an operational need to do so (e.g. in the retail sector).⁴

Legislation adopted after 1994 was generally seen as extending rights to 'non-standard' workers in temporary or part-time jobs, and enabling 'outsiders' such as farm workers to organise and bargain. Importantly, rights to organise and bargain were underpinned by a right not to be unfairly dismissed. The expectation was that the legislation would promote increased levels of bargaining, which would take place – in the same way as it had in the previous system – in what were now called bargaining councils. Collective agreements would in turn be extended to non-parties (employers who were not party to the negotiations, and workers who were not members of the relevant trade unions), and the contract entered into at the inception of employment would diminish in significance, if not disappear altogether. This, however, has not happened.⁵

In fact, contrary to a popular narrative which seeks to attribute South Africa's economic ills to the rights labour legislation gives workers, the labour relations regime is still characterised by dualism, and the number of 'outsiders' has probably been growing. This has to do with the fact that it was adopted in the midst of the 'roaring nineties' (Stiglitz 2002), a period of capitalist triumphalism associated with the promotion of policies that served to weaken the national state and enhance the domination of transnational corporations (TNCs). It was also a period in which TNCs and other large enterprises became increasingly 'vertically disintegrated' rather than vertically integrated, as I will presently describe. This form of industrial restructuring has given rise to the theory of the 'value chain' in which a 'lead firm' (typically a TNC) 'governs' the relationship between the production and consumption of a given commodity.

It is difficult, however, to prove empirically that the number of 'outsiders' is growing. Firstly, this entails making a qualitative assessment, based on analysis of labour law. Secondly, the effect of the process of industrial restructuring referred to above has been to change the structure of employment, in the workplace and in the labour market as a whole. It can be demonstrated through case studies of individual workplaces and sectors, however. This paper attempts, with some trepidation and a degree of scepticism, to do so in terms value chain theory. The scepticism relates in part to the concept of 'governance' in terms of value chain theory, which seems to me to conflate a distinction of cardinal importance for labour law: between the exercise of power and law itself.⁶ One of the objectives of labour law is to regulate the exercise of power.

At the same time it is problematic to confine this enquiry to labour law. Labour law does not exist in isolation from other branches of law. Also, if there is any prospect of labour law protecting its outsiders, it needs to change. The way effective change will come about, I argue, will most likely be through workers organisations challenging the fictions that underpin the current status quo, as they did when it was said that employment was a contract like any other. This can come about through the bargaining process and collective agreements, which I regard as a form of regulation, 'regulation from below'. There are also other forms of regulation which are relevant to the operation of labour law. Here I distinguish state regulation, including policies that inform the interpretation and application of law, and non-state forms of regulation (sometimes referred to as private regulation). Accordingly, the topic of this paper concerns labour regulation as a whole.⁷

⁴ Part-time employment was provided for in terms of the Wage Determination 478, the predecessor of the current Sectoral Determination for the Retail Sector (which does not explicitly refer to part-time employment).

⁵ Arguably, there has been a decline rather than a growth of collective bargaining post-1994. The decline in collective bargaining has to some extent been camouflaged by the establishment of bargaining councils in the public sector in the 1990s.

⁶ I use the term 'law' here to refer to formal law (which in the South African context includes the constitution, legislation and common law).

⁷ Regulation can be defined as any instrument which seeks to establish rules that are intended to govern conduct, including but not confined to formal law. It would include formal policies adopted by the state, agreements that emanate from a

The scheme of this paper is as follows: section 2 concerns the constitutive role law played in industrial restructuring, although not exclusively labour law, and how the structure of employment in the labour market has changed. In section 3 of the paper I outline key aspects of labour legislation, focusing on the provisions which are of most relevance given how the structure of employment has changed. In section 4 I consider labour regulations relevant to the workers in the food value chain, and in section 5 other forms of state regulation affecting employment in the food value chain. Section 6 focuses on the state of worker organisation in the food value chain, and section 7 on collective bargaining. In section 8 I comment on the monitoring and enforcement of state regulation, which partly explains the growth of non-state regulation, which is the subject of section 9. The paper concludes with section 10.

2. THE CHANGING STRUCTURE OF EMPLOYMENT

To illustrate the constitutive role law played in the industrial restructuring of the 1990s and subsequently, it is convenient to begin at what seems to have been the beginning: the realisation in about the 1930s that through ownership of the intellectual property rights to their products, enterprises could enter franchising agreements with others to sell them. This would enable them to control the retail process without having to incur the costs of owning retail outlets themselves. These costs of course include the contingent costs associated with employing workers.

Franchising was already established in the United States when Manpower Inc and others began litigating state by state to win recognition for the proposition that a labour broker (as it is known in South Africa) was the employer of those workers it procured for a client (Gonos, 1997). The same proposition was introduced into South Africa by way of an amendment to labour law, and nicely illustrates its constitutive role.⁸ It facilitated the expansion of labour broking, particularly after the cornerstone of the post-1994 labour relations regime, the Labour Relations Act, was adopted.⁹ There is also evidence that labour broking played a pivotal role in the expansion of outsourcing, both locally and globally. Outsourcing entails redefining the functions workers in an enterprise perform as a 'service' – 'everything is a service', as Rifkin (2000: 73) has commented- and engaging a 'service provider' to provide them.

Labour broking and outsourcing enable those wishing to utilise the labour power of workers to do so without employing them. There are other ways in which the same end can be achieved.¹⁰ Perhaps the most radical of these is based on the realisation that just as owning the intellectual property rights to a product made it possible to enter franchising agreements, it was also possible to enter licensing agreements whereby a TNC like Apple engages a company in China to manufacture its iPhones, (Smith 2012) without itself owning the means of production. In this instance, the workers involved in the production earn an estimated 3,2 percent of the wages an equivalent production worker in the United States would earn (Smith, 2012).

