Finding innovative solutions to extend labour law and social protection to vulnerable workers in the informal economy

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I dedicate this thesis to all women workers in the informal economy.

Domestic Work, 1937

Natasha Trethewey

All week she's cleaned
someone else's house,
stared down her own face
in the shine of copper-
bottomed pots, polished
wood, toilets she'd pull
the lid to--that look saying
Let's make a change, girl.

But Sunday mornings are hers--
church clothes starched
and hanging, a record spinning
on the console, the whole house
dancing. She raises the shades,
washes the rooms in light,
buckets of water, Octagon soap.
Cleanliness is next to godliness ...

Windows and doors flung wide,
curtains two-stepping
forward and back, neck bones
bumping in the pot, a choir
of clothes clapping on the line.
Nearer my God to Thee ...

She beats time on the rugs,
blows dust from the broom
like dandelion spores, each one
a wish for something better.

LIST OF ABBREVIATIONS

ACHPR	African Commission on Human and People's Rights
ActJur	Acta Juridica
AfrSQ	African Studies Quarterly
AfrSR	African Security Review
AJICL	African Journal of International and Comparative Law
ARB	Asociación de Recicladores de Bogotá
ArchPH	Archives of Public Health
ASSAf	Academy of Science of South Africa
AU	African Union
AUC	African Union Commission
AUCIL	African Union Commission on International Law
BCEA	Basic Conditions of Employment Act
BUSA	Business Unity South Africa
CACHIB	Cape Council of Hawkers and Informal Business
CanJWL	Canadian Journal of Women and the Law
CanLELJ	Canadian Labour & Employment Law Journal
CamLJ	Cambridge Law Journal
CBO	community-based organisation
CCMA	Commission for Conciliation, Mediation and Arbitration
CDJ	Community Development Journal
CEACR	Committee of Experts on the Application of Conventions and Recommendations
CEDAW	Convention on the Elimination of All Forms of Discrimination Against Women
CFA	Committee on Freedom of Association
CIEFFA	Centre International pour l'Education des Filles et des Femmes en Afrique
CIW	Centre of Informal Workers
CLLPJ	Comparative Labour Law & Policy Journal
COIDA	Compensation for Occupational Injuries and Diseases Act
CONLACTRAHO	Latin American and Caribbean Domestic Workers' Confederation
COSATU	Congress of South African Trade Unions
DalLJ	Dalhousie Law Journal
DITMB	Durban Informal Trade Management Board
DSA	Development Southern Africa
Env&Urb	Environment & Urbanisation

ESID	Effective States and Inclusive Development
ESTA	Extension of Security and Tenure Act7
FIDA	Federation of Women Lawyers
FLS	Feminist Legal Studies
HarvWLJ	Harvard Women's Law Journal
HumSocR	Humanities and Social Review
ICA	International Co-operative Alliance
ICESCR	International Covenant on Economic, Social and Cultural Rights
IDWF	International Domestic Workers Federation
IJCLLIR	International Journal of Comparative Labour Law and Industrial Relations
IndJLE	Indian Journal of Labour Economics
IJSSP	International Journal of Sociology and Social Policy
ILJ	Industrial Law Journal
ILO	International Labour Organization
ILR	International Labour Review
ILSA	International Law Students Association
ILSA JICL	ILSA Journal of International and Comparative Law
IOSR-JHSS	International Organization of Scientific Research Journal of Humanities and Social Science
IPEC	International Programme on the Elimination of Child Labour
IPC-IG	International Policy Centre for Inclusive Growth
IPSJ	International Politics and Society Journal
IROJ	Inherent Requirement of the Job
JAL	Journal of African Law
JAPA	Journal of the American Planning Association
JDS	Journal of Development Studies
JMAS	Journal of Modern African Studies
JPE	Journal of Political Economy
KDWU	Karnataka Domestic Workers Union
KKPKP	Kagad Kach Patra Kashtakari Panchayat
LC&S	Labour, Capital and Society
LCN	Lesotho Council of NGOs
LD&D	Law Democracy & Development
LLDRL	Labour Law and Development Research Laboratory
LLRN	Labour Law Research Network
LRA	Labour Relations Act
MBO	membership-based organisation

MDG	Millennium Development Goal
MEWC	Make Every Woman Count
MRF	Materials Recovery Facility
NASVI	National Association of Street Vendors of India
NEDLAC	National Economic Development and Labour Council
NEPAD	New Partnership for Africa's Development
NewSol	New Solutions
NGO	non-governmental organisation
NHI	National Health Insurance
NLR	New Left Review
NMW	national minimum wage
NSF	National Savings Fund
NWMS	National Waste Management Strategy
OHSA	Occupational Health and Safety Act
PAJA	Promotion of Administrative Justice Act
PER	Potchefstroom Electronic Law Journal
PhilSocCrit	Philosophy and Social Criticism
PrevLR	Preventive Law Reporter
PULP	Pretoria University Law Press
RSBY	Rashtriya Swasthya Bima Yojana
SAA	Social Assistance Act
SACCAWU	South African Commercial Catering and Allied Workers' Union
SACTWU	South African Clothing and Textile Workers Union
SADAGWU	South African Domestic and General Workers Union
SADC	Southern African Development Community
SADC LJ	Southern African Development Community Law Journal
SADSAWU	South African Domestic Services and Allied Workers Union
SADWU	South African Domestic Workers Association
SAJEMS	South African Journal of Economic and Management Sciences
SAJHR	South African Journal on Human Rights
SAJPA	South African Journal for Public Administration
SALB	South African Labour Bulletin
SALJ	South African Law Journal
SASSA	South African Social Security Agency
SAWPA	South African Waste Pickers Association
SAYIL	South African Yearbook of International Law
SCA	Supreme Court of Appeal
SCID	Studies in Comparative International Development

SDG	Sustainable Development Goal
SERI	Socio-Economic Rights Institute of South Africa
SEWA	Self- Employed Women's Association
SME	Small- and Medium-sized Enterprises
Soc&Antr	Sociologia & Antropologia
SocLS	Social and Legal Studies
SocRev	Sociological Review
SocS&M	Social Science & Medicine
SocW	Social Work
SPIREWORK	Social Protection Plan for the Informal Economy and Rural Workers
Stell LR	Stellenbosch Law Review
STEP	Strategies and Tools against Social Exclusion and Poverty
STR	Sindicato dos Trabalhadores Rurais
TES	temporary employment service
TSAR	Tydskrif vir die Suid-Afrikaanse Reg/Journal of SA Law
UIA	Unemployment Insurance Act
UIF	Unemployment Insurance Fund
UICA	Unemployment Insurance Contributions Act
UN	United Nations
UNDP	United Nations Development Programme
UNICEF	United Nations Children's Fund
VCA	value chain analysis
VirgJIL	Virginia Journal of International Law
WashLJCRSJ	Washington and Lee Journal of Civil Rights and Social Justice
WFP	Women on Farms Project
WIEGO	Women in Informal Employment: Globalizing and Organizing
WLSA	Women in Law in Southern Africa
WOLG	Work Organisation, Labour and Globalisation

PUBLICATIONS AND CONFERENCE CONTRIBUTIONS EMANATING FROM DOCTORAL STUDIES

Articles

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ABSTRACT

The world of work has changed and this includes its fundamental design, purpose and coverage of employment. Work in the informal economy has increased and in many developing and middle income countries, work in the informal economy is the norm. In South Africa as well as in other developing countries informal economy workers do not enjoy sufficient protection in terms of labour and social protection measures. 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. In countries where the informal economy is increasingly creating a parallel economic world to that of the formal economy, the extension of protection by facilitating the ability of these workers to bargain collectively and the role of national and local governments become increasingly important. Women workers in the informal economy are particularly vulnerable and face discrimination on multiple grounds and levels as gender inequalities in the informal economy cut across race and class lines. Linkages between informality, gender and poverty exists, 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 that there is a gender gap in earnings in the informal economy as women were earning less than their male counterparts and were less likely to be organised and have social protection.

It is of the utmost importance that labour and social legislation accommodates and extends protection to informal economy workers. The larger the informal economy becomes, the greater the need becomes for social and labour protection. It will be impossible to provide these workers with the protection they deserve without legislative intervention. Furthermore, this intervention must be innovative and tailor-made to successfully extend labour and social protection to informal economy workers. When considering the protection of these workers it is also of importance to explore the design and implementation of innovative and tailor-made solutions, considering for example the nature of their work and their workplace.

The focus of this study is specifically on distinctive vulnerable categories of women workers in the informal economy who are without adequate labour and social protection. These categories are domestic workers, informal traders and waste pickers. It is important

to consider lessons learnt in other jurisdictions to adequately address the challenges in the informal economy. This study considers interventions in two leading developing jurisdictions, namely India and Brazil. Both these countries have a high prevalence of informal workers with inadequate labour and social protection.

Labour law must thus meet the challenges posed by the realities of new forms of work. The important function of labour law to protect and promote the human dignity of workers will often result in a cross-over of various subsystems of the law. If we consider human dignity as an important component of labour law, then we need to consider an interdisciplinary approach and the promotion of such an approach. This approach will mean that labour law can no longer function in isolation and other branches of the law, such as social security law, corporate law, human rights and family law will increasingly have an impact on the human dignity of workers.

When considering the future of labour law and specifically in relation to the labour and social protection of women in the informal economy, it is vital that the new framework is intrinsically linked to concepts such as democracy, social justice, freedom, and human rights.

International and regional institutions are playing an increasingly important role in the empowerment of women, the promotion of equality and decent work for all women. This study identifies and critically considers the relevant international institutions and instruments, the impact of international standards, regional institutions and regional labour standards, particularly those of the African Union (AU) and the Southern Africa Development Community (SADC), and other global initiatives directed at the social and labour protection of women workers in the informal economy.

The South African position with reference to domestic workers appears to provide an adequate regulatory framework in respect of the regulation of these workers; however, in practice there are various challenges, including the enforcement of the legislative provisions and a disregard for the notion of substantive equality. Although domestic workers enjoy some protection, waste pickers and informal traders as own-account workers without a distinctive employee-employer relationship are excluded from most labour and social protection measures and innovative and tailor-made solutions are required. The regulation of waste pickers and informal traders in South Africa is fragmented and lacks comprehensive and uniform legislation is absent.

Voice and representation is of paramount importance to these women to ensure decent work. Enabling frameworks must be established to promote this. One of the most important objectives of organisation for women workers is to promote the recognition of these women and given their vulnerabilities experienced on various levels, this recognition must be wide and include recognition as workers, citizens and members of society that must be afforded human dignity on all levels.

The position of the three categories of women workers was also considered in two jurisdictions, namely India and Brazil to distil best practices with reference to these workers.

The research question of this study is: How can labour law and social protection measures provide vulnerable women workers in the informal economy with the appropriate protection to ultimately give effect to decent work? The main inquiry of this thesis, therefore, is to explore the issue of extending labour and social protection to these workers through the extension of existing labour and social security rights; including, where necessary, the design and implementation of innovative and tailor-made solutions.

KEY WORDS

informal economy; women, worker; domestic worker; informal trader; waste pickers; labour and social protection; vulnerable; decent work; social security; social assistance; gender equality; discrimination; social justice; human dignity; voice and representation; mobilisation; legal and economic empowerment; worker organisations; tailor made provisions; transformative constitutionalism; international and regional frameworks.

OPSOMMING

Die werksomgewing het verander en dit sluit die fundamentele ontwerp, doel en dekking van werkverskaffing in. Werk in die informele ekonomie het toegeneem en in baie ontwikkelende en middelinkomstelande is werk in die informele ekonomie die norm. In Suid-Afrika en ook in ander ontwikkelende lande het werkers binne die informele ekonomie nie voldoende beskerming ten opsigte van arbeids- en maatskaplike beskermingsmaatreëls nie. Hierdie werkers word nie deur arbeidswetgewing of maatskaplike beskermingsmaatreëls erken, gereguleer of beskerm nie en word gekenmerk deur verskillende grade van afhanklikheid en kwesbaarheid. In lande waar die informele ekonomie toenemend ’n paralelle ekonomiese wêreld met dié van die formele ekonomie vorm, word die uitbreiding van beskerming gefasiliteer deur die vermoë van hierdie werkers om kollektief te beding en is die rol van nasionale en plaaslike regering toenemend van belang. Vrouewerkers in die informele ekonomie is veral kwesbaar en kom te staan voor diskriminasie op veelvuldige terreine en vlakke, aangesien geslagsongelykhede in die informele ekonomie oor ras- en klaslyne strek. Verbande bestaan tussen informaliteit, geslag en armoede, onder andere: dit is waarskynliker dat armes in die informele ekonomie werk; meer arm vroue as nie-arm vroue werk in die informele ekonomie en daar is ’n geslagsgaping in verdienste in die informele ekonomie, aangesien vroue minder as hul manlike eweknieë verdien. Verder is dit minder waarskynlik dat hulle georganiseer is en maatskaplike beskerming geniet.

Dit is uiters belangrik dat arbeids- en maatskaplike wetgewing werkers in die informele ekonomie akkommodeer en aan hulle beskerming bied. Hoe groter die informele ekonomie word, hoe groter word die behoefte aan maatskaplike en arbeidsbeskerming. Dit sal onmoontlik wees om sonder wetgewende ingryping aan hierdie werkers die beskerming te gee wat hulle verdien. Voorts moet die ingryping innoverend en doelgemaak wees om geslaagde arbeids- en maatskaplike beskerming aan werkers in die informele ekonomie te bied. Wanneer beskerming van hierdie werkers oorweeg word, is dit ook belangrik om die ontwerp en implementering van innoverende en doelgemaakte oplossings te verken volgens hulle spesifieke behoeftes, byvoorbeeld die aard van hul werk en hul werkplek.

Die fokus van hierdie studie is spesifiek op bepaalde kwesbare kategorieë van vroue-werkers in die informele ekonomie wat geen of onvoldoende arbeids- en maatskaplike beskerming geniet. Hierdie kategorieë sluit in huiswerkers, informele handelaars en

afvalversamelaars. Dit is belangrik om lesse wat in ander jurisdiksies geleer is in aanmerking te neem om toereikend die uitdagings in die informele ekonomie die hoof te bied. Hierdie studie ontleed ingryping in twee ontwikkelende, maar toonaangewende jurisdiksies, naamlik Indië en Brasilië. Albei hierdie lande het ’n hoë voorkoms van informele werkers met ontoereikende arbeids- en maatskaplike beskerming.

Arbeidswetgewing moet dus die uitdagings wat die realiteite van nuwe vorms van werk oplewer, die hoof bied. Die belangrike funksie van arbeidswetgewing om die beskerming en menswaardigheid van werkers te bevorder, het dikwels die wisselwerkin van verskillende substelsels van die reg tot gevolg. As menswaardigheid as ’n belangrike komponent van arbeidswetgewing beskou word, dan moet ’n interdissiplinêre benadering en die bevordering van so ’n benadering oorweeg word. Hierdie benadering sal beteken dat arbeidswetgewing nie meer in afsondering kan funksioneer nie, en ander takke van die reg, soos sosialesekerheidsreg, korporatiewe reg, menseregte en familiereg sal toenemend ’n uitwerking op die menswaardigheid van werkers hê. Wanneer na die toekomstige arbeiswetgewing gekyk word, en spesifiek met betrekking tot arbeids- en maatskaplike beskerming van vroue in die informele ekonomie, is dit uiters noodsaaklik dat die nuwe raamwerk intrinsiek aan konsepte soos demokrasie, maatskaplike geregtigheid, vryheid en menseregte gekoppel word.

Internasionale en streeksinstellings speel toenemend ’n belangrike rol in die bemagtiging van vroue, die bevordering van gelykheid en behoorlike werk vir alle vroue. Hierdie studie identifiseer en oorweeg krities die relevante internasionale instellings en instrumente, die invloed van internasionale standaarde, streeksinstelling en streeksarbeidstandaarde, veral die van die Afrika-unie (AU) en die Suider-Afrikaanse Ontwikkelingsgemeenskap (SAOG) en ander wêreldwye inisiatiewe wat op die maatskaplike en arbeidsbeskerming van vrouewerkers in die informele ekonomie gerig is.

Die Suid-Afrikaanse posisie met betrekking tot huiswerkers blyk ’n toereikende regulerende raamwerk te verskaf ten opsigte van die regulering van hierdie werkers; in die praktyk is daar egter ’n verskeidenheid uitdagings, insluitend die toepassing van die wetgewende bepalings en ’n verontagsaming van die idee van substantiewe gelykheid. Hoewel huiswerkers ’n mate van beskerming geniet, word afvalversamelaars en informele handelaars as werkers vir eie rekening sonder ’n bepaalde werknemer-werkgewer-verhouding van die meeste arbeids- en maatskaplike beskermingsmaatreëls uitgesluit, en innoverende en doelgemaakte oplossings moet gevind word. Die regulering van

afvalversamelaars en informele handelaars in Suid-Afrika is gefragmenteer en omvattende en eenvormige wetgewing ontbreek.

'n Stem en verteenwoordiging is van die grootste belang vir hierdie vroue om behoorlike werk te verseker. Bemagtigende raamwerke moet gevestig word om dit te bevorder. Een van die belangrikste oogmerke van die organisasie van vrouewerkers is om die erkenning van hierdie vroue te bevorder, en gegewe hulle kwesbaarheidservaring op verskillende vlakke, moet hierdie erkenning wyd strek en erkenning as werkers, burgers en lede van die gemeenskap insluit wat menswaardigheid op alle vlakke bied.

Die posisie van die drie kategorieë vrouewerkers in twee buitelandse jurisdiksies is ondersoek, naamlik in Indië en Brasilië, ten einde die beste praktyke met betrekking tot hierdie werkers te identifiseer en te oorweeg.

SLEUTELWOORDE

informele ekonomie; vroue, vrouewerkers huiswerkers; informele handelaars; afvalversamelaars; maatskaplike beskerming; arbeidsbeskerming; kwesbare groepe; behoorlike werk; sosialesekerheidsreg; maatskaplike toelae; geslagsgelykheid; diskriminasie; maatskaplike geregtigheid; menswaardigheid; stem en verteenwoordiging; mobilisering; regsbemagtiging; ekonomiese bemagtiging; werkersorganisasies; internasionale regsraamwerk; streeksregsraamwerk.

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CHAPTER 1
INTRODUCTION

1.1 Overview

In recent times employment as well as its fundamental design, purpose and coverage have changed extensively to the detriment of many workers. Non-standard work is increasing and new forms of work have emerged.[1] Labour legislation was often drafted to protect employees in the traditional full-time employment paradigm and is currently inadequate to provide protection to workers in forms of non-standard employment.[2]

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 criticised 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".[3] The failure of labour law to provide cover for these vulnerable workers poses the question whether the discipline is

> … conceptually coherent, relevant to the new empirical realities of the world of work, and normative salient in the world as we know it.[4]

Informal employment is now a reality and a growing acknowledgement of its existence and pervasiveness exists.[5] In South Africa as well as in other developing countries informal economy workers do not enjoy sufficient protection in terms of labour and social protection measures.[6] These workers are not recognised, regulated or protected by labour

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1 Vanek *et al Statistics on the informal economy: Definitions, regional estimates and challenges* 2.

2 Vanek *et al Statistics on the informal economy: Definitions, regional estimates and challenges* 2.

3 Davidov and Langille "Understanding labour law" 1.

4 Davidov and Langille "Understanding labour law" 1.

5 A number of factors contributed to an increased 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 these workers, a realisation that the majority of informal workers are not there by choice and an emphasis on the important role of social protection in the reduction of poverty and vulnerability of these workers. See also the ILO Social Protection Floors Recommendation of 2012; Lund "Extending social protection to informal workers".

6 In 2002 the Taylor Committee stated the following: "Moreover, the development paths of African economies and developing countries require a fresh look at social protection systems more appropriate to their environment and needs. The reality is that in the developing world, formal sector employment may never become the norm it is in Europe … The European concept, primarily that of contributory social insurance, took its basic assumption that social security would develop around formal sector employment. As a result, social security is often described as measures to protect against 'loss of (formal wage) income'. Such a conception is therefore of limited relevance to Africa and the developing world, where the risk of 'insufficient' income (formal or informal) is invariably more prevalent than 'loss' of income (Committee of Inquiry into a Comprehensive System of Social Security in South Africa *Transforming the present – Protecting the future* 101). For purpose of this study social protection is used as the wider concept and must be distinguished

legislation or social protection measures and can be characterised by varying degrees of dependency and vulnerability.[7]

Initially it was assumed during the 1950s and 1960s, based on W. Arthur Lewis's predictions, that through economic development enough work would be created in developing countries to absorb the low-income traditional economies and "transform them into dynamic modern economies".[8] This turning point when wages would rise above subsistence levels is generally referred to as the "Lewis Turning Point".[9] During the 1960s in developing countries high levels of continuing unemployment discredited Lewis's theory as there was no indication of the "Lewis Turning Point" approaching in developing countries. In 1970 Hans Singer, in contrast with Lewis's prediction, predicted the following in respect of developing countries:

> A persistent "dangerous" dualism in labour markets with high levels of casual and intermittent employment, as well as disguised or open unemployment.[10]

A concerned International Labour Organization (hereafter ILO) reacted to this prediction by initiating a number of "employment missions" to developing countries as part of the ILO World Employment Programme.[11] Reports highlighted the potential of the informal sector[12] to create employment and reduce poverty.[13] Currently the renewed interest in the informal economy can be contributed to the fact that the informal economy is closely linked to the formal economy and contributes to the economy.[14] During the 1970s the term "informal sector" was used by the ILO to identify activities of the working poor who were not recognised, recorded or protected by public authorities.[15] This term has been replaced by the wider term "informal economy" to extend coverage to a very diverse

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from social security. Social protection can be seen as a system of social support, not linked to the regular employment relationship. The wider notion is particularly important to workers in the informal economy where a regular employment relationship is absent. The term refers to a system of general welfare support and protection (Olivier "The concept of social security" 26).

7 ILO Resolution Concerning Decent Work and the Informal Economy 2002, Conclusion 9.

8 Chen *The informal economy: Definitions, theories and policies.*

9 Chen *The informal economy: Definitions, theories and policies*.

10 Singer 1970 *JDS*.

11 ILO *Employment, incomes and equality: a strategy for increasing productive employment in Kenya*.

12 The term "informal sector" was used by Hart in 1971 in his study of low-income activities in Accra, Ghana (Hart 1973 *JMAS*). This term was also used by the Kenya mission, one of the employment missions initiated by the ILO during the 1970s. The Kenya mission found the informal sector consisted of marginal activities and included "profitable and efficient enterprises". ILO *Employment, incomes and equality: A strategy for increasing productive employment in Kenya*.

13 ILO *Employment, incomes and equality: A strategy for increasing productive employment in Kenya*.

14 WIEGO *Statistics on the informal economy: Definitions, regional estimates and challenges* 3.

15 ILO *Employment, incomes and equality: A strategy for increasing productive employment in Kenya*.

group of workers not limited to workers in a specific sector. The informal economy refers to all economic activities by workers and economic units not covered or inadequately covered by formal arrangements. For the purposes of this study, the term "informal economy" refers to the following:

(a) all economic activities by workers and economic units[16] that are in law or in practice not covered or insufficiently covered by formal arrangements; and

(b) the term 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.[17]

Women in Informal Employment: Globalizing and Organizing (hereafter WIEGO) and the ILO estimate that in developing countries, one half to three quarters of non-agricultural workers is informally employed, and when informal economy workers in agriculture are included, it may be as high as 90% in certain countries in South Asia and sub-Saharan Africa. In South Asia, sub-Saharan Africa, Latin America and the Caribbean and urban China, informal employment is a greater source of non-agricultural employment for women than for men.[18]

In Table 1.1 an indication is given of the percentage of the population engaged in informal employment (excluding the agricultural section) in some regions of the world.

16 ILO Recommendation 204 of 2015 refers to economic activities as "units that employ hired labour; units that are owned by individuals working on their own account, either alone or with the help of contributing family workers; and cooperatives and social and solidarity economic units".

17 ILO Recommendation Concerning the Transition from the Informal Economy to the Formal Economy 204 of 2015.

18 Vanek *et al Statistics on the informal economy: Definitions, regional estimates and challenges* 2.

Table 1.1 *Informal employment in non-agricultural employment*

Country	**Women workers**	**Male workers**
South Asia	83%	82%
Sub-Saharan Africa	74%	61%
Latin America and Caribbean	54%	48%
Urban China	36%	30%

Source: Vanek *et al Statistics on the informal economy: Definitions, regional estimates and challenges* 1.

In sub-Saharan Africa 13% more female workers than male workers are engaged in informal employment (excluding the agricultural sector). The percentage of women engaged in own account employment in sub-Saharan Africa is also higher than that of men.[19]

The ILO World Social Protection Report 2017-19 indicated that 71% 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.[20] Extending social protection to these workers is vital in realising the fundamental right to social security.

In developing countries a high participation rate in the informal economy is in reality the norm and not the exception.[21] In countries where the informal economy is increasingly

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19 Sixty percent of women are own-account workers Vanek *et al Statistics on the informal economy: Definitions, regional estimates and challenges* 1.

20 ILO *World Social Protection Report 2017-19*. The ILO World Social Protection Report 2017-2019, highlights the importance of social protection coverage for workers in the informal economy to promote decent work and prevent poverty, and recognises that coverage can be achieved in various ways, including a combination of contributory and non-contributory schemes.

21 In developed countries, employment arrangements exist that can be compared to informal employment in developing countries. Different concepts are used in developed countries such as "non-standard work" and "undeclared work"; however, this does not mean that all non-standard work is informal; neither is all informal employment non-standard. These concepts are not identical to informal employment in developing countries, even though similarities do exist. "Undeclared work" refers to work that has not been declared to for example administrative authorities. Although employment in Germany is highly formalised, recent changes in the world of work have also affected many workers in Germany and they are often in precarious positions. In 2010 non-standard employment in Germany was 10 million, 27 percent of total employment. This percentage

creating a parallel economic world to that of the formal economy, the extension of protection by facilitating the ability of these workers to bargain collectively and the role of national and local governments become increasingly important. Workers in the informal economy face many challenges, such as difficulties in accessing credit, non-payment of wages, unsafe working conditions, lack of job security and social benefits, trade barriers and lack of an enabling environment without supporting policies and programmes.[22] These workers are vulnerable, face great insecurities and are denied social justice. Women workers in the informal economy are particularly vulnerable and face discrimination on multiple grounds and levels as gender inequalities in the informal economy cut across race and class lines.[23]

The informal economy is characterised by its linkages with the formal economy and the diverse categories of workers and work relationships found therein. To fully understand the potential and challenges in the extension and realisation of labour and social security rights, it is important to analyse the existing links between the formal and informal regulatory framework and to consider the establishment of new links.[24]

South Africa is one of the countries in the SADC region with a relatively small informal economy; however, earnings from informal employment still account for 14% of the income that allows households to exist above the poverty line.[25] In June 2017, unemployment reached 27,7%. Officially 6,2 million people are unemployed and 29,8% of these are women.

Table 1.2 provides an overview of the labour force in South Africa from 2017 (Quarter 3).

includes own-account self-employment (Vanek *et al Statistics on the informal economy: Definitions, regional estimates and challenges* 15-18).

22 Vanek *et al Statistics on the informal economy: Definitions, regional estimates and challenges* 2.

23 Dias and Ogando (2015 *WOLG* 54) state: "… in many societies there is a clear association between racial structures of oppression with such kinds of labour being allocated by gender, class, caste, race and ethnicity".

24 Banik *The legal empowerment agenda* 3.

25 The informal economy provides 8% of the national Gross Domestic Product and employs 27% of those active in the economy (Stats SA 2017 https://www.statssa.gov.za/publications/P0211/P02113rdQuarter2017.pdf). See para 4.2 below.

Table 1.2 *Overview of the labour force in South Africa, 2017 (Quarter 3)*

	Weight			% of Weight		
	Male	Female	Total	Male %	Female %	Total
Formal sector (non-agricultural)	6 574 000	4 805 000	11 379 000	58	42	100
Informal sector (non-agriculture)	1 744 000	1 026 000	2 770 000	63	37	100

Source: Stats SA 2017 https://www.statssa.gov.za/publications/P0211/P02113n3Quarter 2017.pdf

It is of the utmost importance that labour and social legislation accommodates and extends protection to informal economy workers. The larger the informal economy becomes, the greater the need becomes for social and labour protection. It will be impossible to provide these workers with the protection they deserve without legislative intervention. Furthermore, this intervention must be innovative and tailor-made to successfully extend labour and social protection to informal economy workers. When considering the protection of these workers it is also of importance to explore the design and implementation of innovative and tailor-made solutions, considering for example the nature of their work and their workplace. If we consider the precarious position of women workers a sustainable integrated approach must also include the legal and economic empowerment of these women workers. [26]

The objective of creating a meaningful impact on the position of women workers in the informal economy and a proper holistic understanding of the position of these women in its entirety, necessitated the extensive scope of this thesis. It required an integrated approach and it was therefore necessary to evaluate both labour and social protection measures.

[26] Legal empowerment is a process that increases access to justice and the legal rights of the poor (Banik *The legal empowerment agenda* 2). WIEGO defines economic empowerment as increased access to and control over resources and markets, increased agency and improvements in and control over specific outcomes. These outcomes include improved wellbeing and dignity, better work-life balance and improved economic opportunities (see WIEGO date unknown http://www.wiego.org/wee).