The focus of this analysis is on the employment and labour law effects of arrangements to utilise the labour power of workers without employing them. What franchising and licensing have in common, as well as labour broking and outsourcing, is that the employer of the workers

process of collective bargaining, and codes of conduct and the like, including industry codes which are sometimes characterised as 'private regulation' or 'soft law'.

⁸ This provision was introduced by way of an amendment in 1983 to the Labour Relations Act of 1956, in all probability at the instance of TNCs such as Manpower Inc that were already operating franchises in this country. It was retained in the 1995 Act (Theron 2005).

⁹ Act 66 of 1995.

¹⁰ For present purposes, I will disregard subcontracting, which is similar to outsourcing but in certain sectors (construction, for example) can be regarded as distinct from it. (Theron et al. 2011).

concerned is a satellite of another enterprise, be it a franchisor, licensor, client or user. The legal effect of such arrangements is that persons utilising the labour power of others are able to avoid legal accountability for doing so (although in South Africa the 'client' of a labour broker may be held jointly and severally liable in certain limited instances).¹¹ Seen from the perspective of the workers whose employment is externalised, they now work for someone who is not their employer. The same effect can also be achieved by utilising workers who are ostensibly self-employed but are in fact in a relationship akin to employment. Collectively, I refer to these different forms of employment as externalisation.

Workers in externalised employment are thus confronted with a new legal status quo, in which their employment is governed by a contract to which labour law does not apply. In the case of workers who are ostensibly self-employed, this is a contract to which they are party. They may, however, be able to challenge the legitimacy of this contract, insofar as they are in fact in a relationship akin to employment.¹² In all other cases where employment is externalised, the contract which governs their employment is a commercial contract between what I refer to as a core enterprise (it is not necessarily a lead firm) and its satellite. The workers are not party to it, nor are they privy to its terms.

All workers who labour for another under conditions of dependency are in a labour relationship, I argue, but it is only 'insiders' in standard jobs who benefit to the full from the rights labour law provides, and specifically the rights to organise and bargain. However it is no longer meaningful to describe the structure of employment in terms of simple binary categories, such as 'standard' and 'non-standard' or 'formal' and 'informal' employment. These terms conflate different categories of workers, since the difficulties they have in exercising their rights are different in kind. The difficulties of temporary or part-time workers whose employment has not been externalised are simply a consequence of their temporary or part-time status. The difficulties workers employed by satellite enterprises have are of an entirely different order, as I will explain. The self-employed, as a general proposition, have no labour rights because they are not in a labour relationship.¹³

The different categories of employment outlined above correspond with different tiers in the labour market, where a tier is understood to refer to a distinct form of employment constituted by a distinct legal regime (Theron, 2014). Workers in standard employment occupy the top tier, and as a result of externalisation are predominantly educated, skilled and comparatively well paid. Workers whose employment has not been externalised but are temporary or part-time occupy a second tier. These workers are part of the formal economy, and the second tier sometimes serves as a pool of potential recruits for the top tier. To that extent there is some upward mobility. Workers employed by satellite enterprises occupy the third tier. They are lesser skilled, comparatively poorly paid and have no prospect of upward mobility. Although on paper they have the same right to organise and bargain as workers in the top tier, in fact they do not.

This is both for the reason already mentioned, that their employment is governed by a contract to which they are not privy or party, and because the organisational rights labour law provides are exercised in the workplace of the employer. This is a further example of law's constitutive role: the workplace where workers of satellite enterprise typically work is not controlled by their employer. If therefore workers in the third tier are to be organised, as they will need to be in order to displace

¹¹ Section 198, LRA of 1995.

¹² A challenge would be possible on the basis that the contract is a sham, and the relationship is one of 'disguised employment'. In the case of the LRA, such a challenge would lie in terms of section 200A, which creates a presumption as to who is an employee. If one or more of seven factors are shown to be present, a worker may bring an application to be presumed to be an employee.

¹³ This would not be the case where the contract is challenged, on the basis outlined in footnote 14, but above. However such challenges are rare, doubtless because of the imbalance of power between the worker and the person for whom he/she works.

the new legal status quo, they will have to do so as ‘outsiders’. In this respect, they are in a not in a dissimilar position to the ostensibly self-employed. However, the ostensibly self-employed are located in a fourth tier, together with those who are genuinely self-employed and work for their own account. If they are to organise, they could either do so with the objective of becoming employees, in which case the logical form of organisation to further their interests would be a trade union, or organise together with other own account workers to become an enterprise, in which the logical form of organisation would be a co-operative.

3. KEY LEGISLATIVE PROVISIONS

The Constitution is the supreme law of the country and the instrument to which one must have regard if it is possible to make good any shortcomings there may be in labour law. The provisions of the Constitution which are of most immediate relevance to this analysis are section 17, which establishes that ‘everyone’ has the right to freedom of association, and section 23, concerning labour relations. Any worker, in terms of section 17, would thus be entitled to form or belong to an organisation that advances his or interests, as would any producer or enterprise. Section 23, however, was clearly intended to dovetail with the regime the Labour Relations Act (LRA) first introduced, because the Constitution was adopted after it. It did not envisage a situation in which ‘labour relations’ were not coterminous with a relationship between employer and employee, any more than the LRA did.

Perhaps the provision in section 23 providing that ‘everyone has the right to fair labour practices’ could be utilised to address some of the anomalies that result from externalisation. However, this right has hardly been developed at all. The other provisions in the section relate to the right of ‘workers’ to form a trade union and to strike, and the right of trade unions and employers to engage in collective bargaining.¹⁴ The term ‘workers’ can be interpreted to include persons who are not employees. Arguably, therefore, such workers would have a constitutional right to strike in furtherance of a demand in respect of the person for whom they actually work. However, the LRA is the law which gives effect to the labour rights provisions of the Constitution. Such a strike would not be ‘protected’ in terms of the LRA.¹⁵

The LRA establishes a right of all ‘employees’ not to be unfairly dismissed. This right, as indicated above, underpins the organisational and bargaining rights it provides, coupled with a prohibition against the victimisation of workers on account of their membership of a trade union. A quasi-autonomous institution, the Commission for Conciliation Mediation and Arbitration (CCMA), is entrusted with resolving unfair dismissal disputes, and is generally perceived as accessible and efficient. However there is reason to believe the CCMA is less successful in disposing of disputes involving externalised employment. These cases will in most instances give rise to a jurisdictional issue, insofar as someone other than the employer in law is cited as being accountable for the dismissal, or there is a dispute as to whether the worker was dismissed. The latter situation arises when a core business terminates the contract with a satellite enterprise, and the worker’s contract with the satellite enterprise is regarded as terminated.

The organisational rights the LRA provides, as indicated, are exercised in the workplace of the employer. To qualify for the exercise of these rights, workers must belong to a trade union that is sufficiently representative of workers in that workplace. In 2014, amendments to labour law were adopted which for the first time acknowledge that workers other than those of the core business may share the same workplace.¹⁶ In the case of labour broking, the amendments envisage the possibility that organisational rights may be exercised in respect of the client of the labour broker,

¹⁴ Neither the Constitution nor the LRA provide a right to bargain.

¹⁵ The relevant provisions of the LRA (section 64) apply to the employees of an employer.

¹⁶ Section 21(8)(b)(v), LRA of 1995.

although how this will be done in practice is by no means clear.¹⁷ However it is doubtful that these measures are clear enough, or go far enough, to address the problems externalisation creates for labour law (Theron, 2014a).

The same amendments also seek to address three forms of 'non-standard employment', namely temporary employment (on a fixed term contract), part-time employment and labour broking.¹⁸ However, apart from introducing a principle of equal pay for work of equal value, it is unclear what the policy objectives of the provisions in respect of part-time employment and fixed-term contracts are. The policy objectives in respect of the provisions regarding labour broking, on the other hand, are clearly to restrict it. However, they are awkwardly formulated. In the absence of measures to restrict other forms of externalisation, moreover, the likely outcome of attempts to restrict labour broking will be to spawn an increase in services fulfilling essentially the same function, under another guise (Theron, 2014a¹⁹).

In summary, the rights to organise and bargain the LRA provides are really only applicable to workers in the top two tiers of the labour market. However, in respect of the second tier they are applicable but not effective, due to the practical difficulties these workers face in exercising their rights, because of their part-time or temporary status. At the same time, although the right not to be unfairly dismissed is applicable to all employees, it is effective primarily in the case of workers in standard jobs. A worker employed by a satellite enterprise might seem to be in a standard job, where he works full-time on a continuous basis. When the core business he works for issues an instruction that he or she be barred from the workplace, however, the worker is left with no obvious remedy against it. The LRA only has relevance in respect of his employer in law, who may be made of straw.

Accordingly, for workers in the second and third tier, as well as unorganised workers in the first tier, the Basic Conditions of Employment Act (BCEA) assumes greater importance. The BCEA establishes 'basic conditions' regarding hours of work, leave entitlement and the like that apply in all workplaces, but not of course in the fourth tier where the workers are not employees.²⁰ Most importantly, the BCEA also establishes the mechanism by which minimum wages in specific sectors, as well as 'basic conditions', can be determined administratively by the Minister of Labour publishing a Sectoral Determinations.²¹ Aside from the public sector, far more workers are covered by Sectoral Determinations than bargaining council agreements. The other labour laws that apply to the first three tiers (but not the fourth tier) are the Employment Equity Act (EEA), the Occupational Health and Safety Act (OHSA)²², the Compensation for Occupational Injuries and Diseases Act (COIDA)²³, the Unemployment Insurance Act (UIA)²⁴, the Skills Development Act (SDA)²⁵ and Skills Development Levies Act (SDLA)²⁶. Employers are required to register as such with the Department of Labour for the purpose of complying with COIDA and UIA. The failure of employers to register in terms of these two laws has in the past been regarded as a criterion for differentiating between employment in the 'formal' and 'informal' economy.

¹⁷ Section 21(12), LRA of 1995.

¹⁸ See Chapter 9, LRA of 1995.

¹⁹ Theron (2014a) is paper on the 2014 amendments also discusses the extraordinary section 200B of the LRA, which might be regarded as a misplaced attempt to regulate externalisation.

²⁰ Act 75 of 1997.

²¹ In terms of the BCEA the Minister of Labour is empowered to make sectoral determinations on the advice of a commission, the Employment Conditions Commission (ECC). Section 51, Act 75 of 1997.

²² Act 85 of 1993.

²³ Act 130 of 1993.

²⁴ Act 63 of 2001.

²⁵ Act 97 of 1998.

²⁶ Act 9 of 1999.

The EEA calls for a more detailed comment. On the one hand this legislation provides a remedy for unfair discrimination. On the other it seeks to promote 'employment equity' in the workplace, primarily by requiring 'designated employers' to have employment equity plans. However a 'designated employer' is defined as an enterprise that employs more than 50 workers. The effect of externalisation has been to reduce the number of workers 'on the books' of an employer, and increase the numbers working for them who are not their employees. Since the workers who are not their employees earn far less than their counterparts who are, and also are not able to exercise the same rights as them, 'employment equity' becomes the privilege of the top tier.

As regards the skills development laws, there appears to be a degree of consensus about the need for a levy to promote skills development and training. To the extent that there is controversy, it concerns the role of the Sectoral Education and Training Authorities (SETAs) the legislation established, and how the levies are utilised. Related to this are policy questions regarding the kind of training provided and who actually benefits from the SETAs' programmes. It is likely that workers in the third tier, for example, generate significant revenue for the SETAs but gain minimal benefit from them.