1.2 The precarious position of women workers in the informal economy

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 that there is a gender gap in earnings in the informal economy as women were earning less than their male counterparts and were less likely to be organised and have social protection.[27] More women than men are in vulnerable employment and according to the UN Women, 60% of women were in vulnerable employment compared to 54% of men.[28] This report also indicated that only half of women are in the labour force, compared to more than three quarters of men.[29]

According to WIEGO, women are often disadvantaged due to market relationships within the informal economy, as members of groups defined by race, class, ethnicity or caste and as women due to gender norms in their societies.[30] Domestic work, caring, cross-border trading and other instances of underrecognised work, are mainly made up of women workers. It is vital that in the quest for gender equality, the work that women undertake is valued appropriately. Women often find themselves in dependent relationships, both at home and at work. The nature of their work often results in a lack of worker identity as their work is seen as their everyday duties.[31] In addition to this women often have to balance various responsibilities such as responsibilities of sole provider and childcare and often also care of the elderly.[32] They are also particularly vulnerable to career breaks, limited educational opportunities and discrimination. Feminisation of poverty and gender discrimination mean that female workers are among the most vulnerable workers in the informal economy.[33] This position informs the focus of this thesis on women workers in the informal economy due to their particular vulnerabilities.

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27 Chen, Vanek and Carr *Mainstreaming informal employment and gender in poverty reduction* 30.

28 The largest gender gaps were found in Northern Africa, sub-Saharan Africa and Western Asia. In Brazil the increase of minimum wages for women workers resulted in a decrease in the gender pay gap (UN Women 2015 http://progress.unwomen.org/en/2015/). The next report will be issued in 2018.

29 UN Women 2015 http://progress.unwomen.org/en/2015/ Chapter 2.

30 WIEGO date unknown http://www.wiego.org/informal-economy/occupational-groups/domestic-workers.

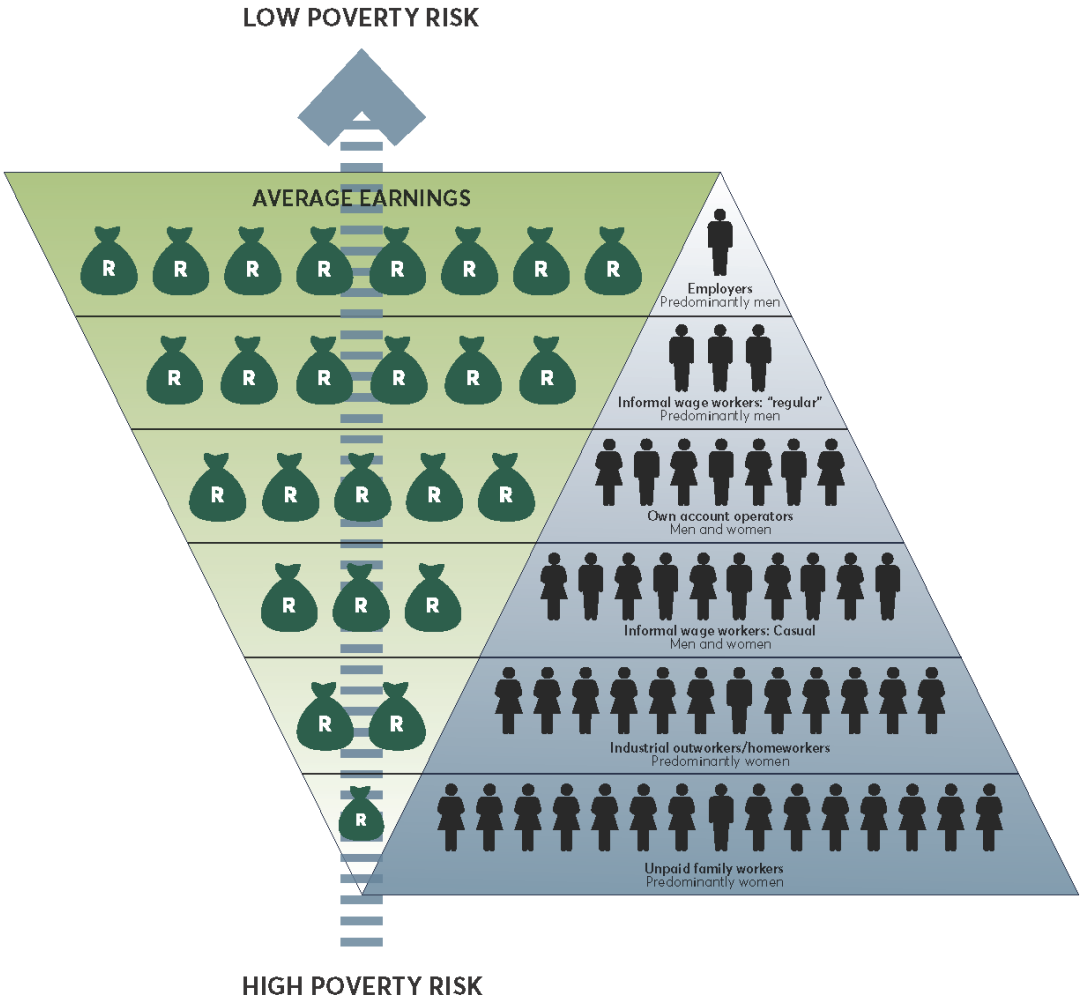
31 Bonner and Spooner 2011 *IPSJ* 89.

32 Bonner and Spooner 2011 *IPSJ* 89.

33 Conclusion 20 of ILO *Resolution on Decent Work and the Informal Economy* (2002).

Within the informal economy gender hierarchies exist, as is illustrated in the following figure:[34]

Figure 1.1 Hierarchies within the informal economy



Men are predominantly employers or regular wage workers with higher average wages and lower poverty risks.[35] The prevalence of women as casual wage workers, home-workers, industrial outworker and unpaid family workers is higher and they are more vulnerable with reference to irregular wages and poverty risks.[36]

Strategies must be developed to address the discrimination to which these workers are often exposed. Policies aimed at reducing poverty of women workers should introduce

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34 The male and female figures in Figure 1.1 do not represent any numerical or statistical value, but merely illustrate that more women are in vulnerable employment in the informal economy than men. This illustration (ES Fourie, University of Johannesburg 2017) is based on an earlier illustration and statistics by Chen *The informal economy: Definitions, theories and policies* 9.

35 Chen *The informal economy: Definitions, theories and policies* 9.

36 Chen *The informal economy: Definitions, theories and policies* 9.

measures to value the work of women, such as minimum wages, safe working conditions, including a workplace safe from violence and harassment and the necessary social protection measures. Vulnerable women workers in the informal economy also need access to basic services, such as shelter, power, water, basic infrastructure and sanitation. These measures must build on a safe and healthy work environment with appropriate job security and a living wage.

Shared challenges by women workers in the informal economy include the following:

(a) lack of labour and social protection or inadequate labour and social protection;

(b) various levels of poverty;

(c) women workers in the informal economy often represent previously disadvantaged groups, based on race, gender and caste;

(d) a lack of skills and lower educational levels due to being previously disadvantaged as well as to gender inequalities;

(e) a lack of empowerment, including legal and economic empowerment;

(f) low or irregular wages;

(g) poor working conditions; and

(h) a lack of representation and collective bargaining at various levels.[37]

Solutions must include legislative interventions, as well as tailor-made, innovative solutions in accordance with the diverse needs of these workers.[38]

The focus of this study is specifically on categories of women workers in the informal economy who are without adequate labour and social protection. It is important to consider lessons learnt in other jurisdictions to adequately address the challenges in the informal economy. This study considers interventions in two leading developing jurisdictions, namely India and Brazil. Both these countries have a high prevalence of informal workers with inadequate labour and social protection.[39] However, successful efforts to extend labour and social protection do exist and will be considered. The study focuses predominantly on women domestic workers who currently are recognised in many

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37 Fourie and Smit "Precarious work, gender and non-discrimination".

38 Fourie and Smit "Precarious work, gender and non-discrimination".

39 See Chapter 6 for a comparative analysis and specifically para 6.1 for reference to the relevance of the selected jurisdictions as comparative benchmarks.

countries and represent a group of workers that enjoy some protection *de jure*; however, *de facto,* they are still without adequate protection. The study also considers two other distinctive vulnerable groups of women workers in the informal economy, namely waste pickers and informal traders. These workers are often own-account workers and are at the lowest end of the informal economy hierarchy with reference to labour and social protection; they represent the poorest members of many societies.[40] In most countries, they are unrecognised and undervalued as workers.[41] In most countries, they are unrecognised and undervalued as workers. As own-account workers their regulatory framework is often dependent on various local policies and legislative provisions outside the labour paradigm. Waste pickers represent one of the most precarious occupations in the informal economy; however, they make important contributions to the global economy and they contribute to public health and a safer environment. Their work reduces municipal costs with reference to solid waste.[42] In most countries they are not covered by a legal framework as most labour law paradigms only extend protection to categories of employees and not to own-account workers. Moreover social protection contributions are often only based on a formal contract of employment and a distinct employee-employer relationship, which is absent for many of these workers. An in-depth analysis of the position of homeworkers in this context is beyond the scope of this study; however, it is submitted that certain similarities exist with reference to the regulatory framework for domestic workers and that in many instances these workers will fall within the scope of the definition of "employee" as contained in labour legislation in South Africa, but when such homeworkers are in disguised employment relationship their position remains precarious.

1.2.1 Characteristics and challenges of selected categories of women workers in the informal economy

Various categories of women workers, such as domestic workers, waste pickers and street traders, have unique characteristics and also face distinctive challenges that must be considered. These categories will be briefly discussed.

1.2.1.1 Waste pickers

Millions of waste pickers around the world earn a living by collecting, sorting, recycling and selling materials.[43] Their workplaces include streets, dumping and landfill sites and

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40 Dias and Samson *Informal economy monitoring study sector report: Waste pickers* 6.

41 Dias and Samson *Informal economy monitoring study sector report: Waste pickers* 6.

42 Dias and Samson *Informal economy monitoring study sector report: Waste pickers* 6.

43 The term "waste picker" as a preferred concept was adopted at the First International Conference of Waste Pickers held in Colombia in 2008. The objective of this conference was specifically to

they are often categorised accordingly. These workers are also referred to as "reclaimers", "waste recyclers", "garbage pickers" and "scavengers".[44] Categories of waste pickers can include landfill waste pickers, doorstep waste pickers, buyers and handlers.[45] In countries such as India, South Africa and Brazil they also work as members of cooperatives. In most countries waste management through the activities of waste pickers saves governments costs; however, these workers remain marginalised, unrecognised and undervalued. These workers do not only contribute to environmental protection but also to the recycling of waste in a world where the percentage of solid waste is constantly increasing and which constitutes a major challenge for many cities.[46]

Waste pickers, and specifically the women workers, are one of the most vulnerable groups of workers and they are among the poorest in the informal economy. In developing countries these workers are often at the lowest end of the occupational hierarchy and socio-economic range.[47] According to WIEGO reports there are 20 million people involved in waste picking across the world and they are responsible for the recycling and re-use of the world's waste, contributing to a positive change in recycling habits.[48] It is therefore of the utmost importance to provide these workers with adequate labour and social protection.

Women waste pickers are exposed to various inequalities at all levels, including in their work within the various recycling activities, at home due to societal norms and even as leaders in various worker organisations. Studies have indicated that more men take part in negotiations with local authorities than women.[49] Their vulnerabilities are increased by the many challenges that they face. They are constantly in contact with toxins and other hazardous materials and other disasters such as landfills.[50] They are also exposed to

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strengthen the organisation of women waste pickers around the world (WIEGO *et al Waste pickers without frontiers*). Countries such as Colombia have recognised the value of waste pickers in respect of the recycling process. These workers collect, sort and process waste at various locations that can include households or dumping sites (Dias and Fernandes "Cooperation among workers in the informal economy"). Child labour is also a common phenomenon in waste management (ILO *Sustainable development, decent work and green jobs*).

44 Viljoen, Blaauw and Schenk 2016 *SAJEMS* 176.

45 WIEGO 2018 http://www.wiego.org/informal-economy/basic-categories-waste-pickers.

46 Dias 2016 *Env&Urb* 3. In Brazil, for example, waste pickers are responsible for recycling 80% of cardboard and 92% of aluminium.

47 Comaru and Werna *The health of workers in selected sectors of the urban economy*; Narayan and Chikarmane "Power at the bottom of the heap" 207.

48 WIEGO 2013 http://www.wiego.org/sites/default/files/resources/files/WIEGO-Waste-Pickers-Position-Paper.pdf.

49 Dias and Ogando *From theory to action: gender and waste recycling* 6.

50 In April 2017 more than 25 people lost their lives in Colombo, Sri Lanka as a result of a collapsed landfill (Fernandez 2017 http://www.wiego.org/blog/who-really-cares-about-our-earth-neglecting-waste-pickers%E2%80%99-contributions-promoting-huge-busines).

weather conditions and dependent on favourable weather conditions in their search for recyclables.[51] Waste pickers often have limited formal education and turn to waste picking as an only alternative.[52] These workers contribute to the recycling of waste, and therefore also to the promotion of health in many countries;[53] they are, however, exposed to various hazardous circumstances and still face social exclusion within communities.[54]

The provision on labour and social protection for waste pickers is particularly problematic, as there is no discernible employment relationship with the household whose waste they collect or with the local authorities, including municipalities. If we consider social protection for these workers, social insurance is problematic because an employment relationship and contributory employee-employer framework do not exist. [55] Representation and collective bargaining is particularly challenging as their bargaining partners include local authorities and other public role players.[56]

1.2.1.2 Domestic workers

This study also specifically considers the precarious position of domestic workers.[57] As an ILO study recently indicated, there are more than 67 million domestic workers across the world; 83% of these are women[58] and 60% are excluded from social security coverage.[59] These statistics highlight the extreme vulnerability of these workers and the global importance of prioritising the extension of protection to these workers in line with the UN Sustainable Development Goals, such as gender equality and decent work for all.[60]

This category of informal workers is important to this study because of its sheer size and its valuable social and economic contribution to the global economy. The increase in domestic work can be ascribed to various reasons, such as an ageing population, more

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51 Samson *Refusing to be cast aside* 5.

52 Samson *Refusing to be cast aside* 5.

53 Studies have indicated that poor solid waste management impacts on various health aspects of people, specifically in developing countries (Ziraba, Harequ and Mberu 2016 *ArchPH* 1).

54 Comaru and Werna *The health of workers in selected sectors of the urban economy* 3.

55 Sankaran and Madhav "Legal and policy tools to meet informal workers' demands" 2013 8.

56 See chapter 7.

57 In terms of the ILO Domestic Workers Convention 189 (2011) these workers are defined as follows: any person engaged in domestic work within an employment relationship. This is a wide definition; many national definitions are more limited in scope.

58 As a result of statistical challenges in obtaining accurate data, this percentage might be even higher. The highest percentages of domestic workers are concentrated in Asia and Latin America (ILO *Formalizing domestic work* 2). See also para 3.3.6.4 below.

59 ILO *Formalizing domestic work* 6, 12, 13. Developing countries have the highest prevalence of domestic workers as wells as the largest deficits in labour and social protection coverage; however, even in countries such as Italy 60% of these workers do not enjoy sufficient protection; this applies to 30% in Spain and France. This illustrates that domestic workers are a vulnerable category of workers all over the world (ILO *Social protection for domestic workers* ix).

60 See paras 3.2 and 3.2.2 below.

women entering the labour market, a promoted equality agenda and, specifically in Europe, home care is preferred to institutional care for various reasons, including financial considerations.[61] This category of workers is also unique in a number of ways, namely, their workplace is private and often also the place where the worker resides; the work is undervalued and unrecognised in most societies, and it often falls outside the ambit of labour and social protection.[62] The nature of domestic work is innate to these women workers as they often leave their own children behind with family members to care for the children of the employer. In many countries the value of domestic work is underestimated with respect to its contribution to economies, as these workers often enable their women employers to enter the labour market through performing household and care duties for them. This symbolises the nature of multiple contributions to labour markets on a variety of levels, as these workers are also now able to earn a living, and contribute to the income of their own households. The various tasks performed by the domestic worker thus support the function of the family at an immediate level and in a wider framework that of societies and communities.[63]

Internationally there is a strong focus on domestic work and the extension of labour and social protection to these workers to achieve decent work standards and improve their working conditions.[64] Applicable international conventions require member states to ensure that these workers are treated equally to other workers, specifically in respect of social security measures.[65]

In many countries, among them South Africa, legislative measures do extend coverage to certain categories, thus providing examples of formalising a category of informal workers. However, as a result of lack of enforcement measures these workers do not enjoy adequate labour and social protection and thus continue to fall within the scope of the definition of the informal economy as provided by ILO Recommendation Concerning the Transition from the Informal to the Formal Economy 204 of 2015. Another important factor that must be considered is that in a number of countries, such as South Africa, domestic workers represent a previously disadvantaged group and this often contributes to their vulnerability in respect of exploitation and discrimination based on gender and

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61 ILO *Formalizing domestic work* vii.

62 ILO *Formalizing domestic work* viii.

63 ILO *Formalizing domestic work* 2.

64 See the Domestic Workers Convention 189 (2011), the Domestic Workers Recommendation 201 (2011); Social Protection Floors Recommendation 202 (2012) and the Transition from the Informal Economy to the Formal Economy Recommendation 204 (2015). Brazil and India have not yet ratified the Domestic Workers Convention. See also para 3.3.6.4 below.

65 See article 14 of Domestic Workers Convention.

race. In Brazil, just like in South Africa, the majority of domestic workers are women and they represent previously disadvantaged groups.[66] Brazil also has a Federal Constitution[67] that guarantees equality between men and women, and specifically provides for the prohibition of discrimination on the grounds of sex/gender in employment matters.[68] However, similar to South Africa, these fundamental rights have not transcended into equality for all on the work floor. In India, domestic work is often seen as inferior work and is performed by women that are regarded as being at the bottom of the caste hierarchy.[69]

Migrant domestic workers are particularly vulnerable; however, this topic does not fall within the scope of this study. These workers face many challenges and pose many challenges for governments and policy makers. These challenges include the intimate nature of the working relationship, the fact that work is performed in a private household and that the workplace is often also the home of the worker, low wages, and irregular and long working hours.[70]

1.2.1.3 Informal traders, including street traders (vendors)

In sub-Saharan Africa, street trade accounts for more than 51% of all women active in the informal economy, excluding agriculture.[71] In 2011 statistics indicated that there were more than half a million street traders in South Africa; 70% of them are women.[72] A high percentage of women is also occupied in street trading in most cities in sub-Saharan Africa.[73] In India street vending accounts for 14% of urban informal employment and in 2013 it was estimated that there were more than 3 million vendors,[74] whilst in Brazil there are approximately 1 million street traders.[75]

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66 Gomes and Bertolin 2010 *LLDRL* 2. In 2010 domestic work was the biggest occupational category and specifically so for women. Due to their social standing within communities, women in Brazil only entered the labour market during the 1990s and this was characterised by low-income jobs that did not require many skills.

67 Of 1988.

68 Article 5 and 7.

69 ILO *Formalizing domestic work*.

70 ILO *Formalizing domestic work*.

71 Roever 2016 *Env&Urb* 2.

72 Alfers *et al* 2016 *NewSol* 274. See also para 5.2 below.

73 Roever 2016 *Env&Urb* 2.

74 Recent research indicates that it can be more than 10 million (Comaru and Werna *The health of workers in selected sectors of the urban economy* 6).

75 Roever *Informal economy monitoring study sector reports: Street vendors*; Comaru and Werna *The health of workers in selected sectors of the urban economy* 6.

The term "informal traders" includes all traders; it is a wider concept than street traders since it also encompasses all traders in malls and markets.[76] These traders sell a variety of goods; from fresh produce to fashion accessories and building materials.[77] It is interesting to note that among street traders, women traders are more likely to trade from a mobile stall than their male counterparts who are more likely to have a permanent stall.[78] Once again women workers are therefor more vulnerable than men in this category in the informal economy with reference to the temporary nature of their workplace.

Statistics have also indicated that informal food traders play an integral role in promoting urban food security and often provide services to communities where the state is not doing so.[79] Informal traders play an important role in urban life and in addressing household poverty in a wider societal context.[80]

The Supreme Court of India in *Sodan Singh v New Delhi* [81] clearly highlighted the contribution of these traders to urban life and stated:

> On the other hand, if properly regulated according to the exigency of the circumstances, the small on the said walks can considerably add to the comfort and convenience of the general public, by making available ordinary articles of everyday use for a comparatively lesser price. An ordinary person, not very affluent, while hurrying towards his home after a day's work can pick up these articles without going out of his way to find a regular market.

Informal traders across the globe face certain universal challenges including police abuse and harassment from authorities;[82] lack of a permanent workplace; illegal evictions and confiscations of good by local authorities;[83] exposure to adverse weather conditions and

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76 The City of Johannesburg supports this wider notion of "informal trader", and names of bylaws were amended from Street Trading By-Laws to Informal Trading By-laws (SERI *The end of the street?* 10).

77 Street vendors can be categorised according to their activities, such as buying and selling of goods in public spaces, manufacturing goods and selling same, as well as those traders who render services such as hairdressing or tailor services (Roever *Informal economy monitoring study sector reports: Street vendors*).

78 Roever *Informal economy monitoring study sector reports: Street vendors*.

79 Roever 2016 *Env&Urb* 4.

80 Roever 2016 *Env&Urb* 3.

81 1989 SCR (3) 1038 para 16.

82 More than half of the traders in Durban have experienced problems with harassment from public authorities (Roever *Informal economy monitoring study sector reports: Street vendors*).

83 In Durban nearly 45% of vendors indicated that they have experienced problems with evictions and vendors have also indicated that even legal traders with the required documentation are often subjected to the confiscation of their goods (Roever *Informal economy monitoring study sector reports: Street vendors*).

lack of shelter and storage facilities;[84] cumbersome registration procedures;[85] lack of sanitation facilities, and communication challenges with local authorities.[86]

1.3 Contemporary national legal framework

The *Constitution of the Republic of South Africa*, 1996 (hereafter the Constitution) is the supreme law of the country and any law or conduct that is inconsistent with it is invalid.[87] The supremacy of the Constitution means that it has a profound impact on all laws in South Africa as laws are measured against the Constitution. The Constitution adopts an approach friendly to international law and comparative law.[88] In *S v Makwanyane*[89] the Constitutional Court stated that for the purpose of section 39(1)(b) (then section 35(1) of the interim Constitution of 1993) public international law includes binding and non-binding law. The court then specifically refers to the reports of specialised agencies such as the ILO to provide guidance as to the correct interpretation of particular provisions of the Bill of Rights.[90] The specific status accorded to international law by the Constitution and the application of international law when interpreting legislation and the Bill of Rights can play a very important role when considering the extension of labour and social protection to vulnerable workers and when promoting decent work for all in South Africa.[91]

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84 Vendors have indicated that their goods are often exposed to adverse weather conditions as they do not have access to adequate shelter and/or storage facilities (Roever *Informal economy monitoring study sector reports: Street vendors*).

85 Limited licenses are available and the costs involved are high (Roever *Informal economy monitoring study sector reports: Street vendors*).

86 Roever *Informal economy monitoring study sector reports: Street vendors*. These traders have poor access to urban infrastructure and access to water and sanitation facilities is often limited.

87 Section 2 of the *Constitution of the Republic of South Africa*, 1996.

88 Section 39(1)(b) provides that when interpreting the Bill of Rights, a court, tribunal or forum must consider international law, and s 39(1)(c) provides for the consideration of foreign law. S 233 provides as follows: "When interpreting any legislation, every court must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law."

89 1995 3 SA 391 (CC) para 35.

90 Para 35. The court also refers to comparable human rights instruments such as those drawn up by the United Nations Committee on Human Rights. Binding international instruments applicable to social protection and labour protection will thus form part of binding laws, and courts interpreting fundamental rights will be obliged to take these instruments in account. Various international conventions relevant to social protection measures have been ratified by South Africa, among them The United Nations Convention on the Rights of the Child (ratified in 1995) and recently one of the most important instruments, namely the United Nations International Covenant on Economic, Social and Cultural Rights (ICESR). This document was initially signed by President Nelson Mandela in 1994; however, South Africa only ratified the ICESR in 2015, making it the 164th state party to the ICESR. South Africa has ratified 27 ILO conventions of which 23 are currently in force. South Africa has ratified all eight of the fundamental conventions of the ILO (see ILO 2017 http:// www.ilo.org.dyn.normlex).

91 Van Niekerk *et al Law@work* 31. Furthermore Van Niekerk *et al* state the following: "First, the *Constitution of the Republic of South Africa*, 1996 expressly recognises international law as a foundation of democracy … Secondly debates on the social dimensions of globalisation have

The Constitution is founded on values such as human dignity, the achievement of equality and the advancement of human rights and freedoms.[92] These values are important to all workers and are vital in any quest for the promotion of decent work. Bob Hepple[93] also highlighted the link between equality and decent work when he stated: "Equality is at the heart of the notion of decent work."

Section 9(1) of the Constitution provides that everyone is equal before the law and has the right to equal protection and benefit of the law, while section 9(2) states that equality includes the full and equal enjoyment of all rights and freedoms. When considering the extension of protection to these vulnerable workers, both values and rights are relevant and it is of the utmost importance to acknowledge that the constitutional concept of equality has two dimensions, namely formal and substantive equality.[94] The notion of formal equality requires that all people must be treated the same, despite their circumstances. Substantive equality focuses on outcomes and this will require an analysis of the social and economic conditions of groups and individuals.[95] The transformative nature of the South African Constitution is also

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emphasised the importance of international labour standards not only as a benchmark for the evaluation of domestic legislation, but also as a basis for regulating global trade and establishing norms to guide actions of companies …" (Van Niekerk *et al Law@work* 23). S 1(b) of the *Labour Relations Act* 66 of 1995 (*LRA*) describes a purpose of the act as to give effect to the country's obligation as a member state of the ILO.

92 Section 1 of the *Constitution of the Republic of South Africa*, 1996. Other founding values include non-racialism and non-sexism, supremacy of the *Constitution* and the rule of law, and universal adult suffrage.

93 Hepple 2001 *ILR* 5.

94 The Constitutional Court has on a number of occasions confirmed the concept of substantive equality and given meaning to the concept; see *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) para 41; *Minister of Finance v Van Heerden* 2004 12 BLLR 1181 (CC) paras 23-35 and para 31; *Brink v Kitshoff* 1996 4 SA 197 (CC) paras 33, 41-42, 44, where O'Regan J highlights the special place of equality in our Constitution, as well the need to create a new order, a democratic sovereign constitutional state in which there is equality between men and women and people of all races; *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC) para 16; *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 7 BCLR 687 (CC) paras 34, 35; *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 paras 28-33.

95 Van Niekerk *et al Law@work* 121-123.

illustrated by its commitment to equality.[96] According to Le Roux[97] transformative constitutionalism means social change through law, thus fundamental social change can be achieved through legal reforms, supported by proper mobilisation and enforced through, *inter alia*, litigation.

Section 23 of the *Constitution* provides the fundamental labour rights. Section 23(1) and (2) provide as follows:

> (1) Everyone has the right to fair labour practices.
>
> (2) Every worker has the right–
>
> (a) to form and join a trade union;
>
> (b) to participate in the activities and programmes of a trade union; and
>
> (c) to strike.

In *SA National Defence Union v Minister of Defence,*[98] O´Regan J with reference to the ILO and article 2 of one of the oldest ILO conventions, namely the Freedom of Association and Protection of the Right to Organise Convention (1948), concluded that "worker" should be interpreted to include members of the armed forces. Her interpretation of the right was generous and thereby provided workers (as opposed to "employees") with full protection of rights. This generous approach of a concept such as "worker" may provide

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96 See also *South African Police Service v Solidarity obo Barnard* 2014 6 SA 123 (CC) para 29:"At the point of transition, two decades ago, our society was divided and unequal among the adamant lines of race, gender and class. Beyond these plain strictures there were indeed other markers of exclusion and oppression, some of which our Constitution lists. So clearly it has a transformative nature … In so many words, it enjoins us to take active steps to achieve substantive equality, particularly for those disadvantaged by past unfair discrimination." See also *Minister of Finance v Van Heerden* (2004) 12 BLLR 1181 (CC): [23] "For good reason, the achievement of equality preoccupies our constitutional thinking. When our Constitution took root a decade ago our society was deeply divided, vastly unequal and uncaring of human worth. Many of these stark social and economic disparities will persist for a long time to come. In effect the commitment of the Preamble is to restore and protect the equal worth of everyone, to heal the divisions of the past and to establish a caring and socially just society ... [24] Our supreme law says more about equality than do comparable constitutions. Like other constitutions, it confers the right to equal protection and benefit of the law and the right to non-discrimination. But it also imposes a positive duty on all organs of state to protect and promote the achievement of equality – a duty which binds the judiciary too. [25] Of course, democratic values and fundamental human rights espoused by our Constitution are foundational. But just as crucial is the commitment to strive for a society based on social justice. In this way, our Constitution heralds not only equal protection of the law and non-discrimination but also the start of a credible and abiding process of reparation for past exclusion, dispossession, and indignity within the discipline of our constitutional framework … [31] The achievement of equality goes to the bedrock of our constitutional architecture … Thus the achievement of equality is not only a guaranteed and justifiable right in our Bill of Rights, but also a core and fundamental value; a standard that must inform all law and against which all law must be tested for constitutional consonance."

97 Le Roux "Advancing domestic workers' rights in a context of transformative constitutionalism" 39.

98 1999 20 ILJ 2265 (CC) para 25.

an important tool when extending labour protection to female workers in the informal economy.

The *Labour Relations Act* 66 of 1995 (hereafter the *LRA*) provides various labour rights to employees who are covered by the definition in section 213. In Chapter 2 of the LRA the right to freedom of association of both employees and employers is protected and in section 5 the protection is extended to persons seeking employment. Chapter 3 regulates collective bargaining, including organisational rights, collective agreements, bargaining councils and statutory councils. The right to strike is protected in Chapter 4 and protection against unfair dismissal and unfair labour practices is covered in Chapter 8.