4. A SURVEY OF LABOUR REGULATION IN THE FOOD VALUE CHAIN

The labour legislation outlined above, as already noted, applies to all sectors of the economy including the food value chain. The food value chain, for present purposes, can be regarded as beginning with the inputs needed to produce food. It includes the primary production process, namely agriculture and fishing, the secondary production process (food manufacture, or fish processing), the packing, storage and distribution of fresh and processed products, and ends with their marketing and sale. However the diversity of this value chain must be emphasized from the outset. Different products are produced in different ways and for different markets. Just as the product of the primary production process may be an input in the food manufacturing process, a product of the food manufacturing process may be an input in the primary production process – animal feed, for instance. So to talk of a single food value chain is necessarily a simplification.

One would also expect the processes in the food value chain to be affected by externalisation in much the same way, and to the same extent, as the equivalent process in respect of any other product. This is most obviously the case in food manufacture and fish processing, which has historically been dominated by large conglomerates. Although there has been some 'unbundling' of these conglomerates, groups such as Tiger Brands (formerly Tiger Oats), Pioneer Foods (a merger of two erstwhile co-operatives, SASKO and Bokomo), the Tongaat Hulett Group (the result of a merger between two sugar conglomerates) and Premier Foods still account for the vast bulk of processed food available in retail stores. These groups also still have cross-holdings in branches of manufacturing as remote from food as pharmaceuticals and footwear, and in the primary sector, in agriculture and fishing. Anglo Vaal Industries (the holding company of I&J) has historic ties to mining.

Needless to say, these groups as well as most 'independent' food manufacturers are located in the formal economy. These manufacturers provide employment in standard jobs to a core workforce, and in limited circumstances to workers on temporary (fixed-term) contracts, such as replacement labour for 'permanent' worker on maternity leave. Part-time employment in manufacturing seems to be unheard of. Outsourcing, however, has been extensive. Case studies of milling and baking, for example, indicate that the number of workers in standard jobs is approximately half the total number on a given factory site. The remainder are employed by a variety of satellite enterprises including TESSs, industrial cleaners, logistics companies and the like.

It can be argued that these workers should be regarded as informal, in that they are not able to exercise the rights to organise and bargain that labour law provides. Also, in many instances their employers do not deduct statutory contributions for unemployment insurance and the compensation fund. However they are clearly not in the same leaking boat as the vendor who sells home-made foods at the factory gate, for her own account. Persons such as this will generally only employ family labour, which is remunerated in kind. Very few will operate on a large enough scale to employ more than one or two workers, and warrant being classified as an 'enterprise'. All indications are that while food manufacturing in the informal economy may exist, it is not significant either in terms of the employment it provides or the volumes of food it produces.

As regards the operations of packing, storage and distribution, the only reason why the packing, storage and distribution of food products should be affected in a different manner from any other product is insofar as they are perishable. Compliance with food safety standards and product traceability requirements associated with perishable products may require specially trained staff as well as as well as dedicated facilities. There are primary producers that pack and store their own products. There are also producers who have pooled resources to set up dedicated facilities such as pack-stores, which form part of the secondary production process. In other instances, distribution is done by the secondary producers themselves, or by engaging large transport or logistics enterprises to distribute the product in question. These transport or logistical enterprises are typically also engaged in the distribution of other products. Pack stores are labour intensive and do in certain instances utilise TESSs, although it is not clear whether this is universal. There is also evidence of prominent storage and logistics enterprises making extensive use of TESSs (Theron, 2009). As regards distribution by road, a transport enterprise requires a driver and crew to operate the vehicle in question. In the 1990s 'owner-driver' schemes were popularised. This represents a form of externalisation in terms of which ownership of a vehicle is transferred to its driver, who then becomes the employer of the crew. Accordingly, it is constituted by a commercial agreement(s) to finance the purchase, and service level agreements with the core business. The owner-driver could claim these agreements are a sham and the relationship is one of disguised employment. However the mere fact that SA Breweries and the producers of certain cool-drinks still utilise owner-drivers suggests it is not easy to succeed with such a claim.

As is the case in food manufacture, there are undoubtedly informal operators providing transport services. However, if only because of the risks associated with the use of informal operators, their prevalence cannot be considered significant. They also cannot employ a significant number of workers. There are, however, significant numbers of workers categorised as 'informal' in the official statistics in retail operations. Many are likely to be involved in selling raw or processed food. A large part of them, or almost all, are probably self-employed and work for their own account.²⁷ They would therefore not be in a labour relationship, and would belong to the fourth tier as characterised above. Labour regulation is therefore not relevant to them.

Labour regulation is of enormous relevance to workers in the formal retail outlets, however, and especially to part-time workers. This is because the Sectoral Determination for the Retail Sector constitutes specific regimes in which part-time workers may be and are employed. However while there are retail operations which are exclusively concerned with food, it makes little sense to differentiate workers involved in food retail from other retail operations in the present context. I conclude from the above analysis that the only issues relating to labour regulation that are specific to the food value chain relate to the primary production process, ie agriculture and fishing. This is both because of the distinctive structure of employment in these

²⁷ The now defunct Self-Employed Women's Union (SEWU), which was modeled on the Self-Employed Women's Association (SEWA) of India, defined a self-employed worker as someone who did not employ more than three workers. In terms of this approach, there is no necessary contradiction between employing someone and being self-employed (Theron, 1996: 24).

activities – which we will presently consider – and because of specific regulations that apply in agriculture and fishing.

The specific labour regulations that apply in the case of fishing include a bargaining council agreement that applies to workers on deep-sea trawlers, which I will also refer to in section 7 below. The specific labour regulations that apply in the case of agriculture include the Sectoral Determination for Farmworkers (SD 13)²⁸ - which is subordinate legislation, applying to agriculture as a whole - and a number of codes that seek to regulate labour standards or employment in specific sections of agriculture, which I will discuss in more detail later. The codes are significant because of particular difficulties that workers in agriculture have to overcome to exercise their rights. If only because of their location, it is more difficult for workers to refer a dispute to the CCMA (Docrat).²⁹ Seasonal workers are particularly vulnerable, since their job security depends more on being re-employed the following season than the risk of being dismissed during the season.³⁰

Sectoral determinations, as already mentioned, stipulate minimum wages and basic conditions of employment. Although interested parties are entitled to make written representations during any investigation preceding a determination, this process does not allow for an exchange of views as happens in collective bargaining. A determination also does not reflect a consensus between worker organisations and employers. Despite more workers being covered by sectoral determinations, there has been far less public debate about sectoral determinations than collective bargaining. This is probably because of the relatively low minimum wages that have, historically, been prescribed by sectoral determinations. In most cases they therefore have not set the actual wages employers pay in the sector (Godfrey et al., 2010) and are therefore not regarded as onerous.

As a result of the strikes and protest action on farms in the Western Cape in 2012/13, however, the Farmworker Sectoral Determination became the focus of national attention. The outcome of the strikes and protest action was also an unprecedented increase of the minimum wage by 52 percent. One of the consequences of introducing an increase of this magnitude at short notice has been that some farmers unilaterally changed the conditions of employment of their workers and increased charges for housing or services which were previously provided at subsidised rates, or for free, to try and recoup the costs of the increase (FARE, 2014). This has highlighted what increasingly looks like a flaw in the labour relations system. Where the employer unilaterally changes the conditions of employment of his or her workers, the only remedy workers have in the final analysis is to strike.³¹ In the case of unorganised farm workers and in many other instances this is rarely feasible.

One of the groups adversely affected by the unilateral change of conditions are the temporary (seasonal) workers. Seasonal workers living on farms, generally women, have historically been a feature of employment in agriculture for decades. However, there are indications the number of seasonal workers living on farms has been diminishing, as a consequence both of evictions and voluntary migration to rural towns. At the same time there are also indications that the proportion of workers who are seasonally employed relative to workers in standard jobs has also been growing. There is also a trend in labour intensive sectors such as table grapes to utilise labour brokers to supply seasonal workers. It remains to be seen what stance the Sectoral Determination will adopt toward seasonal work and labour broking in the light of the

²⁸ Farm Workers' Sector, South Africa (SD 13). The first SD 13 was only published in 2003.

²⁹ It has been suggested that CCMA statistics of dismissals within the agricultural sector are not accurate, and that only an estimated 1 in 3 dismissals are disputed (Docrat, 2013).

³⁰ The onus would be on the worker in such a situation to prove that he or she was dismissed.

³¹ Section 64(4), Act 66 of 1995.

2014 amendments, but in the case of agriculture a transport service bringing workers from town to farm and back could easily substitute for the service labour brokers provide.

5. OTHER REGULATIONS RELATED FOOD VALUE CHAIN EMPLOYMENT

In light of the dual character of the labour relations regime as outlined above, and the fact that labour regulation only applies to the fullest extent to workers in the top tier of the labour market, as I have argued above, it is not surprising that in the lower tiers other forms of regulation should play a greater role in constituting the structure of employment, and most of all in what I have characterised as the fourth tier. This can be illustrated in the case of fishing, where policies regarding the allocation of fishing rights, and how they are applied in practice, determine which economic actors are able to exploit marine resources and under what terms.³² This is perhaps clearest in the allocation of rights in respect of inshore fishing, which does not require a large capital investment, as distinct from deep-sea trawling. The reason this process is so politicised and contested can be attributed to the potential for self-employment in these activities, and the danger that fishers are increasingly drawn into illegal poaching.³³ At the same time, restrictions on vulnerable resources like rock lobster operate to limit the number of standard jobs in packing or processing, and swell the numbers in temporary (seasonal) employment.

In much the same way, the following all play a part in determining which forms of agriculture are promoted and under what conditions: land reform policies; regulations about land use; agricultural trade and marketing policies; phytosanitary standards; policies regarding extension services and technical support; and water use regulations. Housing regulation and regulations regarding the security of tenure of farm dwellers, specifically the Extension of Security of Tenure Act (ESTA), have played a significant part in the growing shift to off-farm employment.³⁴

The forms agriculture takes can be regarded as ranging from large commercial enterprises to small holder farmers working for their own account. Enterprise size has obvious implications for the structure of employment in agriculture and the efficacy of labour regulation. Large commercial enterprises are likely to employ significant numbers of workers, particularly in labour intensive operations like horticulture. A small holder working for his or her own account is likely to employ family labour, if anyone, and temporary workers to meet seasonal demands.

At the same time there are small holders in agriculture who are contracted to supply large enterprises in an arrangement known as 'contract farming'. Contract farming takes place in the sugar industry in South Africa, and is increasingly prevalent elsewhere in Africa, where multi-national corporations operate large contract farming schemes to supply products such as cocoa and tobacco. Insofar as these farmers are entirely dependent on the enterprise that buys their products for their livelihood, they are in a labour relationship without the protection of labour law (Dubb 2013). It would be possible for these workers to organise, and to attempt to bargain with enterprise for which they work. This question is explored in more detail below. Equally, it would be possible for 'own account' workers who are not in a relationship akin to employment to organise themselves. In this instance the objective should be to form a co-operative enterprise, and bargain with buyers and suppliers. Arguably, it is only through this kind of organisation that it would be possible to address the situation of workers of an 'own account'

³² In 2015, a suite of draft policies was published in terms of the Marine Living Resources Act (Act 18 of 1998), including sector specific policies on abalone, large pelagics, West Coast rock lobster, seaweed and other marine resources. See Government Gazette No 494 of 12 June 2015.

³³ Internationally, the term "fisher" is regarded as encompassing both someone who works for his own account and someone who labours for another.

³⁴ Act 3 of 1996. Where the fairness of the dismissal is disputed, this dispute will first have to be determined. Ordinarily, that will be if the CCMA at arbitration finds in favour of the farmer.

worker. In theory, the provisions of labour law apply to these workers in the same way as any other employee. In practice, it is difficult to conceive of such a worker exercising rights in respect of an 'employer' who is himself or herself economically vulnerable, and who may be a family member. Promoting worker organisation committed to ethical values would also be a realistic way to eliminate child labour.