The *Basic Conditions of Employment Act* 75 of 1997 (hereafter the *BCEA*) regulates hours of work; various types of leave, including maternity leave; severance pay; notice pay, and sectoral determinations.

The purpose of the *Employment Equity Act* 55 of 1998 (hereafter the *EEA*) is to achieve equity in the workplace by promoting equal opportunities and fair treatment by elimination of unfair discrimination and the implementation of affirmative action measures. The Act's scope extends to the same categories of workers as for the *LRA* and *BCEA*.

Other applicable legislation includes the *Unemployment Insurance Act* 63 of 2001, the *Occupational Health and Safety Act* 85 of 1993, *Mine Health and Safety Act* 29 of 1996, the *Compensation for Occupational Injuries and Diseases Act* 130 of 1993 (hereafter COIDA)[99] and the *Skills Development Act* 97 of 1998.

The scope of coverage in the applicable legislative provisions is based on the traditional full-time paradigm of employment and narrow interpretations of definitions such as "employees" leave those excluded from coverage with very little or no (statutory) legal protection.[100] Legislative intervention is required to extend the scope of existing provisions and to design new tailor-made solutions. The appropriate level and reach of such solutions must be determined, and such determination forms part of this research.

Workers in South Africa should be able to achieve decent work through the enforcement of their fundamental rights. Although women in South Africa enjoy equal rights in terms

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99 See also the *Compensation for Occupational Injuries and Diseases Amendment Act* 61 of 1997.
100 Benjamin 2008 *ILJ* 1581.

of our laws, to achieve the fulfilment of these rights in practice, structural barriers and discriminatory social norms need to be addressed.[101]

Other fundamental rights such as the right to human dignity,[102] socio-economic rights,[103] property rights,[104] the right to administrative action,[105] access to courts,[106] the right of every citizen to choose their trade, occupation or profession freely[107] and the protection of ethnic, religious and linguistic minorities[108] may play a vital role in the achievement of social justice and the goal of decent work for all.[109] Social change can be achieved through the law and can be enforced through litigation. If we accept that the South African Constitution supports substantive equality[110] and our courts view our constitution as transformative,[111] then the fundamental values of freedom, human dignity, social justice and non-discrimination must be recognised when considering the protection of poor female workers in the informal economy.

UN Women highlights three important factors to consider when addressing the achievement of substantive equality for female workers, namely, resources,[112] respect[113]

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101 UN Women 2015 http://progress.unwomen.org/en/2015. A recent article stated that South Africa is a dangerous place to be poor, black and a woman. The article confirms that women in South Africa ought to enjoy the highest status globally; however, this has not translated into gender equality for all (Snodgrass 2015 http://theconversation.com/south-africa-a-dangerous-place-to-be-poor-black-and-a-woman-47287). The South African Gender Statistics Report of 2011, published in 2013, revealed that South African women are still seriously disadvantaged compared to men as they are less likely to read, often lack tertiary education and they experience a higher rate of unemployment (Stats SA 2013 http://www.statsa.gov.za/publications/report-03-10-052011).

102 Section 10 of the Constitution.

103 Sections 26 and 27 of the Constitution.

104 Section 25 of the Constitution.

105 Section 33 of the Constitution.

106 Section 34 of the Constitution.

107 Section 22 of the Constitution.

108 Section 31 of the Constitution.

109 See *South African Informal Traders Forum v City of Johannesburg* 2014 4 SA 371 (CC). Moseneke ACJ stated that the ability of informal traders to earn money and support themselves is an important component of the right to human dignity and without it these workers face humiliation and degradation (para 32).

110 *South African Police Service v Solidarity obo Barnard* (2014) *ILJ* 2981 (CC); *President of the Republic of South Africa v Hugo* 1997 4 SA 1, *Minister of Finance v Van Heerden* (2004) 12 BLLR 1181 (CC). See also *Brink v Kitshoff* 1996 4 SA 197 (CC); *National Coalition for Gay and Lesbian Equality v Minister of Justice* 1999 1 SA 6 (CC); *Bato Star Fishing (Pty) Ltd v Minister of Environmental Affairs* 2004 (7) BCL 687 (CC).

111 *S v Makwanyane* 1995 3 SA 391 (CC). See Langa 2006 *Stell LR* 3.

112 The notion of "resources" refers here to the redressing of socio-economic disadvantages.

113 Respect can only be achieved through measures addressing stereotyping, stigma and violence towards women.

and voice.[114] The law on its own cannot achieve decent work; however, inclusive labour laws and the extension of social protection measures can be seen as a precondition for the achievement of decent work for all.[115]

On International Women's Day in 2012, the ILO Director-General, Guy Ryder, stated the following:

> Promoting decent jobs for women is imperative, now and for the next generation … It is a matter of rights and what is right for women and for sustainable development.[116]

In the quest for decent work for all, a number of role players can be identified. The responsibility placed on unions in respect of the informal economy does not relieve the state from providing labour and social protection or the employer from providing work with conditions that will meet acceptable (inter-)national standards. Governments should strive to create an enabling environment for organisation and representation. They should also provide an enabling framework at national and local level to support the informal economy.[117] Though certain regulatory policies seek to balance competing interests, these policies may impact on the livelihoods of informal economy workers; for example, citizens have a right of access to pavements and this right competes with the interests of street vendors since the pavement is their workplace. Regulations need to be carefully chosen to accommodate these competing interests. Although all of these environmental criteria cannot be extensively canvassed in this thesis it is necessary to be aware of and alert to all relevant factors that ultimately impact on workers in the informal economy.

The South African Constitution has tasked local government with the promotion of economic and social development at local level, and municipalities interpreting their constitutional mandate have adopted different approaches with reference to the informal economy.[118] It must be realised that municipal regulations have an effect on the "workplace" of informal workers. Street-trading laws, for example, can be very restrictive and can destroy livelihoods of informal traders.

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114 The notion of "voice" refers to representation and participation. Voice should also include strengthening the voice of these workers in their dialogue with government and other role players. See UN WOMEN 2015 http://progress.unwomen.org/en/2015.

115 ILO *Decent work indicators: Concepts and definitions.*

116 ILO *Decent work indicators: Concepts and definitions.*

117 Fourie and Smit "Precarious work, gender and non-discrimination".

118 Section 152(1) of the Constitution lists the objects of local government, and a municipality must strive to achieve these objects within its financial and administrative capacity. S 152(1) of the Constitution also provides for the involvement of communities in matters of local government. See also Chapter 5 below.

The importance of the right to human dignity in providing protection to these workers should not be underestimated. In *South African Informal Traders Forum v City of Johannesburg*[119] the court stated that the ability to earn money and support oneself is an important component of the right to human dignity and that without it the traders face "humiliation and degradation".

Member based organisations (MBOs),[120] cooperatives,[121] NGOs and community-based organisations can provide links at both national and international levels with government institutions and can ensure political pressure in promoting the interests of workers.[122] These organisations, for example the South African Informal Traders Forum, can provide these workers with assistance when they need to engage with government departments to accommodate their specific needs.[123]

When considering the labour protection of these workers one must take into account that apart from labour laws other regulatory laws can impact on certain occupational groups of informal economy workers. However, providing for fundamental rights is not enough: government should engage with these organisations and provide innovative measures to accommodate their specific needs. (Governments should, for example, provide for simple, less expensive and speedy registration procedures of these organisations.) Existing unions can strive to provide and accommodate workers in the informal economy, but independent unions formed by these workers will concentrate on issues most relevant to those individuals. Good governance, which outlaws the practices of harassment, bribery and extortion by corrupt officials, is essential to enable informal economy workers to access

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119 2014 4 SA 371 (CC) para 31. This case dealt with the removal of informal traders by the City of Johannesburg without following the procedures set out in the *Business Act* 71 of 1991. See also Chapter 5 below.

120 Membership-based organisations are those in which members elect their leaders and which operate on democratic principles that hold their elected leaders accountable to the general membership.

121 The *Co-operatives Act* 14 of 2005 of South Africa recognises in the preamble the value and importance of co-operatives in the creation of employment and the eradication of poverty. S 1 of the Act defines a co-operative as an autonomous association of persons united voluntarily to meet their common economic and social needs and aspirations through a jointly owned and democratically controlled enterprise organised and operated on co-operative principles. According to s 1 of the Act these principles are internationally recognised principles of co-operation as typified by the principles adopted in the International Co-operative Alliance. See also the *Co-operatives Amendment Act* 6 of 2013

122 See Chapter 7 below.

123 In *South African Informal Traders Forum v City of Johannesburg* 2014 4 SA 371 (CC) 1210, informal traders were represented by the South African Informal Traders Forum. This illustrates the important role that private institutions can play in promoting and protecting the rights and interests of these workers.

resources, information, markets, public infrastructure, technology and other social protection measures.[124]

1.4 The international legal framework

Over the last century the ILO has played a very important role in developing labour standards and conventions.[125] New forms of work have been recognised by the ILO, and in its standard-setting it covers employees outside the traditional employment relationship.[126] The changes in the traditional concept of work have not escaped the attention of the ILO and since 1990 this topic has been receiving increasing attention at annual conferences. The ILO's initial stance that the informal economy would be absorbed into the formal economy has changed as there is a renewed interest in the informal economy worldwide and it is clear that the informal economy is here to stay.[127] The renewed interest can also be contributed to the fact that the extent of the informal economy is increasing in developing countries. Globally there is a recognition of the links between informality and growth, informality and poverty and informality and inequality.[128] Currently the informal economy forms a large part of the global workforce that contributes to the global economy but it does not enjoy sufficient protection in practice or in law.[129]

The ILO has acknowledged the increase in non-standard work and the need for labour and social protection of non-standard work in the following ways:

(a) drawing up conventions and recommendations pertaining to particular categories of non-standard workers, such as part-time workers and homeworkers;

(b) support for micro-enterprises in the informal economy;

(c) programmes like Strategies and Tools against Social Exclusion and Poverty (STEP) to promote the extension of social protection to informal workers;

(d) support for mutual health insurance schemes; and

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124 It must be noted that in 2013 South Africa has ratified two of the four ILO Conventions pertaining to governance, namely, the Labour Inspection Convention 81 (1947) and the Tripartite Convention 144 of 1976.

125 See Chapter 3 below.

126 See Chapter 3 below.

127 Chen *The informal economy: Definitions, theories and policies*. See also para 1.1 above.

128 Chen *The informal economy: Definitions, theories and policies.*

129 Chen *The informal economy: Definitions, theories and policies.*

(e) the continuance of work at its social security department, commissioning research and investigating the extension of social security protection to non-standard workers.

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). In terms of this declaration, member states are required to adopt at least the core conventions containing certain fundamental rights.[130] South Africa has ratified all eight of the core conventions.[131] The minimum standards reflected in these conventions also form part of domestic legislation in South Africa. When ILO standards are included in national legislation they become most effective in terms of enforcement. Internationally the trend is to extend coverage to include non-standard workers, but the number of countries that have ratified relevant conventions in this respect remains low.[132] Therefore the effectiveness of these conventions in protecting the position of non-standard workers is limited.

South Africa also ratified the Domestic Workers Convention 189 (2011).[133] Although this convention is classified as a technical convention, it contains very important principles applicable to domestic workers.[134] Establishing a framework or benchmark and promoting decent work can have an impact on the lives of millions of workers. This convention aims

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130 The Declaration commits member states to respect and promote the principles concerning the core rights contained in the core conventions, even if they have not ratified core conventions. The fundamental rights highlighted in these conventions are as follows: freedom of association and the effective recognition of the right to collective bargaining; the elimination of all forms of forced or compulsory labour; the effective abolition of child labour; and the elimination of discrimination in respect of employment and occupation.

131 See para 3.3.2 below.

132 See Chapetr 3 below.

133 Though South African domestic workers enjoy a degree of labour and social protection, they are still excluded from *COIDA* and compliance with sectoral determinations setting minimum wages remains low. Organising these workers remains problematic due to the nature of their workplace. As a result of the protection they have both in national legislation and internationally they do present an interesting in-between group of informal economy workers from which lessons may be learnt. They could also be used as an example of initiating transition from the informal economy to the formal economy by identifying a specific group of vulnerable workers. The transition of workers in the informal economy to the formal economy may seem an immense process to many developing countries; however, by identifying a specific target group, countries can start the process. See also ILO Recommendation 2014 of 2015 and para 3.3.6.8 below.

134 An ILO report in 2013 (ILO *Domestic workers across the world*) estimated that there is a minimum of 53 million domestic workers worldwide; however, accurate data on domestic workers is not readily available and the real number may be higher. These statistics illustrate the significant extent of domestic work worldwide and the importance of setting international standards for these workers as promoted by the ILO Domestic Workers Convention 189 (2011). See para 3.3.6.4 below.

at improving the living and working conditions of domestic workers and advancing decent work for these workers.

The international awareness in respect of the informal economy can also be seen in the adoption by the ILO Recommendation Concerning the Transition from the Informal to the Formal Economy 204 in June 2015. This Recommendation provides important strategies to consider when facilitating the transition from the informal economy to the formal economy. In this thesis, I will evaluate the validity of this transitional approach and propose more nuanced approaches.

The ILO has adopted the concept of "decent work", which has set four objectives for all, 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. As it is clear that vulnerable groups (including women, children and migrants) are often found working in the informal economy, it seems that reducing decent work deficits in the informal economy will definitely improve the conditions of these workers. The ILO is committed to make decent work a reality for all and this is clearly illustrated by recent adoption of the ILO Convention on Domestic Workers (189) and the supporting Recommendation.

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.[135] However, governments can start by removing all obstacles to the free organisation of these workers. The participation of these workers in the planning and implementation of programmes to extend protection is vital for the success of such programmes. 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 focusing on ratification related to the protection of non-standard workers. The international standards set by the ILO could serve as a roadmap to direct policy and legislative responses. The ILO *Employment Relations Recommendation* highlights important principles in terms of international standard setting, but to be effective member states must include relevant principles in national

[135] See Chapter 3 below.

legislation, policies and codes. It is also important that such implementation must occur in consultation with representative organisations.

Other international,[136] regional and national instruments (directly or indirectly) regulating labour and social protection measures in the South African Development Community (SADC)[137] will also be considered in this study for the purposes of extending protection to these vulnerable female workers.

1.5 Voice and representation

Workers in the informal economy have the right to protect themselves through collective action. Reaching the 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. Retaining their credibility as the voice and true representation of the working class should compel unions to endeavour to organise the informal economy. [138]

Challenges that unions face include political and conceptual challenges, lack of resources, experience and perhaps the political will to organise informal economy workers.[139] Often the exclusion of these workers by labour legislation serves as motivation for exclusion by trade unions as they believe that these workers fall outside the trade union scope. The lack of a traditional employment relationship, unidentifiable relationships or small workplaces such as individual households, add to the reluctance of unions to organise these workers. The workplaces of these workers, in particular, often poses difficulties as they are often widespread, remote (agricultural workers are often found in scattered workplaces) and mobile (such as the workplace of street hawkers/vendors and waste pickers), thereby hampering recruitment and contact. [140] These challenges require innovative solutions, such as new organising strategies, tailor-made benefits, new structures, innovative communication tools and effective collective methods. Where the traditional concept of a trade union[141] might prove ineffective in respect of organising the

136 For instance international instruments adopted by the United Nations (UN). See Chapter 3.
137 See para 3.4.2 below and Chapter 6.
138 See Chapter 7.
139 See Chapter 7.
140 Bonner and Spooner 2011 *IPSJ* 89.
141 In South Africa the LRA, in s 213, defines a trade union as an association of employees whose principal purpose is to regulate relations between employees and employers, including any employers' organisations. An employee is defined in s 213 as: (a) any person, excluding an independent contractor, who works for another person or for the State and who receives or is entitled to receive, any remuneration; and (b) any other person who in any manner assists in carrying on or conducting the business of the employer. Definitions based on the traditional full-

informal economy, alternatives such as "social movement" unionism might provide solutions.[142]

The notion of solidarity and collective action can in certain instances be considered to be a foreign concept to informal economy workers, as the very nature of the work is competitive; therefore it is of paramount importance to find common goals and objectives. The different categories of informal economy workers and their demands will also determine the manner in which they organise themselves. For example, wage workers through organisation would want to improve terms and conditions of employment whereas the self-employed seek to better their place in the market.[143]

Workers' organisations for informal economy workers do exist, both at national and international levels. These organisations include member-based organisations (MBOs), cooperatives, NGOs and community-based organisations. Linking these networks at both the national and international level 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 the working conditions of their members. Through group membership, members can obtain social benefits, solidarity and support. It is important that local governments recognise and support these organisations.

Trade unions and workers' organisations can play an important role in the protection of these workers through existing legislative provisions and the design of innovative and tailor-made solutions. Bargaining partners must be identified and a relationship must be established with a long-term vision. This issue of voice and representation must be addressed since social insurance schemes and labour regulation that cover the needs of informal workers will only then become feasible.

1.6 Research question

The research question that needs investigation is: How can labour law and social protection measures provide vulnerable women workers in the informal economy with the appropriate protection to ultimately give effect to decent work? The main inquiry of this thesis, therefore, is to explore the issue of extending labour and social protection to these

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time employment paradigm will exclude many workers in in the informal sector due to the lack of a traditional employment relationship.

142 Du Toit 2011 *ILJ* 16. Du Toit describes social unionism as a combination of organisation in the workplace or around workplace issues with organisation around broader issues relevant to workers' conditions of employment. This concept represents a holistic approach that is vital when considering the protection of these workers.

143 Mather 2012 http://wiego.org/.../wiego-research-project-informal-workers%20.

workers through the extension of existing labour and social security rights; including, where necessary, the design and implementation of innovative and tailor-made solutions.

1.6.1 Objectives of the study

This study proposes to:

(1) identify and analyse the scope of existing labour laws and selected social protection provisions, including gaps in coverage or effectiveness, and to provide the rationale for and ways to, where appropriate, extend existing legislative provisions to provide protection to vulnerable female workers in the informal economy;

(2) investigate and analyse successful extension of labour and social security measures and/or rights (as well as innovative interventions and tailor-made provisions) in foreign jurisdictions to successfully extend and provide labour and social protection to female workers in the informal economy;

(3) critically examine and analyse the different role players (public and private) and then determine the role they should play in establishing an enabling framework to extend labour and social protection to these workers;

(4) critically analyse and investigate the role of trade unions and workers' organisations (as important role players) in representing these workers and to seek alternatives in representation of these workers to provide innovative solutions and the role of trade unions in the extension of protection or the design of new solutions;

(5) critically evaluate the role of the ILO and the value of its decent work strategy to promote the interests of these workers;

(6) critically analyse applicable regional instruments in the SADC and the African Union applicable to these women workers; and

(7) reach a conclusion and make recommendations on the amendment and/or extension of existing legislative measures and to suggest tailor-made solutions in the extension of protection to informal economy workers in order to better realise labour and social security rights of said workers.

1.6.2 Assumptions and hypotheses

1.6.2.1 Assumptions

In this study the following assumptions are made in respect of workers in informal employment:

(a) Full-time employment as we know it has changed universally; non-standard work is increasing and new forms of work have emerged in recent times. Labour laws drafted to protect workers in formal employment are inadequate to protect the increasing number of vulnerable workers in the informal economy

(b) It is critical that the place where one works should not ultimately determine whether one enjoys labour, social or other protection. Neither should the type of work performed be the deciding factor, but rather the relationship in which one functions. The nature of such relationship (being economically dependent) should weigh heavily in a determination of one's status and rights.

(c) The assumption is that workers in the informal economy in South Africa and other developing and middle-income countries do not enjoy sufficient protection in terms of labour law and social protection measures and that trade unions are reluctant to represent these workers due to various challenges posed by organising these workers.

(d) A further assumption is that though the ILO extends coverage to non-standard workers through specific conventions for the general acceptance, promotion and extension of protection to these workers, ratification of these conventions remains low and mostly targeted on non-standard work in the formal economy.

(e) The current conceptual understanding of the informal economy, by its very nature, implies that there is no, or inadequate, regulation and protection in existing national legal frameworks for these workers.

(f) The assumption is that lessons can be learnt from selected foreign jurisdictions by analysing examples of best practices illustrating the successful extension of existing rights and the provision of tailor-made solutions. The assumption is further that in respect of items (c) and (e) above, any progress made in the various jurisdictions has not been comprehensive, but rather on a piece-meal basis, within categories of workers in the informal economy. Therefore lessons can be learnt from selected best practices within the chosen jurisdictions.

1.6.2.2 Hypotheses

In this study the following hypotheses will be examined and tested:

(a) The first hypothesis is that through the extension of current legislative provisions and implementation of innovative measures through the provision

of tailor-made solutions these workers can gain the required protection they deserve.

(b) The second hypothesis of this thesis is that in order to assist workers to act collectively to meet the challenges set out above, innovative solutions are required, such as new organising strategies, tailor-made benefits, new structures, innovative communication tools and effective collective methods.

(c) The final hypothesis of this thesis is that public and private institutions must partake in the process of extending labour and social security rights through existing interventions or through the design of novel interventions, *inter alia* by creating an enabling environment (a holistic approach that includes a transdisciplinary approach).

1.6.3 Framework of the study

The research reported on in this study has been presented in eight chapters for purposes of addressing the research question posed in the study. An overview of chapters as well as a short summary of each is provided here.

Chapter 1 supplies a general introduction to the study.

Chapter 2 analyses the function and purpose of labour law with reference to vulnerable women workers in the informal economy.

Chapter 3 analyses the international and regional framework regulating labour and social protection for women workers in the informal economy.

Chapter 4 focuses on the South African regulatory framework. In particular, the labour and social protection legislative framework with specific reference to domestic workers.

Chapter 5 analyses the position of informal traders and waste pickers with reference to by-laws and other applicable legislation outside the scope of labour legislation.

Chapter 6 adopts a comparative focus where the foreign jurisdictions of Brazil and India are examined in terms of the labour and social protection for categories of women workers in the informal economy to benchmark best practices.

Chapter 7 focuses on the importance of voice and representation for women workers in achieving labour and social protection.

Chapter 8 offers concluding remarks and recommendations aimed at innovative solutions to extend labour and social protection to women workers in the informal economy.

1.6.4 Research methodology

The study has been based on an analytical literature study exploring and analysing legislation, case law, academic articles and other journals, various text books, electronic sources, international legal instruments, recommendations and reports. The study has adopted a critical approach and compares foreign practices, studies existing labour and social protection provisions elsewhere and analyses the shortcomings of current labour and social security legislation. The study has regard to the successful extension of protection to categories of informal economy workers in various other developing countries and middle-income countries, analysing shortcomings and and best practices. Foreign countries have been chosen and referred to, having had regard to the number of workers in the informal economy, comparability in local conditions, and the proven successful extension of labour and social protection through existing legislative provisions and/or innovative tailor-made solutions in such countries and economies.[144] In this case studies from two other jurisdictions, namely India and Brazil, will be considered to identify and consider measures that improved the position of these specific categories of women workers through the extension of existing legislative measures and innovative and tailor-made measures of protection. In India and Brazil, extension of existing measures as well as innovative and tailor-made solutions are evident and these will be analysed in order to evaluate whether they can offer guidance to South Africa. These countries were chosen as, on the one hand, they have introduced pronounced and unprecedented measures to extend both labour and social protection measures to these informal economy workers and, on the other hand, innovative policy developments are evident which provide these workers with protection. These countries were also chosen with reference to the significant number of workers in the informal economy and local conditions as compared to South Africa, as will be illustrated in the discussions below. South Africa, India and Brazil are currently categorised as emerging or middle-income countries.[145] In this study,

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144 See Chapter 6.

145 ILO *World employment and social outlook: Trends 2017* 34. According to the World Bank, middle-income countries are diverse with reference to income levels, size and population. Five billion of the seven billion people in the world live in these countries and 73% of the world's poor. Countries are categorised according to per capita gross income and in this category the income in 2011 ranged between USD 1026 and USD 12 475 (The World Bank date unknown http://www.worldbank.org/en/country/mic).

both foreign law and international law were considered in line with section 39(1)(b) and (c) and section 233 of the Constitution.

This approach was chosen due to the assumption of incomprehensive and inadequate regulation of the informal economy in countries worldwide. The diverse nature of work in the informal economy poses many challenges for generic traditional regulation,[146] and in most instances requires distinctive solutions. Therefore this thesis adopts a comparative study within the selected jurisdictions to ultimately make recommendations for innovative and tailor-made solutions in South Africa.

[146] For example, labour and social regulations were designed to provide for workers in the traditional formal paradigm.

CHAPTER 2
THE FUNCTION AND FUTURE OF LABOUR LAW

2.1 Introduction

At present labour law scholars are debating the future and function of labour law since labour law is considered to be in a crisis.[1] Hyde[2] aptly describes the labour law of the past as follows:

> The elders tell us of a golden age when labour law dwelled in a mighty mansion in every nation's capital. Each mansion naturally reflected the styles and building materials of its country. But had you gone down to the basement in those years, you would have seen that they all rested on very similar foundations, with the same pillars sunk deep into the ground.

Hepple refers to Gramsci's work *Prison notes*[3] when he describes the current dilemma that labour law faces as an interlude "where the old is dying and the new cannot be born".

Labour law is distinctive from other branches of the law. Arthurs[4] describes it as follows:

> … labour law is different from other legal fields because it is so often promulgated through non-legal (ie political, social and cultural) processes, expressed in the form of "non-legal" (ie non-state) norms and administered through "non-legal" (ie non-crucial) forums operating with non-legal processes (ie those not normally employed by conventional courts).[5]

The above description also highlights the interdisciplinary nature of labour law. The ILO's Declaration of Philadelphia (1949) confirmed Hugo Sinzheimer's principle that labour is not a commodity. This is a normative claim and also means that the labour market is unique and cannot be subjected to the same regulations as other markets.[6]

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1 Davidov and Langille "Understanding labour law" 1.

2 Hyde "The idea of labour law: A parable" 88.

3 Quoted in Hepple 1996 *CLLPJ* 627.

4 Arthurs "Labour law after Labour" 16.

5 Certainly this is true of labour law in South Africa in respect of the different role players in the enactment of labour legislation. After the fall of the apartheid regime, post-apartheid statutes were considered by the National Economic Development and Labour Council (NEDLAC), a tripartite platform for social dialogue. It must be noted that the consideration by NEDLAC of all labour legislation relating to labour market policy and socio-economic policy was authorised by the *National Development and Labour Council Act* 35 of 1994 that also heralded the establishment of NEDLAC. See also Benjamin and Theron 2009 *ActJur* 207-208.

6 See principle I of the ILO Declaration of Philadelphia; Weiss "Re-inventing labour law" 44. Sinzheimer recognised workers as human beings – "die Arbeit ist also der Mensch selbst" (quoted in Dukes "Hugo Sinzheimer and the constitutional function of labour law" 59). See also Langille "Labour law's theory of justice" 106; Dukes *The labour constitution* 12-14.

Labour law is facing fundamental challenges as the world of work is constantly changing. According to the ILO *World Employment Social Outlook* for 2017 there are at present 1,4 billion people, globally who are in vulnerable forms of employment.[7] In developing countries nearly four out of five workers are in vulnerable forms of employment.[8] According to the ILO report, vulnerable forms of employment are invariably higher for women across Asia, Africa, the Pacific and the Arab States.[9]

In 2010 Benjamin[10] also reported that since the enactment of the South African *Labour Relations Act* 66 of 1995 (*LRA*) the labour market has changed immensely:

> Work has become increasingly diverse with an increasing proportion of work being performed by workers in non-standard employment. This process of informalisation has resulted in increasing numbers of workers not being protected, or being inadequately protected by labour law.

Theron[11] refers to the duality of the process of informalisation as processes from above and below. According to him, informalisation from above refers to externalisation of employment and that results in categories of workers without labour and social protection. If we consider the process from below, this refers to those workers without adequate labour and social protection that display various degrees of vulnerability[12] and precariousness.[13] Informalisation from below thus refers to various categories of vulnerable informal economy workers, such as domestic workers, home workers, street traders and waste pickers across the world.[14]

External challenges to the discipline include criticism for "impeding efficiency, flexibility and development", the failure to cover vulnerable workers in the informal economy and a preference for employees in a traditional employment relationship. Internal challenges include questions about the discipline's conceptual coherency and whether it is at all

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7 Vulnerable employment is defined as those forms of employment that are subject to high levels of precariousness and without adequate access to contributory social security schemes (ILO *World employment and social outlook: Trends 2017* 2).

8 ILO *World employment and social outlook: Trends 2017* 2.

9 ILO *World employment and social outlook: Trends 2017* 2.

10 Benjamin 2010 *ILJ* 845.

11 Theron 2010 *AfrSQ* 87.

12 Fudge (2005 *CanLeLJ* 159) states that vulnerability is closely linked to precariousness and highlights the dependent nature of the employment relationship. In respect of vulnerable women in the informal economy it is important to note that they are also often vulnerable members of society and lack access to resources, such as education and adequate social protection measures.

13 Routh and Borghi "The idea of form, informality and aspirations of workers" 9. Fudge (2005 *CanLELJ* 159) refers to the Webster dictionary for a definition of the word "precarious" and describes it as follows: "precarious means depending upon the will of another, dependent on chance, circumstances or uncertain development, or characterized by lack of security or stability that threatens with danger".

14 Routh and Borghi "The idea of form, informality and aspirations of workers" 9.

relevant to the new "empirical realities of the world of work".[15] Labour law is in disrepute and a contributing factor is its inability to extend coverage to the large number of workers in the informal economy.[16]

The traditional focus of labour law, where protective labour legislation was confined to the traditional employment relationship is no longer valid or sustainable. A need exists to extend labour and social protection to those who fall outside the traditional ambit of protection.[17] Initially, during the beginning of the industrial revolution, labour law aimed to protect the precarious workers against physical and moral abuse; thereafter the provisions of safe working conditions became a focal point, over time decent remuneration became an important focus to meet the needs of workers and this shifted to collective issues.[18]

In India, 93% of the workforce remains in the informal economy and reliance on the traditional employment contract in respect of these workers will not provide them with adequate labour and social protection.[19] The informal economy is here to stay and is becoming an increasing reality.