Externalisation, as noted above, envisages a situation in which a core business contracts with a satellite enterprises which in turn employs the workers the core business needs. This can be depicted as a vertical relationship, although some emphasise its trilateral character. Value chain theory also envisages a vertical relationship, between a more powerful 'lead firm' and others in the chain. Competition law defines a vertical relationship as one between a firm and its suppliers, customers or both. However, it is only in exceptional circumstances concerned with vertical relations. Its primary focus is the horizontal relationship between competitors (Brassey et al., 2002). It is therefore somewhat ironic that one of the most destructive consequences of externalisation, which lawyers label as 'cascading outsourcing', is where one service provider is replaced by another offering the same service at a lower price. This is almost invariably a consequence of competition on wage levels. Perhaps competition law will at some point regard this as an abuse by the 'dominant firm' in the relationship. However a satellite enterprise will have to think twice before challenging the loss of its contract to another service provider, for the same reason an owner driver or contract farmer will not easily challenge the person that provides him or her with employment. To do so may be economic suicide.

6. WORKER ORGANISATION AND REPRESENTATION

For workers in the fourth tier, organisation into a co-operative may be the only way in which to sustain their enterprise. This is most obviously the case in respect of small-holder farmers, where co-operatives have a proven track record. Indeed, agricultural co-operatives, particularly co-operatives at a secondary and tertiary level, played a critical role in the structuring a food value chain in South Africa in the past. There are also producers of products such as dairy, animal feeds, flour and mealie-meal who believe they were better off owning their own processing facilities and distribution networks through their co-operative than they are today. There has been a shift in government thinking toward actively promoting co-operatives in fishing, as a strategy to counter poaching.

However co-operatives have not flourished post 1994, notwithstanding the vast number registered following the adoption of a new Co-operatives Act in 2005. This is partly because of a global consensus which has been hostile to any form of organisation premised on values of solidarity, and partly because of institutional failings on the part of government (Theron, 2008). These include the neglect of agricultural co-operatives by the Department of Agriculture (DoA) despite it having been previously responsible for co-operative development, or perhaps for this very reason (Theron, 2008). From about 2000 the Department of Trade Industry was responsible for co-operative development until its recent transfer to the Department of Small Business Development. However, this neglect by the DoA now appears to be a thing of the past. In 2010, it adopted new guidelines for agricultural co-operatives (DAFF, 2010).³⁵

The preferred form of worker organisation in terms of labour law is of course the trade union. This is because trade unions are or should be 'independent' of the employer, by virtue of the fact that they are self-financed. An organisation that is not genuinely independent cannot effectively represent workers.³⁶ However as matters stand, trade unions primarily benefit standard workers

³⁵ Department of Agriculture, Forestry and Fisheries, 2010. Guidelines for the establishment of Agricultural Co-operatives.

³⁶ Section 95(2) of the LRA defines independence as not being under the control or influence of an employer or employers' organisation.

in the top tier of the labour market, and an analysis of trade union membership in the food value chain would bear this out. Although there are trade unions organising workers of satellite enterprises, notably in industrial cleaning, they are not attempting to hold the businesses for which they actually work accountable for their wages and conditions of work. Arguably, they are not perceived as effective for this reason.

In order to be viable, there also need to be sufficient workers aggregated in the workplace to finance the activities of the trade union. This is probably the primary reason that trade unions have up until now not succeeded in establishing a significant presence in agriculture. The indications are that even where trade unions have been established, the relatively small numbers have made it difficult for them to sustain themselves economically in the absence of any form of subsidy. According to one commentator, only 4.4% of employees in the agricultural sector belong to a union.³⁷ However this does not obviate the need for worker organisation to prevent breakdowns in labour relations such as occurred in 2012/2013, with the farm worker strikes and protest actions in horticulture in the Western Cape.

There are regulatory steps that could be taken without necessarily amending existing legislation that would facilitate trade union organisation.³⁸ Even if such steps were taken, however, the difficulties of sustaining trade union organisation in agriculture would remain. For this reason it is important to consider alternative forms of organisation that could supplement trade union organisation. The Future of Agriculture and the Rural Economy (FARE) panel, which investigated the cause of the strikes and protest action, recommended the establishment of regional bargaining forums where civil society organisations as well as trade unions could be represented (FARE, 2014). There are a number of civil society organisations which could potentially play a role in this regard, some of which are linked to initiatives to establish worker committees on farms.

The Eastern Cape Agricultural Research Project (ECARP) is an example of the latter. It promotes the establishment of committees representing both farm workers and farm dwellers (Theron & Visser, 2012; Theron, 2014). There are also a number of organisations which set industry standards or are associated with promoting ethical trade. The Ethical Trading Initiative (ETI) is an example of a global NGO which requires that farmers seeking accreditation in terms of such codes are required to have elected worker committees on farms, if there is no recognised trade union. Nothing in the LRA precludes the establishment of such committees in the workplace. However the LRA itself does not cater for any form of organisation or representation other than through a trade union, apart from the workplace forum (WF).³⁹

The WF as mooted by the LRA has two important limitations. Firstly, it can only be triggered by a representative trade union. In a workplace where there is no trade union, or a trade union that is not sufficiently representative, there can therefore not be a WF. Secondly and more fundamentally, it is forum for employees of the employer only, in the workplace as defined. It is therefore not a forum where workers labouring for the same employer but employed by someone else can be represented. It can therefore not be used to address the fragmentation of the workplace as a result of externalisation. This is not to suggest there is any reason why a forum which is inclusive of all workers cannot be established in the workplace. However, for this purpose, the workplace would

³⁷ Mandy Jones of Adcorp Holdings.