Sankaran[20] states the following in this regard:

> What is constitutive of informality is not the manner of entering into employment or the employment contract, but the *vulnerability* of the informal worker which is caused by the absence of work/employment security and social protection.

The bigger the informal economy becomes, the greater the need becomes for social and labour protection for these vulnerable workers and the more the inadequacy of existing labour and social protection measures are highlighted.

If we then consider the future of labour law in this changing world of work, it is clear that an intervention is necessary to extend protection to the large number of vulnerable

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15 Davidov and Langille "Understanding labour law" 1. The prevalence of women in the informal economy without adequate labour and social protection is one of the new empirical realities that characterise the world of work.

16 Davidov and Langille "Understanding labour law" 1.

17 Benjamin 2010 *ILJ* 845.

18 Arthurs "Labour law after labour" 14.

19 Sankaran "Informal employment and challenges for labour law" 224. According to the UN System of National Accounts, the informal economy in India is defined as consisting of all unincorporated private enterprises owned by individuals or households engaged in the sale and production of goods and services operated on a proprietary basis and with fewer workers than 10. The definition in the ILO *Recommendation* 204 of 2015 will include more workers and is wider in scope than the above definition that tends to focus on an enterprise approach. See para 3.3.6.8 below and para 1.1 above.

20 Sankaran "Informal employment and challenges for labour law" 224.

workers outside the scope of protective measures. This intervention must be innovative and tailor-made to successfully extend labour and social protection to informal economy workers.[21] When considering the extension of labour and social protection an integrated approach is preferable, whilst it is required, to take cognisance of the diverse nature of the informal economy and the fact that their needs may differ from country to country. An analysis will also require an investigation into their reasons for entering the informal economy and their specific protection deficits. For many workers in developing countries the informal economy is a way to escape poverty; however, it can also be that they are part of the informal economy as a result of their vulnerabilities.[22]

Informality is also seen as a result of an imbalance as there are more job seekers than available jobs.[23] Often those who are unable to find work in the formal sector find work in the informal economy.[24] Working in the informal economy is often a last resort to fight poverty; however, there are those who work in this economy by choice.[25] It is important to note that some fluidity exist between economies as many of these workers often fluctuate between the formal and the informal economy, and whilst working in the formal economy they will have more labour and social protection than when working in the informal economy, the lines between the two economies are often less distinct.

The challenges in extending protection to these workers thus require an inclusive concept of labour law that at the same time embraces the concept of an overarching informal economy, but recognises the different types of activities and diverse nature of protection required. The inadequacy of labour laws created to protect employees in the traditional full-time employment paradigm means that decent work for these workers remains a major challenge as governments and unions struggle to respond with innovative solutions whilst relying on laws that are unable to respond to the needs of these workers.[26]

Although an in-depth analysis of unpaid family work,[27] unpaid care and unpaid domestic work is beyond the scope of this study it is necessary to consider these forms of unpaid

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21 Fourie and Smit "Precarious work, gender and non discrimination" 3.
22 Routh and Borghi "The idea of form, informality and aspirations of workers"10.
23 Trebilcock "Using developmental approaches to address the challenges of the informal economy for labour law" 9.
24 Trebilcock "Using developmental approaches to address the challenges of the informal economy for labour law" 69.
25 Trebilcock "Using developmental approaches to address the challenges of the informal economy for labour law" 71.
26 Fourie and Smit "Precarious work, gender and non discrimination" 2-4.
27 Sankaran "Informal employment and challenges for labour law" 229. Sankaran describes this as "unpaid labour performed by a contributing family member in producing goods and services".

work briefly in relation to the purpose and function of labour law. Women bear the larger burden of unpaid care and unpaid domestic work.[28] These forms of unpaid work can be seen as informal activities, thereby categorising the work and recognising their value.[29] Classifying these types of socially valuable work under an umbrella concept can assist with policy considerations in creating an awareness of the value of these types of work for any society and promoting the interests of these workers, of which the majority are women.[30]

This chapter will consider the function and future of labour law in respect of the proliferating informal economy and specifically in respect of vulnerable women workers. It must be noted, however, that the changing nature of work in developed countries is often as a result of developments such as technology or other innovations, whereas in developing countries non-standard work develops in the informal economy mostly as a result of survival activities, unemployment and similar factors.[31] The purpose of this chapter is also to re-evaluate the purpose of labour law in the new world of work and to consider whether it is necessary to reinvent this discipline or if mere adaptation will suffice. In this chapter, I also considered examples from two other jurisdictions, namely the United States of America (hereafter US) and the United Kingdom (hereafter UK). The purpose of this is to distil some guidance from these jurisdictions that might be beneficial to women workers in the informal economy, even though the cases do not deal specifically with developing countries, or with women in the informal economy.[32] However, the legal principles with reference to the personal scope of labour law provide useful insights as cases used as examples considered new forms of work and to a certain extent represent a reinvention or reinterpretation of a conceptual labour law framework. The aim of this chapter is also to consider specific theories and perspectives with reference to the women workers in the informal economy by recognising their unique vulnerabilities. The purpose of this is to find innovative solutions to extend protection to these vulnerable workers. The chapter then critically considers Sen's capability approach and the development of this approach to find sustainable solutions. The concept of a sustainable approach is also

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Although their contribution is recognised as an economic activity, they are not remunerated for their services.

28 ILO *World employment and social outlook: Trends 2017* 2.

29 Routh and Borghi "The idea of form, informality and aspirations of workers"11-12.

30 Routh and Borghi "The idea of form, informality and aspirations of workers" 12. Routh and Borghi state the following: "The recognition of unpaid work is thus based on reciprocity between social contributors and society." Supiot argues that if an activity is obligatory, it should be classified as work (Supiot *Beyond employment* 81).

31 Goldin "Global conceptualizations and local constructions of the idea of labour law" 83.

32 See Chapter 6 for a comparative framework with reference to Brazil and India.

evaluated, with references to decent work, human rights, including human dignity within a social justice framework.

2.2 The idea of labour law – the old and the new

Davidov[33] argues that the real crisis that labour law faces lies in the discrepancies between goals and means. He states the following:

> The regulation that we use – the legal instruments and techniques – have lost their harmonization with the goal they are supposed to advance.[34]

He accurately describes this unsuitable alliance as a twofold problem: firstly, the increasing number of workers that do not enjoy labour and social protection,[35] for example informal economy workers, and that are often excluded because of conceptual challenges. Secondly, labour law does not reflect the changes in the world of work and is often based on the traditional employment relationship.[36] These disparities between goals and means can be ascribed to a number of reasons, including the erosion of the standard contract of employment, globalisation, changing cultural and social norms[37] and lack of support from governments for these challenges.[38] Is labour law then indeed experiencing an "authenticity crisis"?[39] This question specifically refers to the disparities that exist between the law in theory and the law in reality and this includes the enforcement or lack of enforcement of the law.[40] Informal economy workers are often covered by laws; however, the actual implementation and enforcement of the legislation is problematic, or the laws are based on the traditional employment relationship and do not accommodate the diverse nature of informal work.[41]

One of the aims of labour law is to address the inherent unequal relationship between the employer and employee, where the employer is in a position to determine the nature of

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33 Davidov *A purposive approach to labour law* 2.
34 Davidov *A purposive approach to labour law* 2.
35 Davidov *A purposive approach to labour law* 3.
36 Davidov *A purposive approach to labour law* 3.
37 Davidov (*A purposive approach to labour law* 2, 3) explains that this entails a more individualistic approach as opposed to a notion of solidarity that does not denounce the circumvention attempts by employers in respect of labour laws. However, in many instances it is the unchanged social and cultural norms in society that contribute to the precarious position of women in the informal economy and often the concept of solidarity is unfamiliar to these workers as a result of patriarchal societies.
38 Davidov *A purposive approach to labour law* 3.
39 Goldin "Global conceptualizations and local constructions of the idea of labour law" 81.
40 Goldin "Global conceptualizations and local constructions of the idea of labour law" 81.
41 In South Africa domestic work is regulated and covered by labour laws and most social security provisions, however the enforcement of these provisions remains problematic, due to a lack of labour inspectors, a lack of training these inspectors and the diverse nature of domestic work, as well as the intimate nature of the place of work. See discussion in Chapter 4.

the relationship and the employee is often unable to bargain on equal footing.[42] Thus the main purpose of labour law may be described as follows:

> The main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of the bargaining power which is inherent and must be inherent in the employment relationship.[43]

Protective legislative provisions strive to counterbalance this inherent unequal relationship, by providing employees with rights such as the right to freedom of association,[44] the promotion of collective bargaining[45] and protection against unfair dismissal and unfair labour practices.[46] Tension often exists as governments, such as the South African government, strive to provide decent work for all and economic growth in support of the UN Sustainable Development Goals, but then face claims that the labour market is not flexible and that protective labour legislation hampers the creation of jobs.[47] Therefore labour law is often part of a political, economic and social debate and this illustrates Arthur's[48] description of labour law as being different from other branches of the law and also its interdisciplinary nature.[49]

2.2.1 The libertarian and social justice perspective

Two broad perspectives exist in respect of the labour market and state intervention, namely, the libertarian perspective and the social justice perspective.[50] The libertarian perspective highlights the importance of the contract of employment and associated with that the individual bargaining component in the regulation of a labour market. The social justice perspective recognises that the contract of employment alone is inadequate to regulate the employment relationship and emphasises the importance of social justice.[51]

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42 Van Niekerk *et al Law@work* 8.

43 Davies and Freedland *Kahn-Freund's Labour and the law* 18.

44 In South Africa freedom of association is protected in s 18 of the Constitution and Chapter II of the *LRA*.

45 The purpose of the *LRA* in South Africa includes the promotion of collective bargaining and the provision of a framework for this. See s 1 and Chapter III.

46 Davies and Freedland *Kahn-Freund's Labour and the law* 18. See also Van Niekerk *et al Law@work* 4. S 23(1) of the Constitution and Chapter VIII of the South African *LRA* provide for protection against unfair dismissals and unfair labour practices.

47 Van Niekerk *et al Law@work* 3. It must be noted that the ILO is not just concerned with the creation of more jobs at all costs, but with the creation of decent jobs (ILO *Republic of South Africa Decent Work Country Programme 2010-2014*).

48 Arthurs "Labour law after Labour" 16.

49 Van Niekerk *et al Law@work* 7.

50 Van Niekerk *et al Law@work* 7.

51 Van Niekerk *et al Law@work* 7-10. The importance of social justice is highlighted in South African labour legislation. S 1 of the *LRA* describes the purpose of the Act as to advance social justice, and the Constitution provides for the values of human dignity, equality and freedom; values intrinsically linked to social justice (see s 1). The *EEA* strives towards social justice by promoting equality and prohibiting unfair discrimination (see s 2). The *BCEA* expressly mentions the

Supporters of the libertarian perspectives endeavour to promote freedom through the absence of interventions by governments.[52] Another argument that supports this perspective is that lower labour law standards ensure a competitive advantage in the global market.[53] Brassey also argues that in South Africa less stringent protective labour laws, specifically dismissal laws, will lead to higher employment levels and that the stringent dismissal laws are to the disadvantage of the unemployed.[54] He states the following in this respect:

> Whether they (the employed) are, as a whole, better off is debatable – job protection regimes come at a cost, and somebody must pay. No less debatable is the question whether the benefit outweighs the cost to the employers and consumers. But the one that is most keenly felt is beyond question: the cost of the regime is most keenly felt by those who can *least be expected* to bear it – the unemployed.[55]

In his argument he relies on John Rawls' theory of justice and this is a novel argument, as reliance on Rawls' theories is normally found in works by supporters of the function of labour law as a "a form of intervention in the labour market to uplift the lot of the poorer and less powerful members of our society".[56] Brassey's arguments support utilitarianism and therefore the inflexible protection against unfair dismissal is too high a price to pay for unemployment. However, Rawls' theory of justice does not in truth support this approach.[57] Brassey does propose deregulation of dismissal laws to combat unemployment. Supporters of deregulation of labour markets often rely on studies conducted by the World Bank, such as the *Doing Business Survey* and studies conducted

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advancement of social justice as a purpose of the Act, through the establishment of basic conditions of employment (see s 2).

52 Van Niekerk 2013 *ILJ* 28.

53 Van Niekerk *et al Law@work* 7-10.

54 Brassey 2012 *ILJ* 2. The nature of his argument is based on the following notion that high unemployment in South Africa has the consequence of competition of resources between the employed and the unemployed, whereby the unemployed offers their services at a reduced rate. Brassey argues that fundamental changes are required in South African labour law to combat unemployment, including the abolition of unfair dismissal laws, except for regulation against victimisation and discrimination. See Van Niekerk 2013 *ILJ* 28.

55 Brassey 2012 *ILJ* 13. Emphasis added.

56 Van Niekerk 2013 *ILJ* 28; see also Brassey 2012 *ILJ* 2. According to Rawls, the guiding idea is that the principles of justice for the structure of a society is based on agreement, and include the fact "that free and rational persons concerned to further their own interests would accept the initial position of equality as defining the terms of their association". According to Rawls "…[t]he principles of justice are chosen behind a veil of ignorance. This ensures that no one is advantaged or disadvantaged in the choice of principles by the outcome of natural chance or the contingency of social circumstances. Since all are similarly situated and no one is able to design principles to favour his particular condition, the principles of justice are the result of fair agreement or bargain" (Rawls *A theory of justice* 11). See also Collins "Theories of rights as justification for labour law" 137.

57 Brassey 2012 *ILJ* 13; Van Niekerk 2013 *ILJ* 33. According to Rawls (*A theory of justice* 25), a just and fair society consists of basic liberties and these are not dependent on the calculus of social interests where the good is specified independently of the right.

by the World Forum, where South Africa's labour laws are ranked high on the scale of being inflexible and rigid.[58] The methodology used by these studies is often criticised due to the limited number of participants.[59] Other studies have indicated that the high unemployment in South Africa can be ascribed to various factors, such as inadequate education and training, structural changes in the economy, the geographical distribution of people and the importance attached to skills rather than to labour-intensive activity.[60] Assumptions that poverty and unemployment are direct consequences of labour market regulation are not proven and it should be highlighted that the relationship between the regulation of employment protection and poverty and unemployment is complex in nature.[61] The recognition of constitutional labour rights that support the importance of social justice and South Africa's international obligations as a member of the ILO certainly hampers the deregulation of the labour market.[62] A characteristic of labour law is that it is based on the two components of collective self-regulation and protective legislation.[63]

Otto Kahn-Freund developed the *collective laissez-faire* theory of labour law; a theory influenced by sociology and based on a policy of non-interference and self-regulation by employers and trade unions where regulation by legislation was limited or secondary.[64] Kahn-Freund found a link between collective bargaining and labour law where the inequality in bargaining power is the first stage.[65] Weiss confirmed the above when he stated that the main goal has always been to compensate for the inequality in bargaining

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58 Van Niekerk 2013 *ILJ* 30. Regional studies conducted by the ILO, for example in Argentina, Mexico and Brazil, could not find a statistical link between rigid employment protection laws and high levels of unemployment. See Berg, Ernst and Auer *Meeting the employment challenge* 132; Benjamin and Theron 2009 *ActJur* 215.

59 Benjamin and Theron 2009 *ActJur* 204. They mention that the World Bank's *Doing Business Survey* based the results on interviews with only 57 business executives in South Africa and the methodologies used appear to be inadequate. The *Doing Business Survey* also ignores the capacity of labour market regulation to produce greater equity. When the World Bank study is compared to other reports such as the 2004 *ILO's Programme on Socio-Economic Security*, it is clear that the *Doing Business Survey* utilised limited input indicators, whereas the more comprehensive study of the ILO developed input indicators, process indicators and outcome indicators. In this instance input indicators highlight domestic and international protective regulations, process indicators refer to monitoring of the input indicators and outcome indicators measure the performance of the other two indicators.

60 Hepple 2012 *ActJur* 2.

61 Benjamin and Theron 2009 *ActJur* 215. The authors warn that labour legislation should not be considered in isolation but rather as a comprehensive policy instrument.

62 Van Niekerk *et al Law@work* 10.

63 Weiss "Re-inventing labour law" 44.

64 Davies and Freedland *Kahn-Freund's Labour and the law* 12; Davies *Perspectives on labour law* 3.

65 Davies *Perspectives on labour law* 18.The power to command is intrinsic to an employment relationship; however, this power can be curbed through regulation. Kahn-Freund stated that the primary function of labour law existed in the creation of enforcement mechanisms of rules that protected the worker and limited the worker's duty to obey and thus increased his freedom.

power.[66] At this stage Kahn-Freund also saw this as a goal for law to strive towards. He based this on three reasons: collective bargaining was sufficient to protect workers without legislative intervention; the classic imbalance between employer and employee was addressed through trade unions, and the flexibility of this paradigm allowed parties to decide their own terms.[67] Kahn-Freund's theory in respect of labour law is clearly visible in phrases such as the following:

> … to be a countervailing force to counteract the inequality of the bargaining power which is inherent and must be inherent to the employment relationship.[68]

However, by the late 1970s this paradigm needed reworking and was described by Langille as outdated.[69] Extensive statutory regulation of labour laws, both individual and collective, has also impacted on Kahn-Freund's theory. Across the world, as a result of globalisation and the decline of trade union membership, collective bargaining as a vehicle of protecting the rights of workers was no longer as effective and faced many challenges in adapting to the new forms of work.[70]

Currently the informal economy certainly poses additional challenges for Kahn-Freund's approach and Hepple [71] identified one of these challenges specifically relevant to vulnerable workers. He highlighted the fact that in a labour law paradigm dependent mainly on collective bargaining and organisation, vulnerable workers are often excluded and marginalised and remain reliant on those who can organise as well as on the welfare state.[72] The traditional concepts associated with organising workers, such as restricted definitions of trade unions and cumbersome registration processes, also pose challenges in organising vulnerable workers. The increase of civil society organisations and their influence, specifically for women in the informal economy, including feminist movements,

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66 Weiss "Reinventing labour law" 44.

67 Quoted in Davies *Perspectives on labour law* 4.

68 Quoted in Davies and Freedland *Kahn-Freund's Labour and the Law* 18.

69 Langille "Labour law's theory of justice" 105.

70 Du Toit 2007 *ILJ* 1408. Du Toit states the following: "Large-scale, mass production assembly-line techniques employing large numbers of workers under relatively uniform conditions, were the historical basis of trade unions and collective bargaining. A union's bargaining power depended on its ability to control a labour market by recruiting a significant number of its participants as members."

71 Hepple 1995 *ILJ* 303.

72 Hepple 1995 *ILJ* 303. Hepple also highlighted the importance of minimum floor rights for vulnerable workers outside the traditional employment relationship.

certainly also marks a change in the character and nature of the original mobilisation of workers through trade union activities.[73]

A new legal framework is required that must include new forms of worker organisations, new platforms for "collective interaction" and new forms of social dialogue.[74] Demands for a new legal framework must also include calls for a platform for the development of collective bargaining in line with the evolving nature of work and the protection of the collective bargaining process as it supports and compliments statutory regulation, provides for tailor-made regulation and is still a "social imperative".[75]

2.2.2 Perspectives and theories on the informal economy

Currently the informal economy is the focus of a number of studies by scholars across various disciplines, including labour law, economics, sociology and various gender studies.[76] This interest can be ascribed to a number of factors, including: the growth in the informal economy; the common denominator of these workers, namely the fact that they lack labour and social protection; the linkages between the formal and informal economy, and the realisation that the informal economy is here to stay and not just a temporary phenomenon.[77] In addition to this, the fact that more women than men can be found in vulnerable employment has created an awareness in respect of their precarious position and an interest to reduce their poverty level and to promote and increase gender equality and decent work.[78]

Different perspectives on the informal economy exist. Four main theories have been developed, which can be loosely named the dualist school, the structuralist school, the legalist school and the voluntarist school.[79] The first school, namely the dualist school, views the informal economy as a form of marginal activities, removed from the formal economy and which includes survival activities for the poor, mostly the self-employed.[80] In many developing countries, work in the informal economy is a way to rise above extreme poverty; however, it is also possible that certain workers are part of the informal

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73 Hepple "Factors influencing the making and transformation of labour law in Europe" 40. Chapter 7 will consider organisation and mobilisation of vulnerable workers in the informal economy through alternative measures such as NGOs and civil society activities.

74 Du Toit 2007 *ILJ* 1417.

75 Du Toit 2007 *ILJ* 1409. A legal framework that allows for the development of collective bargaining processes allows the law to play an enabling role.

76 Chen *The informal economy: Definitions, theories and policies* 1.

77 Chen *The informal economy: Definitions, theories and policies* 3.

78 Chen *The informal economy: Definitions, theories and policies* 3. See also para 3.3.6 below.

79 Chen *The informal economy: Definitions, theories and policies* 4.

80 Chen *The informal economy: Definitions, theories and policies* 4.

economy by choice. Currently when we consider the informal economy we have to consider the links with the formal economy and the fact that workers often move between the two economies. The dualist school of thought focuses on the self-employed including the poor and unemployed.[81] Their idealistic view that the informal economy, with the necessary growth rate of the economy, will eventually be absorbed by the formal economy is no longer sound.

According to the structuralist approach, the informal economy is inferior to the formal economy and this refers to the informalisation of employment to increase competiveness through the reduction of labour costs.[82] In developing countries the informal economy is often the norm as opposed to a formal economy, and the existence of the informal economy is not just the result of informalisation of employment relations in order to be more competitive. The legalist school argues that those in the informal economy operate as such to avoid formal rigid regulation by states, such as expensive and cumbersome registration and other procedural and operating costs.[83] This approach realises that informal organisation requires simplified regulatory procedures. Opposed to this school is the voluntarist approach that focuses on those in the informal economy that by choice and deliberately operate in the informal economy, not as a result of overregulation, but to avoid regulation, costs and taxes.[84] This approach supports the notion that these informal organisations must be incorporated under the regulatory framework of the formal economy. This approach does not provide for an innovative and tailor-made regulatory framework to accommodate the heterogeneous nature of the informal economy. In chapter 5, I will argue that governments should consider different regulatory frameworks for the various categories of informal work according to their diverse needs. Schools also exist that view the informal economy as including illegal activities; however, an analysis of this approach is beyond the scope of this study and does not provide a true reflection of the informal economy in developing countries.

Although various perspectives on the informal economy exist, the informal economy is certainly more heterogeneous and more intricate than what is reflected in any one of the schools of thought discussed in this section.[85]

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81 Smit and Fourie 2009 *TSAR* 517.

82 Chen *The informal economy: Definitions, theories and policies* 4. See also Smit and Fourie 2009 *TSAR* 517.

83 Chen *The informal economy: Definitions, theories and policies* 5.

84 Chen *The informal economy: Definitions, theories and policies* 5.

85 Chen *The informal economy: Definitions, theories and policies* 6.

2.2.3 Women workers in the informal economy and a capabilities approach

If we consider the debate and crisis that surrounds labour law as well as the vast number of workers in the informal economy that are without labour and social protection, it might be worthwhile to consider other approaches in search for a better solution and a better understanding of the function of labour law. Among labour lawyers support can be found for Sen's approach based on a concept of capabilities.[86] Fudge[87] highlights both the benefits and the shortcomings of this approach when he states the following:

> The benefit of the capabilities approach is that it rests upon a positive conception of freedom, it is committed to ethical individualism, it is pluralistic, it is context-specific, and it emphasizes agency. However Sen emphasizes individual responsibility and he employs a choice-centred view of responsibility. He also concentrates too much on adaptive preferences and does not devote enough time to social relations of exploitation. Moreover justice cannot be defined simply by the satisfaction of individual preferences; it is also a matter of obligation, as the example of care work makes so clear.

According to Sen,[88] human freedom depends on social and economic arrangements such as access to education, health and resources, and the ability to participate in public discussions through public forums. Unrelenting gender roles, rigid cultural norms and stereotyping also impact on the freedom of these women.[89] These workers face many challenges such as difficulties in accessing credit, non-payment of wages or low and irregular wages, unsafe working conditions, job insecurity, a lack of social benefits, trade barriers, and lack of an enabling environment without supporting policies and programmes.[90] Social dialogue is important for these workers and this includes the ability to engage with public authorities to improve their labour and social protection.[91] However, due to gender inequalities and patriarchal societies their ability to engage with authorities is often limited.

Sen states that development can be seen as a process of expanding real freedoms, however for women in the informal economy this will first require the elimination of

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86 Amartya Sen was also the winner of the Nobel Prize for economics and Longworth reported as follows in the Chicago Tribune: "Unlike most Nobel Prize-winning economists, Sen has focused on the well-being of those at the bottom of society, not the efficiency of those at the top" (Longworth 1999 http://articles.chicagotribune.com/1999-03-28/news/9903280117_1_ inequality-economy-amartya-sen).

87 Fudge "Labour as a 'fictive commodity'" 129.

88 Sen *Development as freedom* 3.

89 ILO *World employment and social outlook: Trends 2017* 2.

90 Fourie and Smit "Precarious work, gender and non discrimination" 2.

91 See Chapter 7 with reference to informal traders and waste pickers as own-account workers and their various bargaining partners.

"unfreedom".[92] According to Sen's theories, apart from low income, poverty can also be measured in terms of capabilities deprivation and this is specifically applicable to women in the informal economy.[93] Capability failure is a consequence of poverty and a lack of resources in the instance of these women, and it is suggested that with reference to them, Sen's approach then means that humans are the end of development and not the means.[94] If we consider the reasons for this deprivation or these failures it will enable us to analyse and understand their vulnerabilities to provide adequate targeted protection. Their vulnerabilities are increased as they often suffer from multiple grounds of discrimination and are therefore most in need of protection.

The diverse nature of work performed in the informal economy as well as the different social contexts will have an impact on the developmental outcomes and when considering tailor-made approaches, it will require an analysis of these various characteristics, as well as the social context, that will also include an analysis of existing cultural and social limitations.[95] Women workers in the informal economy face many challenges in respect of the development of capabilities both in their market relationships in the workplace and as women categorised by caste, ethnicity, race, class, and to specific societal and cultural norms that contribute to the marginalisation of these women.[96] The development of capabilities in respect of these women will require them to have access to resources, as well as a voice (representation), both in their communities and in the market place. The development of their capabilities can promote substantive equality of these workers.[97] A successful sustainable approach will mean that through various developmental interventions and empowerment programmes they will acquire the ability to influence the wider policy.[98]

Another important factor to consider when evaluating policies that have as an objective the reduction of poverty of women workers in the informal economy, is the promotion of equality through these policies as well as a focus on gender equality and social values.

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92 Sen *Development as freedom* 3.

93 Sen *Development as freedom* 88. Women in the informal economy do not have adequate social protection including lack of access to health care and maternity benefits. Their economic poverty often includes lack of basic services such as access to clean water and adequate sanitation facilities.

94 Hill *Worker identity, agency and economic development* 35.

95 Hill *Worker identity, agency and economic development* 35.

96 See Chen *The informal economy: Definitions, theories and policies*; Fourie and Smit "Precarious work, gender and non discrimination.

97 See also Fourie and Smit "Precarious work, gender and non-discrimination" 2.

98 See also Fourie and Smit "Precarious work, gender and non-discrimination" 2.

These policies should also aim to value the work of women.[99] Sen also recognises that the contribution of unpaid work, either domestic or care work, is often invisible, and that paid work outside the home is more valued in societies.[100] Women in the informal economy need a strong voice to improve their lives. Democracy can play an important role in this regard as it allows for public discussions and debates through various forums.[101] Women can through their voice improve their lives and their "well-being" and be "active agents of change".[102] If we consider the well-being of women in the informal economy, we must consider factors such as decent work, including adequate social protection measures. If we ensure the well-being of these women both in the home and at the workplace, it will mean that they are able to live a life with human dignity. However, without access to resources and to, for example, adequate health and maternity care, their well-being is at risk.[103]

Sen clearly supports an integrated approach to ensure better lives for women. He highlights the importance of equality and social values in policies and recognises that so-called "deprivations" have an impact on the lives of these vulnerable women. The position of women in the informal economy is precarious; they are disadvantaged due to market relationships within a specific sector and they are often categorised with reference to race, class, ethnicity or caste and specifically as women due to gender norms in their societies.[104] Thus gender inequalities within the informal economy often also intersect with race and class divides.[105] These inequalities also stem from the various forms of deprivation. An intersectional approach to analyse these multiple dimensions of inequality may explain the contributory role of these oppressive sources to the coinciding discriminatory grounds prevalent among these women workers.[106] An approach that

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99 Measures that value the work of women should be the promotion of a basic income and provision of a safe workplace; this includes a workplace that prohibits harassment in any form.

100 Sen *Development as freedom* 194.

101 Sen *Development as freedom* 159. Democracy allows for political freedom and the protection of civil rights.

102 Sen *Development as freedom* 189. Sen highlights the importance of women's agency in the quest to improve their lives and ensure equality. He also confirms that agency alone is not enough and that a well-being component must be included to support a sustainable approach in ensuring social change.

103 Sen *Development as freedom* 191.

104 Fourie and Smit "Precarious work, gender and non discrimination" 5.

105 Dias and Ogando 2015 *WOLG* 54. This is evident within categories of workers in the informal economy, such as domestic workers, waste pickers and informal traders, as Chapters 4, 5 and 6 will illustrate, in countries such as South Africa, Brazil and India.