³⁸ The principle reform that is needed relates to trade unions obtaining access to the workplace and the requirement that only a "sufficiently representative" trade union is entitled to exercise organisational rights. The term "sufficiently representative" is not defined in the LRA, but there is anecdotal evidence to suggest it is commonly interpreted to mean a trade union must represent a majority of the workforce (ie have a membership of fifty percent plus one). This is not realistic in the context of agriculture and many other sectors.

³⁹ Chapter 5, LRA. Another form of statutory committee is provided by OHS Act. Employers with more than twenty employees are required to 'appoint' health and safety representatives.

have to be understood to mean the place where workers actually work, as distinct from the workplace as defined in the LRA.

In the context of agriculture, the workplace would of course be the farm, and where the same owner owns several farms, as is increasingly the case as a result of consolidation of ownership in agriculture, it should be all the farms belonging to that owner. An inclusive forum would then provide representation to all who work on the farm(s) concerned, including seasonal workers and workers employed by labour brokers. This could also serve as a model for other workers in the food value chain who are likewise unorganised and unrepresented. However it is unlikely individual employers will embrace innovative approaches to worker organisation and representation without being organised themselves. Employer organisation is more often than not established in response to trade union organisation, but given the enormous reputational damage caused by the strikes and protest actions of 2012/13, there is an argument that organised agriculture needs to be more proactive in this regard. The fact that there is now one registered employers' organisation established in agriculture is some acknowledgment of this, even though it is not representative.⁴⁰

7. THE STATE OF COLLECTIVE BARGAINING

A survey of collective bargaining in the food value chain underscores its weakness. Although the LRA seeks to promote collective bargaining at a sectoral level, in bargaining councils, there are currently no bargaining councils with significant coverage. Despite endeavours to establish one in agriculture in the wake of the strikes and protest action of 2012/13, there is no likelihood of a bargaining council being established, given the weakness of trade unions in that sector. The bargaining council in fishing covers only a fraction of those engaged in fishing, in terms of numbers, and is amongst the most capital intensive activities in the value chain. This agreement is currently not extended to non-parties.

There are also three bargaining councils in food manufacture - the council for the 'grain co-operative industry', the meat trade in Gauteng, and the sugar manufacturing sector. However, the first two are local bargaining councils, each representing a relatively insignificant component of a far larger sub-sector (grain milling and red meat respectively) with activities in different parts of the country. The agreements they negotiate, as well as the agreement for sugar manufacturing, are also not extended to non-parties. The only other bargaining councils affecting the food value chain are in 'road freight', concerning distribution of food, and two small bargaining councils for the 'restaurant, catering and allied trades' in Johannesburg and Pretoria.

In short, bargaining councils are not a significant factor in the food value chain. Bargaining takes place outside of bargaining councils: at farm level, in the case of agriculture; at plant level, in the case of food manufacturing and fish processing, with the exception of inshore fishing, where there is a long-standing arrangement to negotiate at industry level; negotiations in retail take place at company level, with certain of the retail conglomerates, or at individual stores. There is also no publically available data regarding the collective agreements which are the outcome of bargaining, or even bargaining trends, except sometimes when there is a dispute.

The LRA provides an alternative to a bargaining council where neither the employer party nor trade unions are sufficiently representative to form one: the 'statutory council'. It usually happens when an employers' organisation representing at least thirty percent of employers in a 'sector' or area applies to establish one. Although a statutory council is not really a bargaining forum, it may lead to the establishment of a bargaining council. In the food value chain, there is a statutory council for squid and related fishing operations and a newly established council for

'fast food, restaurant, catering and allied trades'. It is unclear how the apparent overlap in jurisdiction between the last-mentioned statutory council and the bargaining councils in Johannesburg and Pretoria is resolved.

8. MONITORING AND ENFORCING STATE REGULATIONS

The essence of regulation, as distinct from governance, is that it embodies rules that are capable of being enforced. However, it is not possible to gauge how effectively regulations are enforced without some form of monitoring of compliance. One of the functions trade unions have fulfilled in the case of labour regulation is to monitor compliance with their own agreements as well as other regulations. Externalisation has greatly weakened their capacity to do so, as the case of the food value chain illustrates. At the same time the capacity of the state to monitor its own regulations has been greatly diminished. In this regard, the resources lavished on the CCMA, which is supposedly responsible for monitoring its own compliance with the procedures it administers, contrasts with the under-staffed inspectorate of the Department of Labour (DoL) (Godfrey&Clark 2002).

The growth of for-profit enterprises providing legal services has to some extent filled the gap left by an increasingly dysfunctional trade union movement. So have civil society organisations concerned with labour issues. The NGO ECARP is an example of an organisation whose *raison d'être* is monitoring compliance with SD 13 in response to the inability of the inspectorate of DoL to do so (Naidoo 2011). To date ECARP services 52 farm committees in areas around Grahamstown and Sunday's River. With its support, these committees have been able to change aspects of employees' working conditions through a process of engagement with the farmer concerned.

9. OTHER FORMS OF REGULATION

The changing role of the state in relation to enforcement is also reflected in the increased reliance on incentives rather than sanctions to achieve its goals. Probably the most important example of this are the Codes of Good Practice introduced in terms of the Broad-Based Black Economic Empowerment Act (BBBEE Act). The incentive is that a favourable rating in terms of the scorecard contained in such codes will translate into the award of government contracts. The code of most relevance to the food value chain is the AgriBEE Code.⁴¹

In agriculture, the private sector counter-part of using incentives to comply with standards are processes of certification, buttressed by private systems of monitoring and inspection, that enable farmers to gain access to markets. Initially these processes of certification were in order to secure their access to global markets. However, they have since inspired the emergence of a number of local initiatives, and the development of domestic standards with which farmers and other producers are expected to comply. This development has been most pronounced in horticulture, which is not surprising given that it is such a labour intensive sector. It has been suggested that these standards can be divided into three groups: product standards; process standards; and social standards (Barrientos & Visser, 2012).