106 Dias and Ogando 2015 *WOLG* 53. With reference to the term "intersectionality" the authors state the following: "… the concept captures how social interactions are impacted when two or more forms of oppression intersect, resulting in a position of privilege or disadvantage". The term is also described as analytical category that provides a better understanding of power hierarchies.

recognises multiple factors also supports the importance of the legal and economic empowerment of these women.[107] To ensure adequate labour and social protection and support their well-being, an integrated and holistic approach is required that ensures that all aspects of their lives are considered including for example also access to education and property rights.[108]

Although, as mentioned earlier, the matter of unpaid care work and unpaid domestic work is beyond the scope of this study, such work is historically predominantly performed by women and has a severe impact on women in the informal economy and women in general, and hence certain comments in this regard are necessary. Fudge states the following in respect of the abovementioned unpaid work:

> It is an indispensable condition of the continuation of human society that many adults devote a great deal of their time to such caretaking however poorly such work may be remunerated in the market.[109]

When considering the nature of unpaid care and domestic work, it is important to reflect on the concept of social reproduction.[110] The role of the woman, as unpaid caregiver, is often seen as natural and part of her everyday duties and therefore the unequal relationship in the household is not deliberated.[111] Woman are often forced into atypical or non-standard precarious work, such as casual and part-time work or home work in order to fulfil their domestic care duties.[112] Unfortunately the productive contribution of this unpaid work to society is disregarded by labour lawyers, economists and labour policies,

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107 Legal empowerment is seen as a process that ensure access to justice and an awareness of legal rights available (see Banik *The legal empowerment agenda* 3).

108 Chen *The informal economy: Definitions, theories and policies*.

109 Fudge "Labour as a 'fictive commodity'"134.

110 Fudge "Labour as a 'fictive commodity'"130. According to Fudge, social reproduction refers to social processes and labour involved in the daily and generational maintenance of the population. The role players in a social reproduction framework include families and the state through various policies, such as those on health, welfare and immigration.

111 Fudge "Labour as a 'fictive commodity'"131.

112 Charlesworth "Law's response to the reconciliation of work and care: The Australian case" 89. In Australia, casual part-time workers have less protection than those in full-time employment; their work is also more precarious in respect of access to training, while leave and union representation is also limited. This is despite legislative provisions prohibiting discrimination on grounds of sex, pregnancy and family responsibilities. This is also an example where, even in developed countries, protection in theory exists through legislative provisions, but weaknesses in enforcement prevail.

and moreover it contributes to gender inequality. According to Fudge unpaid care work and domestic work should be included under the auspices of labour law and not remain peripheral to labour regulation.[113]

An interdisciplinary approach is required. If we allow the social reproduction aspect of unpaid care work and unpaid domestic work to be classified only as a component of one branch of the law, for example family law, instead of following an integrated approach, the unequal and undervalued nature of this type of unpaid work will continue to fall outside the ambit of labour law. Substantive equality in this regard can only be achieved when we reconsider our social norms.[114] This will entail a shift in the traditional role of women as caregivers to a new paradigm of shared responsibilities of care duties and domestic work between men and women.[115] Awareness campaigns and advocacy highlighting the value of this type of work for a society will assist in changing social norms. A change in a specific statutory framework can be an important tool in supporting the change in social norms. Providing paternity leave and family responsibility leave for men to perform child care and other family care duties will promote gender equality and change existing social norms.[116] In developing countries it is pivotal to increase an awareness in

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113 Fudge "Labour as a 'fictive commodity'"132. This will require a shift in labour law's emphasis on paid work to include these types of unpaid care work. See also Charlesworth "Law's response to the reconciliation of work and care" 86.

114 Fudge "Labour as a 'fictive commodity'"135.

115 Fudge "Labour as a 'fictive commodity'"135.

116 In South Africa legislative provisions that provide for paternity leave are absent; however, employees who have been employed for four months and who works for at least four consecutive days in a week for an employer, do qualify for three days' paid family responsibility leave when the employee's child is born (s 27 of the *BCEA*). In *M I A v State Information Agency (Pty) Ltd* 2015 6 SA 250 (LC), the court found a refusal by the employer to provide a male employee in a civil union, and the primary caregiver of the child, with maternity leave, to constitute unfair discrimination. However, this judgment does not extend protection to all fathers and was based on the specific factual scenario, where the applicant was the primary caregiver. The Labour Laws Amendment Bill of 2015, introduced by members of parliament as a private bember's bill and passed in the National Assembly, endeavours to address the obvious shortfalls in the provision of paternity leave.The bill aims to amend the *BCEA* and to provide for parental, adoption and commissioning parental leave to employees. The long title also provides for the right to claim parental and commissioning parental benefits from the Unemployment Insurance Fund by amending the *UIA*. The bill proposes the insertion of s 25A to provide an employee with a minimum of ten days leave. S 25 C provides an employee who is a commissioning parent in a surrogate motherhood agreement with at least ten weeks leave. The provision of parental benefits can be commended; however, only those who fall within the conceptual framework of employee will qualify for such benefits, while the shorter leave periods for fathers still appear discriminatory and not in line with equality provisions in the Constitution (s 9) or in labour legislation (s 6 of the *EEA*). S 28 of the Constitution which provides every child with the right to family and parental care must also be considered. South Africa must consider foreign jurisdictions, such as Sweden, where parents have shared leave, and they can decide how to divide the leave within a framework of shared responsibilities (see the Parental Leave Act (1995: 584). See Law for All (year unknown) https://www.lawforall.co.za/wp-content/uploads/
2016/10/Written-Submission.pdf. A study in the US by the Department of Labor in 2015 indicated

respect of men's shared obligations for care work. Without this awareness and a regulatory framework that focuses on increasing women's employment rate in developing countries, female migration from developing to developed countries to perform care work will also continue.[117] In SADC countries the prevalence of HIV and AIDS is an important factor to consider in respect of care work. In countries such as Malawi, these care workers, mainly women, consist of both paid and unpaid workers and includes primary caregivers, including members of the family, and volunteers that support a free public health care system under tremendous strain.[118]

According to Sen's capabilities' approach, societies can determine key capabilities through a democratic approach; however, when considering unpaid care and domestic work an alternative approach is required, specifically when considering the unequal gender representation that characterises this type of care work. In these instances it will be more valuable to specify the important capabilities that a society has an obligation to address.[119]

A sustainable approach will include an integrated focus when evaluating the extension of legal and social protection to women workers in the informal economy. To ensure that decent work becomes a reality and to combat poverty for women workers we then also need to consider and support their legal[120] and economic empowerment[121] to enhance their capabilities. According to the UN Commission on Legal Empowerment of the Poor, legal empowerment entails a process of intrinsic change.[122] This intrinsic change must ensure that these vulnerable women workers are able to use the law to protect and advance their rights.[123] An approach is followed that recognises multiple factors and also

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that allowing fathers to take paternity leave increases the ability of women to enter the labour force and engage in paid work (United States Departement of Labor 2015 https://www.dol.gov/asp/policy-development/PaternityBrief.pdf). In Brazil, workers in the formal economy are entitled to five consecutive days paternity leave (Licença Paternidade) (Sorj "Country notes: Brazil"). Although legislation does not provide for compulsory paternity leave in India, provisions are made for government employees and a number of private companies do have voluntary provisions (Chakraborty 2017 https://mediaindia.eu/social-vibes/paternity-leave-provided-by-some-firms-in-india/).

117 Fudge "Labour as a 'fictive commodity'" 131.

118 Kanyongolo "Informal labour and the ethic of care" 1178.

119 Fudge "Labour as a 'fictive commodity'" 133.

120 Legal empowerment is seen as a process that ensures access to justice and an awareness of legal rights available (see Banik *The legal empowerment agenda* 3).

121 Economic empowerment is defined by Chen as increased access to and control over resources and markets, increased agency and improvements in and control over specific outcomes (Chen *Women's economic empowerment: WIEGO position and approach*).

122 Commission on Legal Empowerment of the Poor 2008 https://www.un.org/ruleoflaw/files/Making_the_Law_Work_for_Everyone.pdf 3.

123 See also Fourie 2016 *ILJ* 836, 837.

supports the importance of the legal and economic empowerment[124] of these women. To ensure adequate labour and social protection and support their "well-being", an approach is required that ensures that all aspects of their lives are considered. This is in line with Sen's approach and supports the development of capabilities of these workers to ensure decent work and a life lived with human dignity and the ability to exercise "freedoms".

Criticism against Sen's approach for women workers includes the fact that Sen does not recognise collective capabilities and the fact that organised collective capabilities are challenging for women workers in the informal economy.[125] His approach means that no regard is given to unions, civil societies and other organisations that are beneficial to the mobilisation of these women to increase their labour and social protection.[126] Collective capabilities are also an integral component of the human dignity of these workers and an important tool in their legal and economic empowerment. Unfortunately valid criticism exists in respect of the nature of Sen's individualistic approach towards capabilities and freedoms.[127] For women workers in the informal economy, organised collectivities are important in their quest for decent work, and Sen's theories place too much emphasis on personal choice. Evans[128] refers to "organised collectivities" as unions, political parties, village councils and women's groups. These are all organisations through which women in the informal economy can be represented and mobilised. A platform where they can share values is essential to these workers in any quest for decent work.[129] Vulnerable workers need collective action to better their circumstances.[130]

Various other criticisms exist in respect of Sen's theories. Von Broembsen,[131] for example, criticises his work for its inability to engage with the political economy and challenge capital power, which she argues must remain a normative goal. The fact that it does not address "distributive outcomes" or the "global dimensions of work" remain problematic, specifically for women working in the informal economy and in respect of the global end gender dimensions of unpaid care and domestic work.[132] Sen's theories can however be applicable to women in the informal economy if labour rights and various social protection

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124 The legal and economic empowerment as tool to extend labour and social protection to these workers will be analysed in para 7.8 below.
125 Fudge "Labour as a 'fictive commodity'"133.
126 The value of voice and representation in the extension of labour and social protection will be analysed in Chapter 7.
127 Von Broembsen "A new constituting narrative for labour law".
128 Evans 2002 *SCID* 129.
129 Evans 2002 *SCID* 56.
130 Examples to support this approach will be discussed in Chapter 7.
131 Von Broembsen "A new constituting narrative for labour law".
132 Von Broembsen "A new constituting narrative for labour law".

measures assist in the expansion of freedoms of these women and, more importantly, their legal and economic empowerment that allows them to partake in social and economic matters.[133] This also illustrates a developmental component of labour law and supports Langille's notion that labour law should enable workers to live a life they value.[134] This is also then linked to the human dignity of these workers.

2.2.4 Labour law and human rights

When we consider the function of labour law and the fact that large numbers of workers are left without protection it is important to evaluate the relationship between labour law and human rights.[135] Although the development of labour law and fundamental human rights have been distinct, and various role players have adamantly kept them separate, there is growing support for their integration.[136] Human rights are accorded to all human beings and these rights are universal.[137] The argument that labour rights are not universal can be countered by the fact that these social rights are widely recognised by international and regional instruments and institutions. Hepple[138] states that the right to work is as important to people as the right to vote, and Fudge[139] claims the following:

> A core component of the project to recast labour standards as international human rights is to elevate their moral appeal.

Internationally and regionally labour rights are often seen as human rights and the concept of human dignity is often mentioned in relation to labour rights and social protection.[140] Support for the universal nature of human rights can also be found in

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133 Sen *Development as freedom* 228. See also Von Broembsen "A new constituting narrative for labour law".

134 Langille "Labour law's theory of justice" 116.

135 Social and labour rights were recognised in the 1919 Weimar constitution inspired by Hugo Sinzheimer. See also Hepple "Factors influencing the making and transformation of labour law in Europe" 32.

136 Arthurs "Labour law after Labour" 23.

137 Collins "Theories of rights as justification" 141.

138 Hepple 1996 *CLLPJ* 634.

139 Fudge 2014 *DalhLJ* 609.

140 The European Charter of Fundamental Social Rights provides in article 1 that "human dignity is inviolable" and that it must be protected and respected, and article 31 links human dignity to the right of workers to working conditions that will support the human dignity of the worker. The Universal Declaration of Human Rights confirms in article 1 that all humans are born with human dignity. Article 23 (see also s 23 of the South African Constitution) provides that every worker has the right to "just and favourable remuneration" and social protection when required to guarantee that they can live a life with human dignity. This highlights the intrinsic link between human dignity and labour rights, including social protection. See para 3.2.1.1 below. This provision is also reflected in the Constitution of Malawi. Article 7 of the International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR) provides for state parties to ensure a decent living for workers and this would contribute to living a life with human dignity. See para 3.2.1.2 below. The Convention on the Elimination of All Forms of Discrimination against Women (1979) recognises that discrimination against women impairs their human dignity. See article 1 and para 3.2.1.3

international declarations such as the *Universal Declaration of Human Rights.* In this declaration the right to work, decent work, protection against unemployment, non-discrimination, freedom of association and a right to conditions that ensure human dignity, including social protection, are mentioned.[141] Other labour rights that can certainly be classified as universal, include the prohibition on child labour and prohibitions on forced labour.[142] Certain national constitutions of countries in the SADC region contain important fundamental rights for workers in the region and can support women workers in the informal economy.[143] In respect of the inclusion of labour rights as fundamental rights, Collins[144] supports methods used in the liberal political theory and argues as follows:

> The central idea in liberalism of identifying fundamental interests of individuals, such as freedom and dignity and guaranteeing them through a strong legal framework, seems to have the potential of justifying some fundamental labour rights.

Sen[145] refers to a legitimacy attack on human rights, and he very correctly states that humans are not born with these rights but have to acquire them through legislation. In other words, legislative measures to ensure their justiciability and institutions to ensure compliance and enforcement are required. Secondly he refers to the "coherence critique"

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below. The 17 Sustainable Developmental Goals also endeavour to ensure the human dignity of all. See para 3.2.2 below. The ILO has intrinsically linked the concept of human dignity to decent work; see paras 3.3.3 and 3.3.8 below. The Declaration of Philadelphia provides for the well-being of all human beings in surroundings of freedom and dignity. In respect of regional instruments (both binding and non-binding) in the SADC and the African Union, the following include some examples of instruments that highlight the importance of human rights, decent work and dignity: The Constitutive Act of 2011 (see para 3.4 below); the African Charter on Human and People's Rights (see para 3.4.1.1 below); the Protocol to the African Charter on Human and People' Rights of Woman in Africa (see para 3.4.1.2 below); the SADC Treaty (see para 3.4.2 below); the Charter on Fundamental Social Rights (see para 3.4.2.1 below); the Protocol on Employment and Labour (see 3.4.2.1 below) and the Protocol on Gender Development (see para 3.4.2.4 below).

141 See article 23.

142 Collins "Theories of rights as justification" 41.

143 Some examples of constitutions that provide for fundamental labour rights in the SADC region include the *Constitution of the Republic of South Africa*, 1996; the Constitution of Angola 2010 (article 23 provides for the principle of equality and prohibits discrimination, article 31 protects human dignity, article 48 provides for freedom of association, article 50 regulates trade union freedoms and article 51 ensures the right to strike and prohibits lock-outs, article 76 provides that work shall be the right and duty of all, and article 76(4) that dismissal without fair cause is illegal). The Constitution of Malawi, 1994 (as amended in 2010) (this constitution contains similar provisions to the South African Constitution in article 31 that provides for fair labour and safe labour practices for everyone) and the Constitution of the Democratic Republic of Congo, 2006. This constitution contains a specific provision in article 14 that prohibits discrimination against women and ensures the protection and promotion of their rights. In article 31 the state guarantees protection against unemployment and equitable remuneration to ensure a life with human dignity for all workers which includes social protection. See Chapter 6 for a discussion of constitutional provisions in India and Brazil.

144 Collins "Theories of rights as justification" 154.

145 Sen *Development as freedom* 229.

whereby human rights without "agency specific duties" become mere sentiments.[146] He explains that supporters of the "cultural critique" claim that human rights are based on universal ethics or values and that this universal nature of values and ethics does not exist.[147]

The question of the justiciable nature of socio-economic rights provided for in a constitution was raised in South Africa. I specifically refer to the justiciability of these rights as their enforcement can protect the poor and vulnerable in a society, provide a life with human dignity and contribute to the empowerment of vulnerable women. In the *Certification* judgment[148] the court validated the justiciable nature of socio-economic rights even if this does have budgetary implications.[149] All countries, including developing countries, should be able to protect civil and political rights; however, as socio-economic rights are often linked to the resources available in countries, the protection and provision of these rights are more challenging for developing countries.[150] Davies[151] also argues that socio-economic rights are universal but the content of these rights may vary according to each country's level of development. Collins argues that the justification of labour law through socio-economic rights could remove any justification for labour rights and labour law.[152] He argues as follows:

> Although it is true that most people are likely to satisfy their basic needs of this kind (food, shelter and clothing) through paid employment, it does not follow that it is necessary for there to be labour rights or that to address those needs the state would have to regulate employment.[153]

The South African Constitution is based on values such as human dignity, freedom and equality (including non-sexism and non-racialism) and these certainly should be recognised as universal values.[154] Certainly if one considers the global universal plight of

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146 Sen *Development as freedom* 228.

147 Sen *Development as freedom* 228.

148 See *Ex Parte Chairman of the Constitutional Court Assembly: In re Certification of the Constitution of the Republic of South Africa* 1996 4 SA 744 (CC). The following are some examples of judgments that illustrate the justiciable nature of these rights: *Soobramoney v Minister of Health (Kwa-Zulu Natal)* 1998 1 SA 765 (CC); *Minister of Health v Treatment Action Campaign* 2002 (10) BCLR 1075. The *Treatment Action Campaign* case is important to women workers in the informal economy as they often do not have adequate social protection and specifically lack access to adequate health care. The matter of *the Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC) dealt with the right to have access to housing, specifically for the poor and vulnerable. This judgment can also have an impact on women in the informal economy who lack access to adequate housing.

149 See paras 77-78.

150 Davies *Perspectives on labour law* 41.

151 Davies *Perspectives on labour law* 43.

152 Collins "Theories of rights as justification" 153.

153 Collins "Theories of rights as justification" 153

154 Section 1 of the *Constitution of the Republic of South Africa*, 1996.

women in the informal economy, these values can play an important role in improving their lives. The South African Bill of Rights, at first glance, appears to yield a number of possibilities with reference to gender equality.[155] Section 23 of the South African Constitution contains the labour rights and together with other fundamental rights such as human dignity[156] and equality[157] these have already had an impact on the rights of many workers in South Africa.[158] Fundamental rights, including the right to human dignity, the right to fair labour practices, socio-economic rights and the protection of ethnic, religious and linguistic minorities can play an important role in achieving decent work for all. However, when extending socio-economic rights to vulnerable women, a substantive approach with reference to equality is required.[159] This will require a restructuring of institutions to address gender inequalities. In other words, when extending these rights to women their specific circumstances, including socio economic factors must be considered. Fredman states:

> Rather than regarding socio-economic rights as bundles of goods to be distributed in different ways, it is argued that engendered socio-economic rights should take into account the ways in which goods and opportunities can in fact be enjoyed in the context of the actual relationships in which women live. This draws on Sen and Nussbaum's capabilities theory.[160]

The notion of substantive equality and vulnerable women workers refers to the fact that equality in this regard does not necessarily encompass identical treatment but rather the following, as stated by Sen:

> Equal consideration for all may demand very unequal treatment in favour of the disadvantaged. The demands of substantive equality can be particularly exacting and complex when there is a good deal of antecedent inequality to counter.[161]

Social justice can thus also be promoted and achieved through the human rights aspect (the law) and enforced through (strategic) litigation.[162]

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155 Goldblatt and McLean 2009 *SAJHR* 407.

156 Section 10. See also s 23(1) of the *Constitution of the Republic of South Africa*, 1996 which provides as follows: "Everyone has the right to fair labour practices." The application and scope of this provision, as well as the notion of fairness in the South African context will be analysed and considered in Chapter 4.

157 Section 9.

158 See chapters 4 and 5 with reference to the impact of the South African Constitution and specifically the fundamental rights, including the labour rights in s 23, and what the impact of this is for women workers in the informal economy.

159 Fredman 2009 *SAJHR* 417.

160 Fredman 2009 *SAJHR* 417.

161 Sen *Inequality re-examined* (1992); Fredman 2009 *SAJHR* 418.

162 Fourie and Smit "Precarious work, gender and non-discrimination".

The Montréal Principles on Women's Economic, Social and Cultural Rights, adopted in 2002, aptly recognise the effect of poverty and marginalisation of women and commented as follows:

> Economic, social and cultural rights have a particular significance for women because as a group, women are disproportionately affected by poverty and by social and cultural marginalization. Women's poverty is a central manifestation, and a direct result of women's lesser social, economic and political power. In turn, women's poverty reinforces their subordination, and constrains their enjoyment of every right.[163]

The protection of the fundamental right to human dignity can play a vital role in respect of labour and social protection for vulnerable women workers in the informal economy. The right to human dignity can include the right to social protection and equal treatment, and a life free from violence and harassment to enable these workers to live a life that they value. In the *South African Informal Traders Forum*[164] judgment, informal traders in the city of Johannesburg were evicted from their stalls and their goods were confiscated. The Constitutional Court stated the following:

> The ability of people to earn money and support themselves and their families is a component of the right to human dignity.[165]

In this case the right to human dignity[166] was of paramount importance; the Court found that without the ability to earn an income these traders would face "humiliation and degradation".[167] This is an example where the court used the concept of human dignity within the realm of labour law, moving into the sphere of human rights. McCrudden[168] argues that this only happens in extreme circumstances and that the concept of human dignity is closer linked to "ideas of humiliation" than to labour law. I disagree with McCrudden's view; if the human dignity of these precarious workers is infringed when they are denied social and labour protection.

Woman workers in the informal economy who are excluded from labour and social protection and basic services such as adequate sanitation and access to water; they face humiliation and degradation and cannot lead a life with human dignity. Due to gender norms and stereotyping in societies, these women are also often unable to engage with

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163 These principles were adopted in Canada to guide the interpretation of the International Covenant on Economic, Social and Cultural Rights to ensure the full enjoyment of these rights by women.

164 *South African Informal Traders Forum v City of Johannesburg* 2014 4 SA 371 (CC). See also Chapter 5.

165 Para 31.

166 Section 10 of the Constitution.

167 Para 31.

168 McCrudden "Labour law as human rights law" 288.

public authorities, for example in respect of street trading laws, and are thus unable to make their voice heard. The inclusion of justiciable socio-economic rights under the auspices of fundamental rights will also contribute to a life lived with more human dignity for vulnerable workers.[169] Collins[170] even describes "dignity" as a modern-day replacement for the slogan "labour is not a commodity". The concept of decent work is also intrinsically linked to human dignity and the South African courts have confirmed this in a number of instances.[171] Human dignity is also linked to empowerment, and decent work can empower workers to contribute to their own subsistence and to society.[172]

Vulnerable women workers in the informal economy can benefit from a labour law system entrenched in fundamental human rights.[173] Such a system or discourse will allow workers, specifically vulnerable and precarious workers, to align with other universal "right seekers" to ensure adequate labour and social protection.[174] These workers will be able to form alliances and organisations through innovative methods of mobilisation outside the traditional labour law realm that may be more appropriate and perhaps also more effective to address their needs.

According to Hepple substantive equality should be seen as a special function of labour law. This would mean something more than just formal equality between employer and employee.[175] He states that equality as an overarching value encompasses the following consideration:

> The idea that labour is not a commodity, that there must be comparable protection for all dependent or subordinated workers, and that there must be equality of opportunity for disadvantaged groups such as women, ethnic minorities and persons with disabilities.[176]

The Ford factory world symbolised uniformity where uniform standards and statutory provisions applied to all. A discipline based on formal equality, treating all workers the same, despite the nature of their work, or consideration of their specific socio-economic needs, can no longer suffice in respect of new forms of work. An approach based on the notion of substantive equality will require taking into consideration the special needs of

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169 See for example ss 26, 27 and 29 of the South African Constitution. The rights to housing, health care, food, water, social security and education are included in the Bill of Rights.
170 Collins "Theories of rights as justification" 151.
171 See *South African Informal Traders Forum v City of Johannesburg* 2014 4 SA 371 (CC) para 31 and *Makwickana v eThekwini Municipality* 2015 3 SA 165 (KZD) para 136.
172 Gilabert 2016 *PhilSocCrit* 183.
173 Arthurs "Labour law after Labour" 23.
174 Arthurs "Labour law after Labour" 23.
175 Hepple 1996 *CLLPJ* 647.
176 Hepple 1996 *CLLPJ* 647.

various categories of workers.[177] Diversity of regulated structures, standards and tailor-made statutory provisions support the notion of substantive equality. Labour law must be responsive to the needs of workers in new forms of work, such as the workers in the informal economy that represent immense diversity.[178] These workers are vulnerable and will often require tailor-made regulation that offers more protection.[179]

A human rights based approach to extend protection to vulnerable women workers in the informal economy can play a considerable role.[180] In Malawi the Human Rights Based Approach (HRBA) supports the ILO Agenda for decent work and considers it society's responsibility to respond to the basic rights of humans.[181] This approach recognises that poverty entails more than just a lack of income, but also shows up other vulnerabilities, exclusions and the lack of a voice; all factors that characterise the precariousness of women workers in the informal economy. The objective of this approach supports social justice and highlights the importance of both legal and economic empowerment for the vulnerable and marginalised, and also endeavours to combat structural inequality.[182] The result of an approach such as this to extend labour and social protection is an integrated strategy including legal, political, economic, cultural and social components.[183]

Although human rights can in certain instances be a valuable vehicle for extension of protection to vulnerable workers, there are constraints when it is used as a basis for the development of labour law. The success of social rights is often dependent on policies that create an environment conducive to realise these rights.[184] Hepple[185] argues that by classifying rights as fundamental and enforceable, disputes are moved from the political

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177 In *MEC for Education Kwazulu-Natal v Pillay* 2008 1 SA 474 (CC), the court confirmed that people who are not similar should not be treated alike.

178 See also Weiss "Re-inventing labour law" 47.

179 See also Weiss "Re-inventing labour law" 47.

180 Chinsinga and Kayuni "The complexities and paradoxes of governing the informal sector in Malawi" 110.

181 Chinsinga and Kayuni "The complexities and paradoxes of governing the informal sector in Malawi" 109.

182 Chinsinga and Kayuni "The complexities and paradoxes of governing the informal sector in Malawi" 110.

183 Chinsinga and Kayuni "The complexities and paradoxes of governing the informal sector in Malawi" 110.

184 Hepple 1996 *CLLPJ* 634. The political activist Thomas Paine, in Chapter 5, parts 4 and 5 of his acclaimed work *The rights of man*, identified children and older persons as particularly vulnerable members of society and instead of specifically campaigning for socio-economic rights, he argues for policies to provide for the poor through a tax-based system. In his article, Hepple considers the Spanish Constitution as an example of the integration of principles that flow from fundamental rights. This constitution has a special chapter that provides guiding principles on economic and social policy in addition to the chapter on rights and freedoms.

185 Hepple 1996 *CLLPJ* 644.

and industrial arena to that of the judiciary and this is perilous as "it is easy for judges to read their own notions of policy into a bill of rights".[186]

In South Africa, however, the constitutionalising of labour rights has been to the advantage of workers on many occasions and the policy notions read in by the constitutional court judges have been in line with those of an open democratic society based on the values of human dignity, equality and freedom. It is also important to note that constitutional jurisprudence in a number of cases has extended protection to workers who are particularly vulnerable.[187] This is indicative of the fact that the constitutionalising of labour rights can be used effectively to extend protection and develop labour law; however, this will be dependent on the specific history and social economic framework of each country.[188] Social justice can thus also be promoted and achieved through human rights (the law) and enforced through (strategic) litigation.[189]

Human dignity is a concept found in various legal texts applicable to labour law.[190] This intrinsically links it to the world of work. Many writers are concerned with the nature of labour rights, such as the right to promotion, and the fact that this right is not credible as a human right. Certainly this is true; however, if you consider the precarious position of women workers in the informal economy, without adequate labour and social protection, without a safe working area, stigmatised and harassed, then the importance of human rights such as the right to human dignity is of paramount importance as a human right.

Freedland and Kountouris's theory provides that it is important to optimise the dignity accorded to these workers and to increase their capabilities.[191] The increase of capabilities links closely to the legal and economic empowerment of these workers in an attempt to develop a more sustainable approach. If we consider the concept of dignity, it is important to consider how these claims are dealt with by our courts.

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186 Hepple 1996 *CLLPJ* 644.

187 See Chapter 4 and 5.

188 The infringements of the labour rights of vulnerable workers in the informal economy can in certain instances also be seen as infringements of human rights. In India this has proven a faster and more effective dispute route which allows access to higher courts. See also *South African Informal Traders Forum v City of Johannesburg* 2014 4 SA 371 (CC); Sankaran "Protecting the worker in the informal economy" 211. Extension of labour and social protection to the workers in the informal economy in India will be considered in Chapter 6.

189 Fourie and Smit "Precarious work, gender and non-discrimination".

190 See for example s 10 of the South African Constitution, as well as international instruments such as the ILO Declaration of Philadelphia, the Decent Work Agenda, the Universal Declaration of Human Rights and the EU Charter of Fundamental Rights.

191 Freedland and Kountouris *The legal construction of personal work* 49. See also a critical analysis of their theory in McCrudden "Labour law as human rights law" 276.