GlobalGap was one of the first private standards to emerge globally, when leading European supermarkets combined to promote a single European process standard covering good agriculture practice. The base code of the Ethical Trading Initiative (ETI) is another. ETI is an alliance of companies, trade unions and NGOs 'committed to improving working conditions in global supply chains', which requires suppliers to comply with the ETI Base Code, a code of

⁴¹ Sector Code for Agriculture: AgriBEE, published in notice 1065 of 2012, Government Gazette No. 36035, 28 December 2012.

labour practice based on international labour standards' (Barrientos 2006; Barrientos & Visser, 2012). Another private monitoring initiative operating in South Africa is Fair Trade, which mostly covers wine and fruit producers in the Western Cape (Fairtrade, 2010). One of the first of the local ethical codes to emerge was the Sustainability Initiatives of South Africa (SIZA) programme. SIZA is not exclusive to fruit and can be applied to the whole of the agricultural sector.

It is argued that these codes have created greater consciousness amongst workers of their rights, and improved compliance with labour legislation (Barrientos & Visser, 2012). In addition, there have been improvements in other areas of the workers' lives, like housing.⁴² Yet there are also concerns. The scope of coverage of the codes is by no means universal. Most ethical trade initiatives are limited to export products to the exclusion of other farming activities (Theron & Visser, 2012). It also does not appear that workers and their organisations are sufficiently involved in the setting of standards sufficiently if at all. There is an element of paternalism in a notion of labour rights that emanate from an externally imposed code.

10. CONCLUSIONS

The issues relating to labour regulation specific to the food value chain, I have argued, concern agriculture and fishing. Agriculture is the more important of the two, because of the large number of workers it employs, and its perceived potential to generate employment, whether on commercial or small-holder farms. The expectation that commercial farms can generate employment is curious given that they have been shedding jobs for decades, and probably to no lesser extent than food manufacturing or other components of the food value chain, with the exception of retail. It gives the lie to the claim that jobs are being lost due to burdensome regulation. The strikes and protest action of 2012/13, together with the Marikana massacre, are also telling reminders of the cost of labour relations failures.

Although the food value chain is affected by labour regulation to the same extent as other economic activities, by and large, it nevertheless provides a useful illustration as to why labour regulation needs to change. It needs to recognise the existence of a labour relationship that is broader than the relationship between employees as defined in labour legislation and their employer. It needs to reach out to the workers of satellite enterprise, who find themselves in a legal limbo, and small-holder farmers in a relationship akin to employment. It needs to find ways of holding accountable those who utilise the labour of others without employing them. However there are very few situations in which a person who utilises the labour of others may be held accountable: occupational health and safety is the only example that comes to mind. The fact that there has been such limited progress in establishing legal accountability beyond the employment contract concerns the limits of law in effecting change.⁴³ The constitutive role of law does not enable it to close a space which is functional to capital accumulation. The space must first become dysfunctional. So long as workers' organisations are primarily representative of the first tier, and producers in the value chain are price takers and unorganised, there will also be no way to bring pressure to bear on lead firms, or those who utilise the labour of others without employing them. Attempts to organise workers from different tiers of the labour market into the same organisation, or even the same kind of organisation (a trade union), have thus far not proved successful. There needs to be new forms of organisation, particularly in respect of the third and fourth tier, and in agriculture and fishing. There is also a need for

⁴² Barrientos and Visser (2012:34) found that in areas where workers had been subjected to regular audits and training, workers were more aware of their rights.

⁴³ Certain provisions of the BCEA also purport to give the Minister of Labour the power to make sectoral determinations in respect of workers who are not employees, including a recent amendment which envisages sectoral determinations being made in respect of sub-contractors. However it is unlikely it will be possible to regulate any form of externalised employment by administrative fiat. See section 55(4), BCEA.

workers organisation to form alliances: with producer organisations representing price-takers in the value chain, and even with their traditional opponents in certain circumstances, as well as consumer organisations at the other end of the value chain. One objective of an alliance would be to get lead firms to engage regarding conditions of employment along the chain. Another objective would be to explore ways the chain could be shortened, by eliminating intermediaries, or even eliminating the retailers through bulk buying schemes, consumer cooperatives and the like.

New forums for engagement and bargaining will also be needed. These may be workplace forums, I have suggested, but not the workplace forums the LRA provides. They will need to be forums where different kinds of workers and different employers may be represented. A new approach to bargaining is also needed. The benefit of a value chain perspective is to demonstrate the extent to which the terms of a possible bargain between workers and their employer are determined elsewhere along the chain: by the big retailer which is the end destination of the products they produce, for example.

It will not be easy to compel such a retailer to join the bargaining process, and become part of the bargain. Even more so where a value chain straddles national boundaries, as is often the case with horticultural products.⁴⁴ What is needed at this juncture is information: for example, information as to the contractual terms between a core business and a satellite enterprise, or regarding the basis on which intermediaries in the value chain are remunerated. Attempts to compel disclosure of these terms are also likely to be fiercely resisted. They will be seen for what they are: attempts to challenge the fiction that underpins the legal status quo. One way to obtain better information would be through establishing rights regarding the disclosure of information that directly or indirectly have a bearing on employment. This in turn will enable one to identify the contractual hierarchy as well as creating greater transparency as to how value is distributed along the value chain. Associated with this would be the development of mechanisms to monitor employment, and compare conditions of employment within workplaces and sectors. To this end, existing definitions of workplaces and sectors would have to be redefined to encompass services rendered in those sectors. A right to the disclosure of information ought to be a winnable demand in a so-called 'information age'.

⁴⁴ Although the Consumer Protection Act contains a definition of a "supply chain", which means the collectivity of all suppliers who directly or indirectly contribute in turn to the ultimate supply of those goods or services to a consumer, whether as a producer, importer, distributor or retailer of goods, or as a service provider.

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