Labour law must also have a constitutional function that broadens its scope from the individual relationship to a constitutional task of contributing to a specific economic and social order.[192]

Those opposed to a human rights approach to labour law often fear that it will undermine the collective element of labour law and that individual rights can never trump the power of trade unions in equalising the imbalance inherent to the employment relationship.[193] The constitutionalisation of labour rights and the constitutional promotion of substantive equality in South Africa has certainly contributed to the social order of an open democratic society based on values such as human dignity, equality and freedom and the furtherance of economic and social justice.[194]

2.3 A sustainable approach to the extension of labour and social protection

If we consider an integrated and sustainable approach for the extension of labour and social protection to these workers, a sustainable livelihood approach can be relevant, as it contains a number of important elements, including good governance and legal and economic empowerment. The following elements are then relevant:

(a) raising human capital through health and education;

(b) enhancing social capital through raising people's awareness of their rights and obligations;[195]

(c) expansion of options and opportunities through responding to evolving global markets;[196] and

(d) improvement in the policy and institutional context of livelihoods, due to the whole array of factors tackled by efforts to improve governance.[197]

Criticism against this approach highlights its inability to address power imbalances; however, when we consider the precarious position of these workers, an approach that

192 Dukes "Hugo Sinzheimer and the constitutional function of labour law" 65.

193 Davies *Perspectives on labour law* 48.

194 See Chapters 4 and 5.

195 This element corresponds with the concept of legal empowerment where through the creation of awareness campaigns to inform vulnerable workers of their rights, these workers are empowered. In South Africa, a traders' manual was recently launched to inform traders of their rights; see SERI 2017 http://www.seri-sa.org/images/Traders_resource_guide_FINAL_FOR_WEB__Spreads.pdf. Also see Chapter 5.

196 This element also supports the enhancement of capabilities of these workers that will increase their "freedoms" and enable them to live a life with dignity.

197 Ellis and Seely *Background briefing* 2; Trebilcock "Developmental approaches to the informal economy" 77.

supports legal and economic empowerment can play an important role in reaching sustainable solutions. Legal and economic empowerment should also enable these workers to address certain power imbalances and support the mobilisation of vulnerable workers.

A human capability perspective can also play a role.[198] Agency is an important factor in the influencing of political decisions.[199] This is important for women workers when we consider the multiple grounds of discrimination that they face and how a sustainable approach would endeavour to change this. Supporting aspects, such as access to education, a safe workplace free from harassment, and equal treatment can play an important role in extending protection to these workers. A number of examples exists where various associations and organisations have assisted such workers to make their plight and challenges heard.

A sustainable approach will include an integrated focus when evaluating the extension of legal and social protection to women workers in the informal economy. To ensure that decent work becomes a reality and to combat poverty among women workers we then also need to consider and support their legal[200] and economic empowerment to enhance their capabilities. According to the Commission on Legal Empowerment, legal empowerment requires a process of intrinsic change.[201] This intrinsic change entails that these vulnerable women workers are able to use the law to protect and advance their rights.[202] An approach that recognises multiple contributing factors also supports the importance of the legal and economic empowerment[203] of these women. To ensure adequate labour and social protection and support their "well-being" an approach is required which will ensure that all aspects of their lives are considered. This is in line with Sen's approach and supports the development of capabilities of these workers to ensure decent work and a life lived with human dignity and the ability to exercise "freedoms".

If we consider a more sustainable approach, the implementation of a statutory minimum wage must be considered. The concept of a minimum wage was first introduced more

198 Trebilcock "Developmental approaches to the informal economy" 70.

199 Ellis and Seely *Background briefing* 2.

200 Legal empowerment is seen as a process that ensure access to justice and an awareness of legal rights available (Banik "Introduction" 3).

201 Commission on Legal Empowerment of the Poor 2008 https://www.un.org/ruleoflaw/files/Making_the_Law_Work_for_Everyone.pdf 3. See also Fourie 2016 *ILJ*.

202 See also Fourie 2016 *ILJ*.

203 Legal and economic empowerment as a tool to extend labour and social protection to these workers will be analysed in para 7.8 below.

than a century ago in countries, such as Australia and New Zealand.[204] The setting of minimum wages, for example for domestic workers in South Africa, through a sectoral determination illustrates the developmental and progressive redistribution function of labour law.[205] According to Deakin this is an example of where wage regulation plays "a market correcting role".[206]

According to Davidov empirical studies indicate that the effect of setting minimum wages on the employment rate is negligible,[207] while the setting of minimum wages will certainly contribute to the fight against poverty, promoting decent work for all, equality, and the human dignity of these workers, whilst limiting social exclusion and marginalisation of vulnerable workers.[208] When debating the setting of minimum wages, the enforcement of same is an important challenge. Many argue that the setting of a minimum wage will negatively affect business; however, Webb[209] already stated in 1912 that business will then be forced to become more effective while exploitation of vulnerable workers would decrease.

When we consider a sustainable approach and the ability of women workers in the informal economy to exercise their "freedoms", the role of human dignity is of paramount importance. The employment relationship is intrinsically linked to the human dignity of every worker, and one of the most important functions of labour law should therefore be to protect and promote the human dignity of every worker.[210] Closely aligned to the concept of human dignity is the dependency factor that characterises labour law.[211] If we consider the importance and the content of human dignity, it will mean that labour law must involve itself with all aspects, including risks, related to the workers' life. This will mean that social security in a wide sense is an integral part of labour law and the well-being of a worker.[212] Supporting the concept of human dignity of workers also requires these workers to be the bearers of fundamental human rights.[213] Kahn-Freund recognised that "a catalogue of human rights can be an admirable instrument of justice"; however, he recognised a shift in the function of law reform from the government to the bench,

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204 Deakin 2017 *ILJ* 3.
205 Davidov *A purposive approach to labour law* 83. Collective bargaining can also be seen as a redistributive tool; see Chapter 4.
206 Deakin "The contribution of labour law to economic and human development" 160.
207 Davidov *A purposive approach to labour law* 82.
208 Davidov *A purposive approach to labour law* 82. See also Deakin 2017 *ILJ* 23.
209 Webb 1912 *JPE* 981.
210 See also Weiss "Re-inventing labour law" 44.
211 See also Weiss "Re-inventing labour law" 44.
212 See also Weiss "Re-inventing labour law" 44. Hugo Sinzheimer highlighted this fact, however this inclusive approach was not successful in Germany.
213 Weiss "Re-inventing labour law" 50.

which for some can be a risk and for others an opportunity.[214] Smit highlighted the importance of these rights and stated the following:

> The constitutional values and rights provide a solid foundation for the pursuit of social justice.[215]

Fundamental rights provide a rights-based approach to vulnerable workers to improve their livelihoods.[216] However, law as an instrument of social change does have limits, particularly with reference to women workers.[217] Their precarious position is the result of various disadvantages resulting from a number of factors, including sociological, economic and political factors as well as a specific historical context. As far as the notion of a labour law paradigm embedded in a universal human rights framework is concerned, precarious workers can benefit from such a framework that extends beyond statutory or contractual frameworks.[218] Arthurs states this as follows:

> Having shed their old class affiliations and identities, workers would be able to form new alliances with other rights-seekers, to assert new identities as 'citizens' and to initiate with new discursive and legal strategies.[219]

Arthurs also recognises that this new re-invented labour law as a branch of human rights will be

> … de-coupled from employment, de-emphasise worker agency, delegitimise extra-legal self-help initiatives and, increasingly direct disputing parties to courts that lack historical legitimacy in the labour field, as well as the institutional capacity to deal with the quotidian tasks.[220]

What is required, according to Arthurs, is also a new approach to human rights. This will require a different human rights framework that can influence decision-making processes at workplace level.[221] This is valid with reference to relationships where a clear employer-employee relationship is discernible; however, when we consider the precarious position of own-account workers such as informal traders and waste pickers, the reliance on a human rights framework, becomes increasingly important. When we consider the constitutional function of labour law and the role of human rights, we are considering the contribution of labour law in the creation of a certain economic and social order.[222] This

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214 Kahn-Freund 1976 *CamLJ* 270
215 Smit 2010 *TSAR* 6.
216 See Chapters 4, 5 and 6.
217 Du Toit and Huysamen "Implementing domestic workers' labour rights in a framework of transformative constitutionalism" 71.
218 Arthurs "Labour Law after Labour" 23.
219 Arthurs "Labour law after Labour" 23.
220 Arthurs "Labour law after Labour" 24.
221 Arthurs "Labour law after Labour" 24.
222 Dukes "Hugo Sinzheimer and the constitutional function of labour law" 64.

supports an integrated approach and recognises that labour law should not function in isolation but as part of a broader framework.[223] Since this will lead to boundaries becoming blurred, a number of questions remain: Are workers to be protected against the perturbations of unregulated labour markets by a constitutionally mandated social safety net? Or guaranteed access to work through constitutionally-constructed labour market institutions and policies? Or shielded from exploitation at the hands of employers by entrenched minimum employment standards or, better, by a broad right to "decent work"?[224]

Labour rights are entrenched in the constitutions of Brazil,[225] India[226] and South Africa,[227] and although workers in the informal economy in both countries are particularly vulnerable, rights-based litigation based on fundamental rights, including human dignity, has led to both labour and social protection in certain instances.

Arthurs argues that constitutions limit state power and not private power and therefore cannot effectively influence labour relations.[228] However, if we consider, informal traders and waste pickers, who are in an atypical relationship with local authorities, fundamental rights have played an important role in providing the necessary protection to these workers. This includes a model of rights-based litigation founded on human rights. In a country like South Africa, where inequality is a remaining reality, human rights have an important role to play to ensure social justice, substantive equality and a transformative society.[229] Many of the arguments Arthurs presents against the "constitutionalization of employment rights" are still premised on employment relations in developed countries and do not consider the precarious position of many workers in the informal economy of developing countries. Although Arthurs argues furthermore that the constitutionalisation of employment relations will not "significantly alter employment relations", I disagree with this point of view.[230] In countries such as South Africa, India and Brazil, a human rights approach including labour rights has provided protection in certain instances.[231]

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223 Dukes "Hugo Sinzheimer and the constitutional function of labour law" 64.
224 Arthurs 2010 *SocLS* 403-422.
225 See articles 7, 9 and 11 of the Constitution of the Federal Republic of Brazil, 1988.
226 Articles 19(1), 38, 41-3A of the Constitution of India, 1949.
227 See s 23.
228 Arthurs 2010 *SocLS* 406.
229 See *Daniels v Scribante* 2017 4 SA 341 (CC); para 4.3.4 fn 157.
230 Arthurs 2010 *SocLS* 414.
231 See Chapters 4, 5 and 6

2.4 Social justice and labour law

Fraser argues that disputes about justice are no longer argued within national borders, but have expanded across borders in a new globalised world.[232] Fraser states the following:

> Under the umbrella slogan "women's rights are human rights", for example feminists throughout the world are linking struggles against local patriarchal practices to campaigns to reform international law.

She defines justice as "parity of participation" and explains that "justice requires social arrangements that permit all to participate as peers in social life".[233] Women in the informal economy are thus often denied justice as their lack of resources and unequal societies deny them this full participation.[234] They are often denied justice and unable to partake due to gender stereotyping and paternalistic societies.[235] This "class structure" in patriarchal societies thus denies these women justice.[236] This is also an example of what Fraser characterises as "institutionalised hierarchies to cultural norms". Women in the informal economy are often faced with this challenge, as authorities do not accord them a voice and due to the nature of their work, they are often excluded from labour and social protection since they fall outside the scope of concepts such as "employee" and often perform work without an employment contract.[237] They frequently face discrimination within their societies, as women and their work are not valued within the society. This illustrates a double form of injustice faced by these precarious workers in the informal economy, both at institutional level and within a specific society. They suffer from multiple grounds of discrimination. This can again be linked to Sen's theories: since they are denied to live a life that they value, this can be linked to an infringement of their human dignity.

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232 Fraser 2005 *NLR* 73.

233 Fraser 2005 *NLR* 73.

234 Fraser 2005 *NLR* 73. See also Fourie and Smit "Precarious work, gender and non-discrimination". According to the ILO's *Republic of South Africa Decent Work Country Programme of 2010*, poverty in South Africa has a definite gender, racial and age dimension, in particular among black women. This means that these women face many challenges and cannot take part in life, as their poverty is associated with low income and an inability to access resources. They are therefore, according to Fraser's theory, denied justice.

235 See also Fourie and Smit "Precarious work, gender and non-discrimination"; Blyton and Jenkins 2012 *BJIR* 1080. The authors conducted a study among women garment workers in India. These workers represent the lowest scale of the formal economy. According to these authors, these women are reluctant to partake in union activities due to gender stereotyping and patriarchal societies. Concepts such as solidarity are foreign to these women workers. Their reluctance to organise themselves leaves them unable to improve their working conditions.

236 Fraser 2005 *NLR* 74.

237 Fraser 2005 *NLR* 75.

Fraser highlights two important factors of justice, namely recognition and redistribution.[238] When we consider achieving substantive equality and social justice for women workers in the informal economy, these factors play a vital role. Recognition should include respect and this can only be achieved through measures addressing stereotyping, stigma and violence towards women. Recognition should also include representation, participation and a voice. Voice should also include strengthening the voice of these workers in their dialogue with government and other role players. Redistribution should include access to resources and redressing socio-economic disadvantages. Women in the informal economy are often excluded from participation in decision making at various levels, both local and national, as they are not accorded an equal voice.[239] Until they have an equal voice and can participate equally on various levels they are merely "beneficiaries of developmental projects" and can make no real claims to having access to justice.[240] Fraser[241] states the following:

> [J]ustice requires social arrangements that permit all to participate as peers in social life. Overcoming injustice means dismantling institutionalized obstacles that prevent some people from participating on par with others.

Fraser identifies two kinds of challenges to "participatory parity", namely lack of resources or of access to resources and "institutionalized hierarchies".[242] Women in the informal economy often lack access to resources and are often excluded from participation in decision making at various levels, both local and national as they are not accorded an equal voice due to stigmatisation, stereotyping and various other forms of societal discriminatory practices.[243]

Any democracy needs to award a voice to all, and when vulnerable women workers in the informal economy are denied their voice this results in "a meta-injustice".[244] Fraser offers a solution that can be applied to women in the informal economy in a globalised world. This would mean that instead of focusing on citizenship, vulnerable groups are identified globally as "fellow subjects of justice" within a specific framework. This could be a very valuable approach, for example, for garment workers who are widespread across borders

238 Fraser 2005 *NLR* 73, 74.
239 Von Broembsen "A new constituting narrative for labour law" 12.
240 Von Broembsen "A new constituting narrative for labour law" 12.
241 Fraser *Scales of justice* 16.
242 Fraser *Scales of justice* 16.
243 Von Broembsen "A new constituting narrative for labour law" 12.
244 Von Broembsen "A new constituting narrative for labour law:" 12.

in globalised supply chains.[245] This could also entail a shift from a focus on the employment contract to value chains.[246]

Another example of a domain where this concept can be applicable and beneficial to women in the informal economy is that of domestic workers. Domestic workers across the world are examples of groups (fellow subjects of justice) who are often denied labour and social protection and often excluded from participation through voice under a national framework.

The importance of social justice is clear when considering labour legislation in South Africa.[247] The *LRA* describes its purpose as "to advance economic development, social justice and labour peace".[248] The *BCEA* also provides for economic development and social justice as a purpose of the act.[249] The *Skills Development Act*[250] recognises the importance of skills development to improve the life of workers.[251] It is evident from the above that one of the purposes of labour legislation in South Africa is the achievement of social justice. The *EEA* deals with the promotion of equality and the prohibition of discrimination in the workplace and the implementation of affirmative action measures to address previously disadvantaged groups.[252] The achievement of social justice is dependent on equal treatment of all workers.

The South African Constitution does not provide for an express right to work and if we consider the vulnerabilities of women in the informal economy, the question that needs to be asked is whether a constitutional right to work is required to address the challenges that women face.[253] In this regard feminisation of poverty must be considered as well as

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245 Chan "Contract labour in global garment supply chains" 4. Countries that have been identified by this report as key sourcing countries include India, Bangladesh, Turkey and Palestine.

246 Von Broembsen "A new constituting narrative for labour law" 14. Many women workers in the informal economy work in the garment industry under extremely poor conditions. The garment industry is an example of a complex supply chain network. This includes contract workers employed by a third party rather than by the enterprise themselves. These workers are particularly vulnerable and are often denied labour and social protection (Chan *Informal workers in global horticulture and commodities value chain* 4). These workers would benefit from a focus on fellow subjects of justice as it is often difficult to establish the identity of the employer and the nature of the employment relationship is precarious.

247 Labour legislation in South Africa will also be considered in Chapter 4.

248 See s 1.

249 See s 2.

250 97 of 1998.

251 See s 2 of the Act.

252 See s 2 of the Act.

253 Cooper 2009 *SAJHR* 574. Various international instruments provide for an undefined right to work and member states can give content to such a right accordingly. See article 23 of the Universal Declaration of Human Rights (discussed in para 3.2.1.1 below); article 6 of the International Covenant on Economic, Social and Cultural Rights (para 3.2.1.2 below); article 11(1)(a) of the

contributing factors such as unemployment and the low and irregular wages of women workers in the informal economy. The notion of a fundamental right to work is often seen as an indispensable requirement for social justice.[254] A constitutional guarantee of such a right will place a duty on the state to guarantee the provision of work; Cooper refers to this as hard conceptualisation of the right.[255] In the quest for social justice for women, this right to work should include both a qualitative and a distributional dimension.[256] If we consider some categories of women workers, for instance street traders and waste pickers, as own-account workers, a fundamental right to work can address their precarious position in the informal economy. Cooper argues that a right to work as access to work will allow the courts to examine the actions of state parties, to determine whether they are

> … promoting the activities of the self-employed survivalist women workers, thereby assisting them to achieve a livelihood consonant with dignity.[257]

2.5 Purposive interpretations and the scope of labour law

Women workers in the informal economy are often excluded from labour laws as they fall outside the ambit of the definition of an "employee". Davidov[258] states:

> One reason for the exclusion of workers from labour laws, even when they appear to need the protection of such laws from a purposive point of view, is the use of indicia detached from their normative functions.

Labour law usually distinguishes between employees, workers, the self-employed and independent contractors.[259] The self-employed and independent contractors are often excluded, because traditionally they could fend for themselves. However, this is not the situation of many women workers in precarious positions the informal economy, who are own-account workers, such as informal traders and waste pickers. Determining *who is an employee* is not a new challenge as courts have been struggling with this perplexing

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Convention on the Elimination of Discrimination Against Women (para 3.2.1.3 below); the European Social Charter Part 2, art 1.

254 Cooper 2009 *SAJHR* 577.

255 As opposed to a soft conceptualisation that requires a framework of preconditions for acquiring work (Cooper 2009 *SAJHR* 578). See also para 5.4 below with reference to the South African Development Plan of 2012 and the Expanded Works Programme and the specific gender focus.

256 Qualitative refers to conditions of work and the distributional dimension, to equality between women and men (Cooper 2009 *SAJHR* 581).

257 Cooper 2009 *SAJHR* 595.

258 Davidov "Re-matching labour laws with their purpose" 183. He lists characteristics that trigger the applicability of labour law, such as the location of work that is a common characteristic of the traditional employment relationship.

259 See s 213 of the *LRA*; Davies *Perspectives on labour law* 77.

question for a long time. Davidov, Freedland and Kountouris[260] state the following in this regard: "'Who is an employee' is also a question with a heavy normative baggage."

The question is important because if the definition is made as wide as possible, it triggers labour protection such as protection against unfair dismissal and unfair labour practices. The answer to the question therefore pertains to the personal scope of labour law. If we consider the scope of labour law, we also require an understanding of its goals and justifications.[261]

Internationally, the ILO Employment Relationship Recommendation (198) of 2006 provides guidelines and in article 8 states the following:

> National policy for protection of workers in the employment relationship should not interfere with true civil and commercial relationships, while at the same time ensuring that individuals in an employment relationship have the protection they are due.

National policies should thus consider the vulnerabilities of the workers and determine the true nature of the relationship. The worker's precarious work position and economic dependence on the employer should be considered.

An important question to consider, is who should be responsible for determining employee status? Should it be the responsibility of judges or should legislation and regulations provide clear definitional contexts?[262] Wide coverage through legislative provisions would

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260 Davidov, Freedland and Kountouris 2015 http://www.labourlawresearch.net/sites/default/files/papers/The%20Subjects%20of%20Labor%20law%20.pdf.

261 Davidov, Freedland and Kountouris 2015 http://www.labourlawresearch.net/sites/default/files/papers/The%20Subjects%20of%20Labor%20law%20.pdf.

262 In this specific discussion, I considered examples from jurisdictions such as the US, to distil some guidance that can be beneficial to women workers in the informal economy. Even though the cases do not deal specifically with developing countries or women in the informal economy, the legal principles provide useful insights. These cases considered new forms of work and to a certain extent represent a reinvention or reinterpretation of a conceptual labour law framework. In Seattle, the City Council adopted legislative provisions that would include among others, Uber drivers, excluded as independent contractors by the *National Labour Relations Act* of 1935. These provisions include that they can join organisations to bargain collectively; see Seattle.gov 2015 http://council.seattle.gov/2015/10/05/a-voice-for-drivers-a-complex-solution/. If municipal councils in South Africa would adopt similar provision with regards to informal traders this would enable these often own-account workers to formally join organisations to deal with municipal or provincial authorities regarding their street trading and safe work places. (The scope of these organisations should be wider than the traditional trade union concept to enable them to use non-governmental organisations and civil societies.) Regulatory provisions would provide a more formalised regulated approach; see Chapters 5 and 7. It is interesting to note that Nevada established a statutory presumption that a worker is an independent contractor. This provision in S.B. 224 (2015) "conclusively presumes" that a person is for example an independent contractor if classified as self-employed by the Revenue Service and the person is not required to work for a single other person. In South Dakota a rebuttable presumption is created based on a common law test that the person is not an employee for workers' compensation purposes; see Hollrah 2015 https://iccoalition.org/blog/four-states-enact-laws-affecting-the-definition-of-independent-

certainly enhance uniformity and certainty. Across jurisdictions legislative provisions that define the concept of employee exist; however, there is normally scope for courts to interpret same because of the many manifestations of work relationships.[263] Various tests have been developed to assist courts with this challenge. Tests include the control test, the economic dependency test, the organisational test and the more integrated test, namely the dominant impression test.[264] Davidov argues that the tests that courts develop to determine who is an employee must also consider the need for protection.[265] These provisions should also be interpreted purposively in line with the objectives of the statutes.[266]

Across the globe the new realities of work have forced courts to purposively consider the definition of employee and the scope and meaning of workers, often to extend protection to vulnerable workers and prevent exploitation from employers trying to evade labour laws. Certainly Uber as an innovative business form illustrates this, and as these workers are often without adequate labour and social protection, principles can be distilled from this example that can be useful when determining the employment status of many women workers in the informal economy. In an employment tribunal decision in the UK it was found that Uber drivers are not self-employed.[267] In respect of the tests to determine who

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contractor/. This is exactly the opposite of legislation in South Africa that creates a rebuttable presumption as to who is an employee – see ss 200A of the *LRA* and *83A* of the *BCEA*. Thus it seems that certain states in the US are moving in an opposite direction, to exclude workers from labour and social protection, through presumptions that they are self-employed or independent contractors.

263 See Chapters 4, 5 and 6.

264 Van Niekerk *et al Law@work* 63.

265 Davidov "Re-matching labour law" 189.

266 See also Davidov 2016 http:// www. labourresearch.net/sites/default/files/papers/ The%20status%20of%20Uber%20drivers%20A%20purposive%20approach%20copy.pdf.

267 See *Y Aslam, Farrar J v Uber* BV 2202550/2015. In this case the *Employment Rights Act* of 1996 extended limited protection to a new class of worker. S 230(3)(b) of the act provides as follows: "(3) In this act 'worker' means an individual who has entered into or works under (b) any other contract whether express or implied and if it is express whether in oral or writing, whereby the individual undertakes to do or perform personally any work or service for another party to the contract whose status is not by virtue of the contract that of a client or customer of any profession or business undertaking carried on by the individual." This category of 'worker' is only entitled to certain forms of labour protection, such as the national minimum wage and working time regulation. A category of worker is created that enjoys more protection than the self-employed, but less than the employee. In this case legislative provision extends limited protection to a category of vulnerable workers; however, they are still excluded from all the protective legislative measures that are available to employees. This is at least a start to include categories of vulnerable workers that are excluded from protection as they fall outside the scope of definitions of employees. In November 2017 Uber's appeal against the abovementioned case decision was dismissed, but they have indicated that they will once again appeal against the Employment Appeal Tribunal's decision. This case may have a major impact on the growing gig economy in the United Kingdom (*Uber BV v Aslam* 2017 WL 05195010 (2017)). In *Byrne Brothers (Formwork*) *Ltd v. Baird* [2002] ICR Lawson 667, the court stated that the purpose of this section was to extend certain protection to a category of workers who are also subordinate to and dependent on the employer.

is an employee in terms of a contract of employment, three factors were highlighted, namely personal service,[268] control[269] and mutuality of obligation.[270] The court was not just prepared to accept the written terms of the relationship between Uber and the driver, but consideration was given to the realities of this relationship. The submission that the driver enters into a contract with the passenger was declared "pure fiction".[271] The court stated:

> Uber runs a transportation business. The drivers provide the skilled labour through which the organization delivers its services and earns its profits. We base our assessment on the facts and analysis already set out on the following considerations.
>
> (1) The contradiction in the Rider terms between the fact that the ULL (Uber London) purports to be the drivers' agent and its assertion of "sole and absolute discretion" to accept or decline bookings.
>
> (2) The fact that Uber interviews and recruits drivers.
>
> (3) The fact that Uber controls the key information (in particular the passenger's surname, contact details and intended destination) and excludes the driver from it.
>
> (4) The fact that Uber requires the driver to accept trips and/or not to cancel trips and enforces the requirement by logging off drivers who breach those requirements.
>
> (5) The fact that Uber sets the (default) route and the driver departs from it at his peril.
>
> (6) The fact that the UBV[272] fixes the fare and the driver cannot agree a higher sum with the passenger.

The court stated that an assessment will consider the degree of control exercised, the exclusivity, the method of payment, the tools supplied and the degree of risk undertaken. This category is referred to as "dependent contractors" (see Von Broembsen and Chen *Eliminating legal barriers from the perspective of the informal economy* 10, 11). These workers represent an intermediate category, and can include informal traders and waste pickers. However, classification as employees for purpose of labour and social protection must be preferred. In this specific discussion, I considered examples from the UK. These cases considered new forms of work and to a certain extent represent a reinvention or reinterpretation of a conceptual labour law framework.

268 This refers to the aspect of the employee rendering service him- or herself and not through a substitute (Lawson 2018 http://blogs.northampton.ac.uk/law/2018/01/09/is-%E2%80%98worker%E2%80%99-status-something-to-get-worked-up-about/.

269 This refers to the control the employer exercises over the employee, including the manner in which the work is performed (Lawson 2018 http://blogs.northampton.ac.uk/law/2018/01/09/is-%E2%80%98worker%E2%80%99-status-something-to-get-worked-up-about/.

270 This refers to the reciprocate nature of the relationship where the employee avails him- or herself to work and the employer provides work (Lawson 2018 http://blogs. northampton.ac.uk/law/2018/01/09/is-%E2%80%98worker%E2%80%99-status-something-to-get-worked-up-about/.

271 *Y Aslam, Farrar J v Uber BV* 2202550/2015 paras 90-92.

272 The first respondents and the parent company of Uber London and Uber Britannia Ltd (*Y Aslam, Farrar J v Uber BV* 2202550/2015 para 3).

(7) The fact that Uber imposes numerous conditions on drivers (such as limited choice of acceptable vehicles), instructs drivers as how to do their work and, in numerous ways, controls them in the performance of their duties.

(8) The fact that Uber subjects drivers through the rating system to what amounts to a performance management/ disciplinary procedure.

(9) The fact that Uber determines issues about rebates, sometimes without ever involving the driver whose remuneration is liable to be affected.

(10) The guaranteed earning schemes.

(11) The fact that Uber accepts the risk of loss which, if the drivers were genuinely in business on their own account, would fall on them.

(12) The fact that Uber handles complaints by passengers, including complaints about the driver.

(13) The fact that Uber reserves the power to amend the drivers' terms unilaterally.[273]

The court found that Uber drivers fall within the ambit of section 230(3)(b) of the ERA as workers, not employees. This means that they are only entitled to limited protection. In the UK the courts moved from a narrow interpretation of who is a worker under a strict test to a more purposive approach, as illustrated by the above judgment, by considering the true realities of the relationship.[274] In analysing these considerations, it is clear that control was a deciding factor and that the courts investigated the true nature of the relationship, regardless of the label placed on it; substance is thus preferred over form.

In South Africa an employee is defined in terms of the *LRA* in section 213 as:

(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any *remuneration*;[275] and

(b) any other person who in any manner assists in carrying on or conducting the business of an employer.[276]

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273 *Y Aslam, Farrar J v Uber BV* 2202550/2015 para 92.I.

274 Lawson 2018 http://blogs.northampton.ac.uk/law/2018/01/09/is-%E2%80%98worker%E2%80%99-status-something-to-get-worked-up-about/. In a Supreme Court decision *Autoclenz Ltd v Belcher* [2011] ICR 1157 the court had to determine whether car valets were workers. The court recognised the importance of determining the true nature of the agreement, despite the label placed on it by the parties. The court highlighted the importance attached to the relative bargaining power of the parties in these instances. This indicates that the weaker bargaining party needs protection (paras 34-35). See also *Y Aslam, Farrar J v Uber BV* 2202550/2015 para 77-78.

275 A person who has signed a contract of employment, but has not commenced work, is also included (see *Wyeth SA (Pty) Ltd v Manqele* 2005 6 BLLR 523 (LAC)).

276 In s 1 of the *BCEA* and s 1 of the *EEA* the same definition is reflected. The definition does not differentiate between categories of workers such as part-time workers, casual workers, and full-time workers, permanent or temporary workers. Du Toit *et al Labour relations law* 90.

Part (b) of this definition clearly indicates that a valid contract of employment is not a requirement to enjoy protection under the *LRA*.[277]

Section 200A of the South African *LRA*[278] contains a rebuttable presumption as to who is an employee. This presumption did not alter or change the scope of the definition in section 213 of the LRA. The person alleging that he or she is an employee for this purpose must establish one of the factors mentioned in section 200A.[279] The person is then presumed to be an employee and the burden of proof shifts to the employer to rebut the presumption. This is a valuable tool for vulnerable workers in South Africa earning below

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277 The scope of the second part of the definition is wider and will include workers who are in an employment relationship without a contract of employment. Employees without a valid contract may also enjoy protection under the *LRA* in terms of this definition. In *Discovery Health Limited v CCMA* 2008 JOL 21626 (LC), Van Niekerk J stated that a foreign national without a valid work permit was an employee as the definition in the *LRA* is not dependent on a valid and enforceable contract of employment. Van Niekerk was concerned with the exploitation of these vulnerable workers when left without a remedy. The Discovery case dealt with work that is performed illegally. In *Kylie v CCMA* 2010 7 BLLR 705 (LAC) the court had to determine whether a sex worker is entitled to any labour protection and falls within the scope of the definition in s 213. This case dealt with illegal work as performing sex work in South Africa is still a crime in terms of the *Sexual Offences Act* 23 of 1957. Ss 3(a) and (c) and 20(1A)(a) were relevant to the case. The court stated that the purposes of the *LRA,* namely to advance economic development and social justice, mean that the courts have to protect employees that are particularly vulnerable. The 2014 amendments to the *LRA* removed reference to the contract of employment in the definition of dismissal, highlighting that the focus should be rather on the employment relationship and not depend on a valid contract of employment. S 186(1) states: "dismissal means that– (a) an employer has terminated employment with or without notice".

278 66 of 1995. S 200A of the Act provides as follows: "… that a person who works for, or renders services to, any other person regardless of the form of contract to be an *employee*, if one or any of the following factors are present: (a) the manner in which the persons work is subject to the control or direction of another person". In *Mandla v LAD Brokers (Pty) Ltd* 2000 21 *ILJ* 1807 (LC), the court stated that the prominence of control and supervision is one of the most important indicia of an employment relationship and in *Stein v Rising Tide Productions CC* 2002 (5) SA 199 (C), the court accepted that the control test is an important factor to consider; however, the crucial test is related to the dominant impression of the relationship. In *Hydraulic Engineering Repair Services v Ntshona* (2008) 29 *ILJ* 163 (LC) the court in para 25 stated that all the relevant factors must be weighed up and then it must be determined whether the dominant impression is that of employment; in *Pam Golding Properties (Pty) Ltd v Erasmus* (2010) 31 *ILJ* 1460 (LC), Van Niekerk J stated that the Niselow case still supported a multifactorial approach. However, the judge recognised that *State Information Technology Agency (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration* 2008 7 BLR 611 (LAC) had launched a new approach in terms of s 200A. In this case the court listed three primary criteria when determining the nature of the relationship, namely an employer's right to supervision and control, whether the employee forms part of the organisation (organisational test); and the economic dependence factor (para 12). S 200A lists seven factors to be considered. In *Liberty Life Association of Africa Ltd v Niselow* 1996 17 *ILJ* 673 (LAC), the court stated that it is essential to the employment relationship that one person's capacity to work is placed at the disposal of the employer and if this is present, it will automatically indicate a form of control. S 200A of the *LRA* allows a party earning below the threshold to approach the CCMA for an advisory award as to their status. S 83A of the *BCEA* contains the exact same provisions. Similarities exist between South African and Californian law.

279 In *Universal Church of the Kingdom of God v Myeni* (2015) 36 ILJ 2832 (LAC), the Labour Appeal Court held that the application of section 200A is only triggered when some form of a contractual agreement is evident between the parties.

the threshold of R205 433,30. Workers earning more will of course be able to use these factors as guidelines when establishing their status as an employee.

In Phaka v Bracks[280] the court supported the arbitrator's consideration of section 200A and stated:

> Section 200A of the LRA seeks to assist vulnerable individuals in establishing employee status. Although section 200A leaves the definition of "employee" unchanged, it creates a rebuttable presumption that a person who renders services to any other person is presumed, regardless of the form of the contract, to be an employee, if any one or more of a list of seven factors are present. Thus even if the contract of work purports to be that of independent contractor, if any one of the listed factors is present, that person is presumed to be an employee …[281]

If we consider section 200A, it reflects the control test,[282] the organisational test[283] and the economic dependence test.[284] *The Code of Good Practice: Who is an employee* (2006) obliges the courts to determine the true relationship, thus to prefer substance rather than form.[285] There will be instances where the contract will be the determinant; however, this will only mean that the contact is consistent with reality.

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280 2015 36 *ILJ* 1541.

281 Para 26.

282 Section 200A(a) refers to the control and supervision of work and subs (b) refers to the control over the working hours. The *Code of Good Practice: Who is an employee* refers to disciplinary measures against a worker as indicative of the exercise of control (Item 18(a)). In *Smit v Workmen's Compensation Commissioner* 1979 1 SA 51 (A) the court stated as follows: "… control is a wide concept. It includes *inter alia* the right of an employer to decide what work is to be done by the employee, the manner in which it is to be done by him, the means to be employed by him in doing it, the time when and the place where it is to be done by him. Supervision implies the right of the employer to inspect and direct the work done by the employee. However, the court also recognises that it is not the only factor to be considered (paras 60-62 D-G). The court also refers to the Roman Dutch Law and the relationship between the employer and a domestic servant. This relationship is described as "personal" and "intimate" as the worker was often also seen as a member of the household and the place of work was also their home. According to the common law the employer could also "inflict moderate chastisement" on his domestic worker (paras F59-60). The court in *Colonial Mutual Life Assurance Society Ltd v MacDonald* 1931 AD 412 recognised the challenges in determining the indicative level of control, but stated that total absence of control will determine that no master-servant relationship exists (434-435). In *SA Broadcasting Corporation v McKenzie* 1999 20 *ILJ* 585 (LAC) the court confirmed that with a total absence of supervision and control a master-servant relationship cannot exist (para 33). The court also provided that "… [i]n seeking to discover the true relationship between the parties, the court must have regard to the realities of the relationship and not regard itself as bound by what they have chosen to call it (para 10).

283 The Code refers to the aspect of risks that the employer typically bears in an employment relationship (item 18(c)).

284 In compliance with s 200A(4) a *Code of Good Practice: Who is an employee* was issued in 2006. In respect of this factor, the supply of work by the employer can also be indicative of the employment relationship (item 18(e)).

285 In *Denel (Pty) Ltd v Gerber* 2005 9 BLLR 849 (LAC) the court stated: "When a court or tribunal is called upon to decide whether a person is another's employee or not, it is enjoined to determine the true and real position. Accordingly, it ought not to decide such a matter exclusively on the

The enactment of section 200A of the *LRA* and section 83A of the *BCEA* is in line with the ILO Recommendation concerning the Employment Relationship (198) of 2006. This Recommendation recognises that protection should be accessible to particularly vulnerable workers and that challenges in determining the nature of the relationship can affect these workers and their communities and societies. This highlights the importance of extending protection to vulnerable workers and the impact in a wider sense on both immediate communities and societies. The Recommendation calls for national policies to extend protection to workers in an employment relationship and these policies must provide guidance and indicia to determine the nature of the relationship and prevent disguised relationships.

In the *in limine* matter between *Uber South Africa Technological Services (Pty) Ltd and NUPSAW*,[286] Uber challenged the jurisdiction of the CCMA to arbitrate unfair dismissal disputes between Uber and a number of drivers and partner drivers. Uber claimed that these drivers were not employees as defined in section 213 of the *LRA*. The commissioner recognised that section 213(b) is wider in scope and can include these workers and that a single test to determine the nature of the employment relationship cannot be decisive.[287] The *Code of Good Practice: Who is an employee?* (the Code), according to the commissioner, introduces a "reality of the relationship test" that integrates all past tests. This refers to the consideration of substance rather than form. Based on the Code, the commissioner found as follows:

(a) the drivers render personal services;[288]

(b) the relationship is indefinite and does not depend on a specific outcome;[289]

(c) drivers are subject to the control of Uber;[290]

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basis of what the parties have chosen to say in their agreement for it might be convenient to both parties to leave out of the agreement some important and material matter or not reflect the true position" (para 19). See also *Linda Erasmus Properties Enterprises (Pty) Ltd v Mhlongo* 2007 28 ILJ 1100 (LC).

286 7 July 2017. See also *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW)* Case no 449/17(LC) 2018/01/12.

287 Para 39.

288 Para 39. The drivers are not allowed to outsource driving and upon the death of the driver, the relationship terminates.

289 Para 44.

290 Para 45-47. Although drivers can choose their hours of work as well as listed requests, Uber sets clear standards and performances according to a policy and exercises physical supervision through technology. Although partners control their drivers, Uber still has control over the performance of each individual driver.

(d) the drivers are economically dependent on Uber;[291] and

(e) the drivers are an essential part of Uber's service.[292]

The commissioner found that by applying the Code there were sufficient grounds to indicate that these drivers were employees and that this interpretation was in line with the objects of the *LRA* and with the Constitution.[293] The Commissioner stated furthermore:

> Promotion of social justice involves the balancing of power between those with resources and those who are in a weaker position in society. It involves protecting the rights of the weak and making it accessible to them to enforce their rights. An interpretation which promotes social justice must favour the drivers, who are in a considerably weak position when compared to Uber.[294]

In support of the Californian decision in *Douglas O'Connor* none of the indicia should be considered in isolation, but rather a more integrated approach should be preferred.[295] An interesting factor in the extension of protection to vulnerable workers is the inequality in bargaining power and in *Cotter v Lyft INC*[296] the court stated that the legislature extends protection to vulnerable low-skilled employees so as to balance the inequality in the bargaining power. This policy decision is certainly important as many women in the informal economy are found in lower wage and unskilled employment and face great inequalities in bargaining power and this could certainly motivate the extension of labour and social protection through legislative intervention as suggested by the Californian district court. This also refer to Otto Kahn-Freund's classic purpose of labour law to remedy the inequality in bargaining power that is inherent to employment relationship. This brings us back to an initial function of labour law that is just as relevant for workers in the informal economy as for those in the formal economy. Without a voice and adequate bargaining structures they remain vulnerable.[297]

The abovementioned jurisdictional ruling of the commissioner was taken on review and Van Niekerk J found that the respondents did not discharge the onus to establish that they were employees of Uber SA and that the commissioner's decision to refuse to join Uber BV was

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291 Para 48.

292 Para 49.The commissioner stated that the Uber App is merely the tool and the drivers provide the transport.

293 Para 52-55.

294 Para 56.

295 *Douglas O'Connor v Uber Technologies INC* 2013 U.S. Lexis 120406 para IIA 1.

296 Case no 13–CV-04065-VC 2015, para IV.

297 See Chapter 7 for a discussion on voice and representation of women workers in the informal economy.

incorrect and reviewable.[298] The judgment does not reflect a principled exclusion of Uber drivers as employees as it was based on a number of technical issues and the question whether the respondents are employees of Uber BV remained open.

Determining who the employer is can also be a challenge. Home workers form a category of vulnerable workers who often work in supply chains and who are excluded from adequate labour and social protection, and it can be problematic to identify the true employer in such cases.[299]

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298 *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW)* Case no 449/17 (LC) 2018/01/12. Van Niekerk J, found the commissioner erred in failing to distinguish between Uber SA and Uber BV as separate legal entities and that there was no dispute of fact with reference to the delineation of functions as between the two entities (para 97). This judgment does not substantially affect the views expressed in this thesis.

299 The following two cases illustrate the problematic nature of establishing the employer in cases of home workers working in supply chains. These are examples of cases in the US and Canada that relate to vulnerable home workers in supply chains (in the garment industry female workers dominate): *Lian v J Crew Group Inc* 2001 54 OR (3rd) 329 Ontario Superior Court of Justice, and *Doe v Wall Mart Stores INC* 527 F 3d (9th Circ 2009) US Court of Appeal. Legislation in Ontario provides that where organisations are linked or affiliated and this link was to circumvent the law, they can all be considered employers (see s 12 of the *Employment Standards Act* of 1990). In this case the plaintiff emigrated from China and was a home worker in a supply chain with major manufacturers such as J Crew Group INC. She claimed her outstanding wages. Four clothing retailers and manufacturers were cited as defendants. The court established that there was a structural problem in this industry and also in guaranteeing the home workers' wages by the direct employer (see para 12). The courts rejected the treatment of the defendants as one putative employer due to the lack of evidence that the defendants were associated within the meaning of s 12 of the above act (para 68) and that the arrangement was not one to defeat the purpose of the above act. In an *obiter dictum* remark, the court recognised that public policy measures should endeavour realising better compliance with the act in respect of the garment industry. See also Fudge "The legal boundaries of employer, precarious workers, and labour protection" 307. In *Zheng v Liberty Appeal Co* 355 F3d 61 (2d Circ. 2003), the court found that the non-English speaking garment workers of the factory were jointly employed by the factory owner and the manufacturer in terms of the *Fair Labour Standards Act* of 1938, after the owner of the factory disappeared while still liable for outstanding wages. This act defines an employee as "any individual employed by an employer" (203(e)(1)) and an entity employs an individual if it "suffers of permits that individual to work" (203(g)). It is interesting to note that the courts developed two different tests, one to determine cases of joint employers and one to distinguish between employees and independent contractors. Two additional factors, namely the workers' investment in the business and the degree of skill and independent initiative required are used to distinguish independent contractors from employees (para 2; see also para 72). See also Davies *Perspectives on labour law* 153. The ILO Home Work Convention 177, 1996 provides that an employer in this instance includes a person who directly or through an intermediary provides home work. The Recommendation (no. 184) to this convention provides in para 18 for the joint and several liability of intermediaries and employers, according to regulation in national laws. It is noteworthy that in India contract workers are not seen as employees of the principal employer and cannot enforce any dispute against them. However, when this relationship is fiction a dispute can be raised against the principal employer. The principal employer is in many instances not a man of straw but does have enough resources and the ability to pay various benefits. Therefore campaigns in India do exist to deem the contractor as an employee of the principal employer. In instances where the contractor does not provide remuneration, social security benefits or safe working environment, the principal employer can be held liable even though the workers do not enjoy the status of employees of the principal employer. These workers represent a category of workers in informal

In respect of vulnerable women workers in the informal economy, specifically home workers in the garment industry, the concept of joint employment as recognised in the US can be helpful when these workers are exploited.[300] In developing a test to determine joint employment, the courts have decided on a number of factors, such as the use of premises and equipment; the ability of the business to move from one putative joint employer to another; whether the workers performed a line-job that is essential to the employer's process of production; supervision of the work; whether the employees work only or predominantly for one employer and whether the contracts can be transferred from one subcontractor to another without material changes.[301]

Another approach to consider is that of Freedland and Kountouris,[302] who in their endeavours to widen the scope of labour law, subscribe to the following definition of "personal work":

> The personal work relation is a connection or a set of connections, between a person – the worker – and another person or persons or an organization or organizations, arising from an engagement or arrangement or set of arrangements for the carrying out of work or the rendering of services by the worker personally, that is to say wholly or primarily by the worker himself or herself.

This definition contains interesting elements and the use of words such as "worker", "engagement" and "arrangement" certainly widens the scope of coverage and should cover home workers in production chain networks. Although this definition was designed for the European context, use of the above will certainly cover a number of workers in the informal economy.

The focus should be on the *worker* as opposed to a traditional focus on an employee who works in a traditional employment relationship for the same employer(s) until retirement.[303] This new concept of worker should include "… a person who moves between employment and unemployment, other forms of paid work and unpaid work," and the worker who moves between the formal and informal economy should also be

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employment in the formal sector. See also Sankaran "Flexibility and informalisation of employment relationships" 37-38. In 1996, Beedi workers in India were deemed to be employees. See chapter 6 para 7.3.1.2 below for a discussion of the *Beedi and Cigar Workers (Conditions of Employment) Act* of 1966. In this instance their precarious position and economic dependence surpassed the commercial nature of the relationship. This is also in line with the approach of the ILO Recommendation on Employment Relationships; see Sankaran "Flexibility and informalisation of employment relationships" 46.

300 *Lian v J Crew Group Inc* 2001 54 OR (3rd) 329 Ontario Superior Court of Justice; *Doe v Wall Mart Stores* INC 527 F 3d (9th Circ 2009) US Court of Appeal; *Zheng v Liberty Appeal Co* 355 F3d 61 (2d Circ. 2003).

301 *Zheng v Liberty Appeal Co* 355 F3d 61 (2d Cir. 2003) para 7.

302 Freedland and Kountouris *The legal construction of personal work relations* 31.

303 Howe "The broad idea of labour law" 299.

covered in both cases.[304] Policy makers engaged with reform in this regard must have a clear understanding of the goals they must achieve.[305] An important aim for labour law scholars should include the purpose of influencing policy makers and law makers through the provision of knowledge.[306]

Labour law is attacked because a large number of vulnerable workers are without adequate labour and social protection. Often this is a result of a narrow definition of the notions of employee and employer in national legislative provisions. Various countries have extended protection through statutory presumptions or the inclusion and adoption of the notion of worker to extend protection to vulnerable workers and, in certain instances, it has been left to the courts to extend protection. In South Africa the importance attached to the contract of employment as a key indicator to determine the nature of the employment relationship has certainly diminished and the courts will consider substance rather than form. This is important for women workers in the informal economy as they often work without the existence of an employment contract and the nature of the employment relationship with reference to various indicia should be scrutinised to extend labour and social protection to them. The above discussion illustrates that globally courts will purposively interpret legislative provisions to extend protection to workers in precarious employment relationships. However, it cannot yet be stated that labour law's personal scope has been extended to include all workers rather than just employees.

2.6 Conclusion

Empirical changes to the world of work and the proliferation of non-standard employment has immersed labour law in a crisis that is conceptual and normative in nature.[307]

The most important question that must be answered is: Can labour law survive with just minor adaptations or do we need a new paradigm, a reinvention of labour law as we know it?[308] How has globalisation and the changing nature of work impacted on the legitimacy of our discipline? Why is labour law no longer functioning as it should? With regard to the informal economy, it is clear that these workers are often excluded from labour and social protection or are left without adequate protection.

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304 Howe "The broad idea of labour law" 299.
305 Davidov "A purposive approach to labour law" 15.
306 Dukes *The labour constitution* 198.
307 Fudge "Labour as a 'fictive commodity'" 124.
308 Weiss "Re-inventing labour law" 44.

If we accept that labour law is not a commodity, and that it is concerned with the protection and promotion of human dignity of workers, then a complete paradigm shift is not required; however, structural changes are inevitable.[309] This means that we can keep the basic idea of labour law, but this idea must be capable of change.[310] Labour law must develop innovative ways to apply the same values to new realities.[311] This must include innovative conceptual changes and the adoption of new concepts to accommodate workers in the informal economy that are excluded from traditional concepts such as the notion of "employee". Courts must adopt a purposive interpretation of traditional concepts in their endeavours to extend protection to vulnerable workers. Labour law must also provide for new organisational structures, including workplace communities,[312] to enable these workers to mobilise themselves, including recognition of civil societies.[313] In the words of Hepple: [314]

> But the labour legislation of the future, like that of the past, will be the outcome of processes of conflict between different social groups and competing ideologies.

In addressing these challenges we need to clearly understand the "goals of labour law".[315] Freedland[316] refers to autonomy as a paradigm for labour law and he states:

> My own understanding of autonomy as an ideal of labour law consists of the assertion that labour law, if it is to attain a satisfactory level of functional coherence, needs to evolve and operate as an independent subsystem of the general legal system within which it is located, be that a national or supra-national or subnational system.

Labour law must thus meet the challenges posed by the realities of new forms of work, but it cannot be held responsible for the "miseries of the world".[317] Different legal processes and different branches of the law are equipped to deal with applicable challenges in its domain.[318] The important function of labour law to protect and promote the human dignity of workers will often result in a cross-over of various subsystems of the law.[319] If we consider human dignity as an important component of labour law, then

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309 Weiss "Re-inventing labour law" 47.
310 Goldin "Global conceptualizations and local constructions of the idea of labour law" 84.
311 Langille "Labour law's theory of justice" 102.
312 Le Roux 2014 *ILJ* 40.
313 New organisational structures and their value and impact on women workers in the informal economy will be discussed in Chapter 7.
314 Hepple 1996 *CLLPJ* 627.
315 Davidov *A purposive approach to labour law* 14.
316 Davidov *A purposive approach to labour law* 2.
317 Weiss "Re-inventing labour law" 49.
318 Weiss "Re-inventing labour law" 44. For example, family law must still be responsible for family issues within its domain.
319 For example, in cases of pregnancy of a worker social security law, labour law and family law will share objectives; however, they will have different instruments available to assist in these circumstances.

we need to consider an interdisciplinary approach and the promotion of such an approach. This approach will mean that labour law can no longer function in isolation and other branches of the law, such as social security law, corporate law, human rights and family law will increasingly have an impact on the human dignity of workers.

Freedland[320] states the following in respect of the constraint on the boundaries of employment law:

> An oasis of social justice regulation in a desert of neo-liberal laissez-faire for contracts in general … overlooks the considerable and fast developing body of regulation addressing issues of unfairness in the making and performance of contracts in general.

Reflecting on Davidov's analysis of the "crisis of labour law" the solution to this crisis thus lies in the alignment of the various goals. [321] If we argue that we do not need a new paradigm in respect of labour law, then reform is required, to meet the challenges of the changing nature of work and the increasing informal economy.[322]

When considering the future of labour law and specifically in relation to the labour and social protection of women in the informal economy, it is vital that the new framework is intrinsically linked to concepts such as democracy, social justice, freedom, and human rights.[323] The redistributive function of labour law, namely equalising the bargaining power, remains a cornerstone of labour law, and for women in the informal economy this would certainly ensure that through this empowerment they can exercise agency.[324] For these women, however, worker participation in the broader sense is a necessity, as they often have to engage with various role players such as public authorities to ensure their livelihood.[325]

An integrated and expanded approach is required with reference to Sen's capabilities. This will require the recognition of the importance of solidarity combined with the notion of substantive equality. Together these concepts can form a powerful partnership to address the vulnerabilities and challenges women face in the informal economy.[326]

Labour law should strive to minimise the vulnerabilities of women workers and combat their social exclusion and this would include a scrutiny of the various employment

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320 Davidov *A purposive approach to labour law* 2.
321 Davidov *A purposive approach to labour law* 1.
322 Davidov *A purposive approach to labour law* 15.
323 Von Broembsen "A new constituting narrative for labour law".
324 Von Broembsen "A new constituting narrative for labour law".
325 Street traders will have to engage with public authorities to allow them to trade.
326 Fredman 2009 *SAJHR* 410.

relationships in the informal economy and a determination as to the characteristics that subscribe to their vulnerabilities.[327]

If we consider the precarious position of women workers in the informal economy and the diversity in the nature of the work that they perform, I support Freedland and Kountouris' theory that it is important to optimise the dignity accorded to these workers and to increase their capabilities, which they describe as the "personality of work".[328] They have developed this notion specifically around English and European labour law; however, this notion can be very beneficial to women in the informal economy. In this adaptation of a purpose for labour law, they state the following:

> Our intuition is that this adaptation of the traditional equation might serve to identify in a useful way a long-term shift in the pre-occupations of labour law, in the context of the English legal system at least, from supporting and providing default substitutes for collective bargaining for workers in "standard" work relations, to providing basic minimum labour standards, redressing inequalities between groups of workers and controlling the oppressive or arbitrary treatment of individual workers across a rather wide range of work relations.[329]

This approach illustrates an expansion of the scope of labour law, a shift from the contract of employment to the personal relationship; an approach that certainly is better suited to those in the informal economy where the contract of employment as a basis for the work relationship is often non-existent.[330] The increase of capabilities links closely to the legal and economic empowerment of these workers in an aim to a more sustainable approach.

The homogeneity of employment no longer characterises the relationship; as Fudge states:

> The male-breadwinner employment norm is past its pride, and it has long been surrounded by a periphery of secondary workers, most of whom are women.[331]

If we consider the informal economy, heterogeneity characterises the nature of their work, and this diversity requires not only reform of existing labour law but also innovative and tailor-made approaches to the new world of work.

The traditional notion that employees need protection as a result of the inequality in the bargaining power certainly remains. The challenges appear when these workers are unable to organise or mobilise themselves due to various reasons, such as exclusion from

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327 Davidov *A purposive approach to labour law* 31, 63.

328 Freedland and Kountouris *The legal construction of personal work relations* 21, 49. See also a critical analysis of their theory in McCrudden "Labour law as human rights law" 276.

329 Freedland and Kountouris *The legal construction of personal work relations* 21.

330 Freedland and Kountouris *The legal construction of personal work relations* 21.

331 Fudge 2005 *CanLELJ* 154.

concepts, the traditional definition of trade unions, or because of stereotyping and discrimination and a reluctance to organise these marginalised workers.

What then is the answer? Labour law must aim to provide justice for all workers. The inequality in bargaining power and reliance on the contract of employment will not provide workers with justice under the current paradigm.[332] This means that we must endeavour to equalise the bargaining power and this can be done by promoting and protecting collective bargaining and secondly through legislative provisions and a human rights approach to ensure decent work for all.[333] For women in the informal economy the challenges are more severe. The exclusion from collective bargaining is not just a result of inequality, intrinsic to the employment relationship, but also due to discrimination, stereotyping and stigmatisation. Protective legislative provisions also often exclude these workers from definitional contexts.

Therefore to extend labour and social protection to women in the informal economy, we need to consider their legal and economic empowerment, thereby increasing their opportunities and human freedom, increasing their rights through legislation and ensuring their mobilisation through the recognition of effective and targeted alternatives to trade union structures.[334] When we consider the extension of protection to these workers we also need to find a balance between the extension of selective rights and rights that can be universally extended.[335]

The words of Kalula remain of paramount importance when we consider the future of labour law and the extension of labour and social protection to women workers in the informal economy in developing countries where he states:

> The challenges and therefore the future of labour law in Southern Africa lies in seeking to recognise that labour law is a rather sharper instrument of social policy. Labour law must strive to influence work beyond the formal sector narrowly defined. It must strive to treat social protection as a central objective. This is not to deny the privity of the contract of employment. Mutual obligations and rights in the workplace

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332 Langille "Labour law's back pages" 25. He refers to the regulation by legislative provisions as "direct statutory intervention".

333 Langille "Labour law's back pages" 25.

334 Trebilcock "Developmental approaches to the informal economy" 72.

335 Davidov 2016 http://www.labourlawresearch.net/sites/default/files/papers/The%20status%20of%20Uber%20drivers%20A%20purposive%20approach%20copy.pdf. The diverse nature of work performed by women in the informal economy means that different rights might be applicable for different groups of workers according to their specific needs. Davidov argues that on the one hand, universal labour laws are supported by a wider audience, they apply universally and cover more workers, they promote solidarity and provide certain universal benefits. Selective labour laws are, on the other hand, tailor made and therefore target the specific need of a group of workers (Davidov 2015 *CLLPJ*). In the informal economy, the needs of domestic women workers can differ hugely from home workers, street traders or workers in the agricultural sector.

> remain important but they must be related to the broader realities of our countries' situations. Labour law must be part of the poverty agenda.[336]

In the end, the law or legal justice must be the art of the good and the fair or, in the words of Justinianus: "Ius est ars boni et aequi."

[336] Kalula "Present at the creation or another false start in Africa" 14.

CHAPTER 3
THE INTERNATIONAL AND REGIONAL FRAMEWORK

3.1 Introduction

International and regional institutions are playing an increasingly important role in the empowerment of women, the promotion of equality and decent work for all women and in providing countries with technical assistance to achieve these goals.[1] Whereas early international law concerned itself with states only, since 1949 the United Nations (UN) and its agencies have legal personality.[2]

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.[3] After 1994, our new constitutional dispensation recognised the importance of international labour standards as an intrinsic part of a democratic country.[4] South Africa also re-joined the ILO on 26 May 1994 and has since ratified all eight of the fundamental conventions.[5]

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1 See for example UN Millennium goals, such as the eradication of poverty, the promotion of gender equality, decent work and economic growth and reduced inequalities (UN 2015 http://www.un.org/millenniumgoals). See also the Sustainable Development Goals (UN 2015 http://www.un.org/sustainabledevelopment/sustainable-development-goals/).

2 Dugard *International law* 1. The International Court of Justice in a legal opinion recognised the legal personality of international institutions.

3 See para 1.3 above.

4 See s 39(1)(b) (the interpretation clause) of the *Constitution of the Republic of South Africa*, 1996. See also para 1.3 above. The South African Constitutional Court, in line with the interpretation clause and an explicit purposive approach, has used ILO conventions and recommendations as a benchmark and as an important interpretation tool in a number of labour law judgments to extend protection to workers. See *SA National Defence Union v Minister of Defence* (1999) 20 ILJ 2265 (CC) paras 26 and 30, where the court refers to article 2 of the Freedom of Association and Protection of the Right to Organise Convention 87 (1949); *NUMSA v Bader Bop (Pty) Ltd* 2003 3 SA 513 (CC) paras 29-31 where the court refers to the Freedom of Association and Protection of the Right to Organise Convention 87 (1949), the Right to Organise and Collective Bargaining 98 (1949) and the two key supervisory bodies: the Committee of Experts on the Application of Conventions and Recommendations and the Freedom of Association Committee. In *Government of the Republic of South Africa v Grootboom* 2001 (1) SA 46 paras 26 and 45 reference is made to the International Covenant on Economic, Social and Cultural Rights (1966) (ICESCR) as a guide to the interpretation of s 26 of our Constitution. This judgment was delivered before South Africa ratified the covenant.

5 See para 3.3.2 below. Before rejoining, South Africa was a member state from 1919 to 1966. It must also be noted that the *LRA* in s 1 in specific terms provides for the purpose to give effect to the country's obligations as a member state of the International Labour Organisation (ILO). A link is then provided between its primary objects and the interpretation of the Act in s 3, which provides for an interpretation of the Act in compliance with public international law obligations. The *EEA* also contains an interpretation clause in s 3; furthermore, the *BCEA* in s 2 shares the purpose of the *LRA* in terms of South Africa's international obligations but contains no expressed interpretation clause. See also Du Toit *et al Labour relations law* 78-79.

The purpose of this chapter is to identify and critically consider the relevant international institutions and instruments, the impact of international standards, regional institutions and regional labour standards, particularly those of the African Union (AU) and the Southern Africa Development Community (SADC), and other global initiatives directed at the social and labour protection of women workers in the informal economy. In this chapter SADC member states are considered with reference to the international and regional framework, as South Africa is an integral part hereof. India and Brazil are also considered with reference to the international framework as comparative foreign jurisdictions which will be discussed in Chapter 7. These considerations will assist in drawing up recommendations on how to meet the many challenges that women in the informal economy face.[6]

3.2 The United Nations

The United Nations (UN) is an international organisation, established in 1945 and based on the principle of sovereign equality. The purposes of the United Nations include the maintenance of international peace; the development of amicable relations between nations; the achievement of international cooperation in solving problems of an economic, social, cultural and humanitarian nature and the promotion of human rights and fundamental freedoms without discrimination.[7] Article 7 of the Charter of the United Nations and the Statute of the International Court of Justice (1945) (hereafter the UN Charter) provides for the main organs of the UN, namely a General Assembly,[8] a Security

6 See Kalula, Okorafor and Bamu "Towards an effective regulatory framework for labour rights and social protection in Southern Africa" 15.

7 Article 1 of the UN Charter. The UN currently has 193 member states. The preamble reaffirms faith in human rights, in the dignity of people and in equal rights for all. Unlike its predecessor the League of Nations, the UN has a larger focus on socio-economic matters (see Davies and Woodward *International organizations* 119).

8 The General Assembly consists of members of the UN and may discuss issues on any matter within the scope of the UN Charter. The functions and powers of the General Assembly are set out in articles 10-22.

Council,[9] an Economic and Social Council,[10] a Trusteeship Council,[11] a Secretariat[12] and an International Court of Justice.[13]

3.2.1 UN instruments

3.2.1.1 The Universal Declaration of Human Rights (1948)

The aim of this discussion is to consider the core UN human rights instruments applicable to women workers in the informal economy. The Universal Declaration of Human Rights forms the cornerstone of the UN's protection and promotion of human rights. The declaration contains certain important provisions in respect of women workers in the informal economy, such as the right to equality,[14] the prohibition of discrimination,[15] freedom of movement,[16] the right to own property,[17] the right to peaceful assembly and association,[18] the right to equal access to public service,[19] the right to work, protection against unemployment, equality in the workplace, the right to social protection, including social security,[20] and the right to education.[21] Human rights are protected and promoted through the High Commission for Human Rights,[22] the Human Rights Council,[23] and Human Rights Treaty Bodies.[24] The International Covenant on Civil and Political Rights

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9 The main function is the maintenance of peace. The functions and powers are discussed in articles 24-26.

10 The Council can initiate studies and reports in respect of international economic, social, cultural, educational, health and other related matters, make recommendations in respect of human rights and fundamental freedoms, and draft conventions in this regards. The functions and powers are set out in articles 62-66.

11 The functions and powers are discussed in articles 87-88.

12 See articles 97-100. Nearly half of the UN Secretariat is devoted to socio-economic matters (see Davies and Woodward *International organizations* 116).

13 This is the main judicial organ of the UN and members undertake to comply with the decisions of this court in any case to which it is a party. See articles 92-96.

14 Article 1 and 7.

15 Article 7.

16 Article 13.

17 Article 17.

18 Article 20.

19 Article 21(2).

20 Article 24. This article also recognises that mothers and children need special care and assistance.

21 Article 26.

22 This office is responsible for the protection and promotion of human rights, and comments on human rights situations around the globe.

23 The council is the main independent UN governmental body responsible for human rights.

24 These are committees of independent experts that monitor the implementation of core international human rights treaties. Provision is also made for independent experts to work on a voluntary basis to monitor, report and advise on human rights issues from a country, or report from a thematic perspective.

(1966) and the International Covenant on Economic, Social and Cultural Rights (1966) are together referred to as the International Bill of Human Rights.

3.2.1.2 The International Covenant on Economic, Social and Cultural Rights (1966)

The International Covenant on Economic, Social and Cultural Rights (1966) (hereafter ICESCR) came into force in 1976.[25] Important provisions for women workers in the informal economy include the equal right of women and men to the enjoyment of all economic, social and cultural rights of the covenant and the fact that state parties must ensure this equal enjoyment.[26] Article 6 provides for the right to work,[27] and takes cognisance of the importance of an integrated approach to support this. This integrated approach obligates governments to provide technical and vocational guidance, training programmes and policies to achieve the economic, social and cultural development to ascertain the full realisation of this right.[28] This approach supports the empowerment of vulnerable workers to ensure sustainability. Article 7 lists factors that contribute to decent work for all and equal treatment at work.[29] It is important to note that the wider concept of "workers" is used, thereby including vulnerable workers in the informal economy that would fall outside the scope of the traditional notion of "employee". The right to form trade unions and the right to strike are provided for in article 8. Unfortunately no provision is made for other workers' organisations that fall outside the definitional scope of the traditional notion of "trade unions". Workers' organisations such as membership-based organisations (MBOs) are often better suited to represent women workers in the informal economy.[30] Social security,[31] social protection for women during and after child birth,[32] the right to an adequate living and the right to enjoy the highest attainable standard of physical and mental health are also recognised.[33] A flexibility clause in respect of

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25 This covenant was ratified by the following SADC countries: Angola; the Democratic Republic of the Congo; Lesotho; Madagascar; Malawi; Mauritius; Namibia; the Seychelles; South Africa, Swaziland, the United Republic of Tanzania; Zambia and Zimbabwe. Brazil and India are also state parties to this instrument (UN 2017 http://indicators.ohchr.org; see also Mpedi and Nyenti *Key international, regional and national instruments regulating social security in the SADC* 14).

26 Article 3.

27 This includes the opportunity to freely choose a living.

28 Article 6(2).

29 These include fair wages, equal remuneration, safe and healthy working conditions, equal opportunities and regulations in respect of working time.

30 See Chapter 7 with reference to workers' organisations.

31 Article 9.

32 Article 10. Provision is made for paid leave or adequate social security benefits.

33 Article 11. State parties must take steps to ensure the realisation of the right to an adequate standard of living. In respect of health, provisions are made for the reduction of the still-birth rate and infant mortality.

developing countries does exist and allows for developing countries to consider their economy in determining the extent to which they can guarantee economic rights to non-nationals.[34] The abovementioned rights are thus not absolute since provision is made for state parties to subject the rights to limitations determined by national laws.[35] For developing countries or middle-income countries this principle in international instruments can often create budgetary and implementation challenges. However, these flexibility clauses allow these countries to exclude certain groups, and often vulnerable groups such as women and children, from its scope.[36]

3.2.1.3 The Convention on the Elimination of All Forms of Discrimination against Women (1979)

The Convention on the Elimination of All Forms of Discrimination against Women (1979) entered into force in 1981 and is important to all women. This convention recognises that discrimination[37] against women violates the principle of equality and respect for human dignity, as well as neglects the contribution of women to the family and society.[38] The

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34 Article 2(3). Article 2(1) requires state parties to take steps, individually and through international assistance and co-operation, especially economic and technical, to the maximum of its available resources, with a view to achieving progressively the full realisation of the rights recognised in the present Covenant by all appropriate means, including particularly the adoption of legislative measures. See the internal limitation in s 27(2) of the South African Constitution which provides as follows: "The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realisation of these rights." Reference is made to the rights to health care, food, water and social security. With reference to this flexibility clause, the governments of Madagascar and Zambia have postponed the implementation of article 13(2) with reference to primary education as a result of financial implications as well as challenges in particular with implementation. See also Mpedi and Nyenti *Key international, regional and national instruments regulating social security in the SADC* 14.

35 See article 4. The limitations are determined by law only in so far as this may be compatible with the nature of these rights for the purpose of promoting the general welfare of a democratic society (see Mpedi and Nyenti *Key international, regional and national instruments regulating social security in the SADC* 12).

36 Olivier "Gender discrimination in labour law and social security" 233.

37 Discrimination is defined in article 1 as "any distinction, exclusion or restriction made on the basis of sex which has the purpose of impairing or nullifying the recognition, enjoyment or exercise by women, irrespective of their marital status, on a basis of equality of men and women, of human rights and fundamental freedoms in the political, economic, social, cultural, civil or any other field." See paras 4.3.6 and 5.3 below for specific reference to discrimination with the contemporary South African framework

38 This convention has been ratified by all SADC countries, except Angola. India and Brazil have also ratified this instrument; however, both countries have indicated that they are not bound by article 29 para 1. Mauritius has also indicated this and Lesotho noted that the country is not bound by article 2, with specific reference to the law of succession to the throne of the Kingdom of Lesotho, and the law of succession to the chieftainship. Article 29 para 1 refers to the resolution of disputes between state parties with reference to the interpretation and application of the convention. If a dispute remains unresolved, it can be submitted for arbitration and if the parties cannot reach an agreement, the matter can be referred to the International Court of Justice.

recognition of women's contribution to the family and society is important for women workers in the informal economy as their work is often undervalued and their contributions are not recognised within societies and with reference to their contributions to economies.[39] The convention calls for state parties to prohibit discrimination in policies and provide constitutional and legislative protection to ensure equality between men and women and to eliminate discrimination in all matters.[40] Important policy considerations in the convention include the obligation on state parties to take measures to modify social and cultural patterns of conduct between men and women to eliminate stereotyping and to ensure a proper understanding of the role of women in respect of maternity as a social function.[41] The convention calls for equal rights in respect of education,[42] employment (including employment opportunities, remuneration and benefits), social security, health and safety in the work place, [43] and health care, specifically during pregnancy, confinement, and postnatal care.[44] Similar to the instruments of the African Union the convention takes cognisance of the importance of empowerment of women in the quest for gender equality and supports an integrated, sustainable approach, by providing for equal treatment in respect of access to bank loans, mortgage and other financial services.[45] These provisions mean that women in the informal economy who require financial services, for example self-employed street vendors, should have equal access to these essential services. Article 14 explicitly deals with the challenges that rural women face, and addresses these challenges in a comprehensive manner, by obligating state parties to ensure that these women participate in planning at all levels. This article promotes substantive equality by recognising the particular vulnerabilities of rural women and specifically addressing these challenges. State parties should ensure that these women have access to adequate health care, training and education, are allowed access to financial services, receive equal treatment in land issues and that women have the right

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39 Care work and domestic work are often seen as the everyday duties of women workers in the informal economy, disregarding their contribution to families, society and the economy of the country. Domestic workers in return allow many women for whom they work to enter or re-enter the work force since they take care of the household chores of a family.

40 Article 2 and 16.

41 Article 5.

42 Article 10.

43 Article 11. This article also calls for the prevention of discrimination on grounds of marriage and maternity.

44 Article 12.

45 Specifically for self-employed women in the informal economy, equal treatment in this respect can promote their standard of living and assist them in reaching more sustainable solutions. See articles 13 and 14.

to organise self-help groups and co-operatives.[46] This convention recognises that these women can benefit from other organisations, such as co-operatives, to represent their needs more effectively.[47] Social protection measures include housing, sanitation, electricity and water supply, and state parties must ensure that women have an equal right to decent living conditions.[48]

The convention provides extensive protection against discrimination to all women and promotes equal treatment in all aspects; however, the actual implementation by state parties remains problematic.[49] This instrument also addresses many of the challenges faced by women workers in the informal economy and provides sustainable solutions,[50] although many of these challenges persist in many countries that have ratified this convention.[51] One then needs to question the effectiveness of the Committee on the Elimination of Discrimination against Women on monitoring the progress made by countries in implementing these rights.[52]

3.2.1.4 Other UN instruments

In respect of women workers, other UN instruments and provisions that may have an impact on them include the equality principle in the Convention on the Rights of Persons

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46 Article 14(2)(e).

47 The representation of these workers by other workers' organisations, such as co-operatives will be discussed in Chapter 7.

48 Article 14(2)(h).

49 South Africa, for example, has a constitution that provides for equal rights (s 9) for all and supports the notion of substantive equality; however, domestic workers remain excluded from the provisions of the *Compensation for Occupational Injuries and Diseases Act* 130 of 1993 and the enforcement of their labour rights through labour inspectors remains problematic. See paras 4.4.1.1 and 5.8 below for a discussion of the contemporary framework.

50 The convention recognises that discrimination against women is often deeply rooted at various levels, including at a societal level, and that to overcome this, issues must be addressed at this level within communities. Article 5 places an obligation on state parties to take appropriate measures to create an understanding of the social function of women. Participation by women at all levels is encouraged (see articles 7 and 8). Sustainable solutions also include equal access to education, including educational information on health and family well-being (article 10) and access to vocational training (article 11).

51 This convention has been ratified by 189 state parties. However, challenges often persist in developing countries due to a lack of resources and economic constraints. In the SADC challenges include extreme poverty, income inequality and the HIV and AIDS pandemic. See Kalula, Okorafor and Bamu "Towards an effective regulatory framework for labour rights and social protection in Southern Africa" 18-19.

52 See article 17.

with Disabilities (2006),[53] the Convention on the Rights of the Child (1989),[54] the International Covenant on Civil and Political Rights (1966)[55] and the Declaration of Commitment on HIV and AIDS (2001).[56] Racial discrimination is condemned in the International Convention on the Elimination of All Forms of Racial Discrimination (adopted in 1965).[57] These conventions can function as important tools in the achievement of equality for workers in the informal economy as many of these workers are women, and in many countries, such as South Africa, domestic workers predominantly represent a previously disadvantaged racial group and are often particular vulnerable to exploitation and discrimination. The International Covenant on the Protection of the Rights of All Migrant Workers and Members of their Families (1990) regulates the protection of the interests of migrant workers and members of their families.[58]A number of the treaties are supported by optional protocols.[59]

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53 This convention requires equal treatment of people with disabilities by state parties as well as their right to social protection. Brazil and India are state parties to this convention. Botswana is the only SADC party that has taken no action with reference to this instrument.

54 The best interest of the child is of paramount importance and provision is made for social security benefits for children. This convention has been ratified by all state parties, except for the US being the only state party that is only a signatory.

55 Forced labour and slavery are prohibited (article 8). State parties to this instrument include all SADC counties. Brazil and India have also ratified this instrument.

56 This declaration deals with care, support and treatment, human rights, the reduction of vulnerability, vulnerable children, alleviating the socio-economic impact of HIV and AIDS, the value of research and development, conflict and disaster-affected regions, resources and monitoring. Core principles include the elimination of all forms of discrimination, as well as all forms of violence against women. Under the notion of "vViolence" is included abuse, rape and trafficking of women and girls; see article 61. Poverty and the lack of empowerment among women are recognised as a specific causes that add to the vulnerability of women and girls in respect of HIV and AIDS, as well as the need for policies to address the gender dimension of this epidemic (see article 62). In 2017 StatsSA released statistics indicating that male-headed households had an average annual income of R165 853, compared to the income of female-headed households of R98 911 (Stats SA 2017 http://www.statssa.gov.za/?p==9922).

57 This convention obligates state parties to eliminate and prohibit racial discrimination (see article 8). Many women workers in the informal economy represent a previously disadvantaged racial group and are vulnerable as a result of this. In South Africa, the majority of domestic workers, informal traders and waste pickers are African women, and thus represent a previously disadvantaged group. The majority of SADC countries are state parties to this convention; however, Angola is only a signatory. Brazil and India are also state parties to this instrument.

58 The preamble of the International Covenant on the Protection of the Rights of All Migrant Workers and Members of Their Families (1990). Only three SADC countries are signatories to this instrument, namely, Lesotho, Mozambique and Seychelles. Brazil and India have not taken any action with reference to this instrument. Even developed countries, such as Germany and France, have not taken action to ratify this instrument.

59 The Optional Protocol to the Covenant on Economic, Social and Cultural Rights (1966), Optional Protocol on International Covenant on Civil and Political Rights (1966), the Optional Protocol to Convention on the Elimination of All Forms of Discrimination against Woman (1979), and the Optional Protocol to the Convention on the Rights of People with Disabilities (2006). These protocols aim to supplement the treaties.

3.2.2 UN Women as an international entity

UN Women is a UN organisation dedicated to gender equality and the empowerment of all women and is important to women workers in the informal economy.[60] UN Women endeavours to make the vision of the Sustainable Development Goals a reality for all women and girls.[61] The 17 Sustainable Developmental Goals[62] (SDGs) have replaced the eight Millennium Development Goals (MDGs) with a new 2030 Agenda for Sustainable Development and calls for countries to build on the Millennium Development Goals with this new agenda. These 17 goals function as a new 2030 global roadmap and set concrete deadlines. These goals balance economic, social and environmental dimensions of sustainable development and seek to achieve what the MDGs could not, in reaching the poorest and most vulnerable.[63] Poverty is recognised as the biggest global challenge.

Gender equality, the empowerment of women and decent work for all, are important goals for all women.[64] Goal 5, gender equality, is a stand-alone goal that recognises the importance of equality for women.[65] The UN Secretary-General established the High-Level Panel on Women's Economic Empowerment early in 2016 to ensure that these goals become a reality for all women and girls.[66] The panel demonstrates the importance of various role players, in support of a participatory and integrated approach to ensure the empowerment of women, and includes representatives of state parties, governments, academics and various international organisations.[67] These partnerships at regional,

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60 See their website at http://www.unwoman.org. UN Women became operational in 2011 after the adoption of resolution 64/289.

61 UN Women http://www.unwoman.org.

62 The 17 goals can be found at UN 2015 http://www.un.org/millenniumgoals/.

63 These goals came into effect in January 2016.

64 Empowerment and gender equality for all women and girls includes equal access to education, economic resources, political participation, and equal opportunities with men and boys for employment, leadership and decision making at all levels (para 20). Countries such as Jamaica have shown a commitment to goal 5, gender equality and goal 8, decent work, by signing the ILO Domestic Workers Convention 189 in September 2016. This clearly indicates how various international campaigns and instruments can be integrated to achieve decent work and equality for all, even when implemented progressively, for a category of workers such as domestic workers and that the co-operation between these organisations can make decent work a reality for all (UN Women date unknown http://www.unwomen.org/en/about-us/about-un-women).

65 This goal includes the elimination of all forms of discrimination, the recognition and value of unpaid care and domestic work; the effective participation of women at all levels, and equal access to economic resources. The achievement of equality in this regard is supported by engendering, public services, infrastructures, policies and legislation. Without a specific gendered approach at all levels to address the inequalities faced by women, the notion of substantive equality will not be realised. Thus a mere extension of existing provisions will not achieve this goal.

66 Klugman and Tyson *Leave no one behind* 1.

67 Klugman and Tyson *Leave no one behind* viii.

national and international levels are crucial when considering the empowerment of women. In 2016 Ban Ki Moon, the United Nations Secretary-General stated the following:

> The empowerment of [the] world's women is a global imperative. Yet despite important progress in promoting gender equality, there remains an urgent need to address structural barriers to women's economic empowerment and full inclusion in economic activity.[68]

Although 143 state parties constitutionally guarantee equality between men and women, it still means that 50 do not do so.[69] Constitutional guarantees often do not translate in gender equality for all in real life as discrimination still exists in societal norms. Goal 8, dealing with decent work and economic growth, includes the protection of labour rights, the eradication of child labour and the promotion of safe working environments for all workers, particularly migrant women workers and those in precarious employment.

The UN Resolution on Transforming our World; the 2030 Agenda for Sustainable Development also recognises the value and positive contribution of migrants to inclusive growth and sustainable development.[70] The eradication of poverty requires policy frameworks at national, regional and international levels and policies must have gender-sensitive developmental strategies. These universal goals are applicable to developed, middle-income and developing countries; however, national realities are taken into account and developing countries require special attention.[71] Developing and middle-income countries face various challenges with regard to the implementation of these goals, such as financial limitations and limited resources. Regional and sub-regional frameworks are recognised as important building blocks in the realisation of these goals at national levels.[72] By recognising the challenges in these countries and with the proposed support, these goals can become a reality for many of the targeted vulnerable and poor. Child labour is a major challenge in Africa and its eradication is in line with the goal of decent work. Developing countries can strive to achieve this through various

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68 Klugman and Tyson *Leave no one behind* 11.

69 UN 2016 http://www.un.org/sustainabledevelopment/wp-content/uploads/2016/08/5_Why-it-Matters_GenderEquality_2p.pdf.

70 The resolution was adopted on 25 September 2015. See para 29.

71 UN Dept of Economic and Social Affairs 2015 https://sustainabledevelopment.un.org/post2015/transformingourworld para 5.The goals will be implemented at a national, regional and global level. A notion of global solidarity exists and aims to improve the lives of the poorest and most vulnerable. The challenges that developing and middle-income countries face are recognised and support structures at various levels involving multiple stakeholders are envisaged.

72 Specific regional programmes are also recognised and supported, such as the African Union's Agenda 2063 and the New Partnership for Africa's Development (UN Dept of Economic and Social Affairs 2015 https://sustainabledevelopment.un.org/post2015/transformingourworld para 21).

programmes, policies and partnerships. In line with the Sustainable Development Goals and the target date of 2030 for the eradication for child labour, the Union Cabinet of India gave its approval to ratify the ILO Minimum Age Convention (No 138) and the ILO Worst Forms of Child Labour Convention (No 182).[73] The notion of global solidarity created by the Sustainable Development Goals and country endeavours to achieve 2030 Agenda are powerful instruments to motivate countries extend protection to the vulnerable and poor across the world. In this instance it motivated India, the second most populous country in the world, to ratify two fundamental conventions to protect vulnerable children. Apart from the ratification of international instruments, India also amended national legislation, namely the *Child Labour (Prohibition and Regulation) Act* 61 of 1986.[74] This Act prohibits employment or work of children below 14 years and prohibits employment of children between 13 and 18 years in hazardous occupations and processes.[75] India has adopted a holistic and sustainable approach to child labour and has amended the Child Labour (Prohibition and Regulation) Rules, 1988 to create a framework for prevention, prohibition, rescue and rehabilitation of child and adolescent workers.[76] This reaffirms the importance of Sustainable Development Goal 8, namely to promote inclusive and sustainable economic growth and decent work for all.

UN Women endeavours to make these goals a reality for all women and girls through various programmes. Through UN programmes supported by the Women's Fund for Gender Equality, they have, for example, assisted poor women in the United Republic of Tanzania and in India to have access to financial services, social protection and other livelihood programmes.[77]

It is important to consider the means of implementation of these goals. A key principle for the successful implementation is the concept of "global partnerships" that includes governments, the private sector, civil societies, institutions from the UN system and other

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73 See para 3.3.2. Although India has already ratified both conventions, the conventions will enter into force in June 2018.

74 See the *Child Labour (Prohibition and Regulation) Amendment Act* 35 of 2016

75 See s 2.

76 Child Labour (Prohibition and Regulation) Amendment Rules, 2017. This integrated, holistic and sustainable approach to eradicate child labour calls for appropriate measures to arrange public awareness campaigns, through various media channels to discourage the employment of children, promote a reporting structure for contraventions of the *Child Labour (Prohibition and Regulation) Amendment Act* 35 of 2016, to include the provisions of the Act into school curricula, and to promote training of all stakeholders, including medical officers and government officials (see Rule 2A(a)-(e)).

77 UN Women 2014 http://www.unwomen.org/en/news/in-focus/end-violence-against-women/2014/poverty.

relevant actors as well as the mobilisation of available resources.[78] Successful implementation also depends on concrete policies, programmes, actions and targets. Country progress must also be reviewed and monitored at all levels.[79]

3.3 The International Labour Organization

3.3.1 Introduction

In 2017 the International Labour Organization (ILO) celebrated its 98th anniversary and although there have been many challenges, it has survived and continues to pursue its goals.[80] The ILO, established in 1919 as part of the Treaty of Versailles, can certainly be hailed as one of the earliest international institutions concerned with the protection of human rights.[81] War and its devastating effects led to the creation of the ILO in a time where war and work encompassed most human activities.[82] At this time, the vision of the ILO was based on the premise that universal lasting peace can only be achieved through social justice.[83] During the nineteenth century, the idea of better working conditions in countries through international cooperation started taking shape in Europe as part of the European political development and various attempts to legislate labour laws at the time.[84] After a very destructive war, the contribution of the working class to the war was to be rewarded in a peace settlement by recognising the basic rights of workers.[85] The ILO's objective was to establish an institution where conventions and recommendations could

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78 Resolution on Transforming our World; the 2030 Agenda for Sustainable Development para 39 (UN 2015 http://www.un.org/en/development/desa/population/migration/generalassembly/docs/globalcompact/A_RES_70_1_E.pdf).

79 Resolution on Transforming our World; the 2030 Agenda for Sustainable Development para 47.

80 Rodgers et al *The International Labour Organization and the quest for social justice, 1919-2009*.

81 Erasmus and Jordaan 1993/1994 *SAYIL* 65. The ILO became the first specialised agency of the UN in 1946.

82 *Rodgers et al The International Labour Organization and the quest for social justice, 1919-2009*. The ILO's constitution declares that universal peace can only be established if it is based on social justice, displaying the belief that peace can only be achieved if it is based on social justice founded on freedom, dignity economic security and equal opportunity. These values are also reflected in the *Constitution of the Republic of South Africa*, 1996 and are of particular importance to the plight of vulnerable women workers in the informal economy who do not enjoy labour and social protection. In *South African Informal Traders Forum v City of Johannesburg* 2014 ZACC 8, the court stated that the ability to earn money and support yourself is an important component of the right to human dignity and that without it these traders face "humiliation and degradation" (para 31).

82 Rodgers et al *The International Labour Organization and the quest for social justice, 1919-2009*.

83 Rodgers et al *The International Labour Organization and the quest for social justice, 1919-2009*.

84 Erasmus and Jordaan 1993/1994 *SAYIL* 66. In 1890 the first international conference was held in Berlin. The conference was the first to consider the conclusion of an international agreement on working conditions in respect of mine workers, weekly rest and child labour.

85 Erasmus and Jordaan 1993/1994 *SAYIL* 66.

be adopted and through the legal protection of freedom, dignity, economic security and equal opportunities, the material well-being and spiritual development of workers could be promoted.[86] The constitution of the ILO was drafted in 1919, and the preamble states that universal and lasting peace can only be established if it is based on social justice. An improvement of working conditions is required to prevent unrest and any nation that fails to adopt humane conditions of labour is an obstacle in the way of other nations which strive to improve these conditions.[87] The ILO has always recognised that poverty must be addressed at both national and international levels and that poverty poses a threat to prosperity.[88]

The following areas[89] were then highlighted as potential areas of improvement, and many remain relevant today:

(i) regulation of working hours and the establishment of a maximum working day and week;

(ii) regulation of labour supply, prevention of unemployment and the provision of an adequate living wage;

(iii) protection of the workers against sickness, disease, and injury arising out of their employment;

(iv) protection of young children, young persons and women;[90]

(v) protection for old age and injury, protection of interests of workers when employed in countries other than their own;[91]

(vi) recognition of the principle of equal remuneration for work of equal value;

(vii) recognition of the principle of freedom of association; and

(viii) organisation of vocational and technical education and other measures.

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86 Erasmus and Jordaan 1993/1994 *SAYIL* 66.

87 The ILO constitution was modified by the Declaration of Philadelphia and came into effect in 1946. The ILO has always strongly supported the idea that labour is not a commodity.

88 Rodgers et al *The International Labour Organization and the quest for social justice, 1919-2009*.

89 Rodgers et al *The International Labour Organization and the quest for social justice, 1919-2009*.

90 The protection of vulnerable women workers has always been a priority. Article 3(2) of the ILO constitution provides that when issues affecting women are considered, one of the advisors accompanying the delegates of member states must be a woman. This provision highlights how important the protection of women in the workplace is to the ILO.

91 The issue of migrant workers remains a priority.

The first International Labour Conference[92] adopted six conventions, namely the Hours of Work Convention, [93] the Unemployment Convention, [94] the Maternity Protection Convention, [95] the Night Work (Women) Convention, [96] the Minimum Age (Industry) Convention,[97] and lastly, the Night Work for Young Persons (Industry) Convention.[98] On 6 November 1941 President Franklin Roosevelt, on the last day of the ILO conference held in New York, stated the following:

> I well remember that in those days the ILO was still a dream. To many it was a wild dream. Who had ever thought of Governments getting together to raise standards of labor on an international plane? Wilder still was the idea that the people themselves who were directly affected – the workers and the employers of various countries – should have a hand with Government in determining these labour standards.[99]

Less than 28 years after these words, the ILO was awarded the Nobel Peace Prize.

In 1920 the ILO established offices in Geneva, Switzerland and 16 conventions and recommendations were adopted in two years.[100] The Declaration of Philadelphia in 1944 stated unequivocally that "labour is not a commodity" and established basic human and economic rights.

In 1946 the ILO became the first specialised agency of the United Nations and during this time the Freedom of Association and Protection of the Right to Organise Convention 87 (1948) was adopted. In 1998 the Declaration on Fundamental Principles and Rights at Work was adopted and in 2008, the Declaration of Social Justice for Fair Globalisation marked a new vision in an age of globalisation. The Declaration on Fundamental Principles and Rights at Work of 1998 requires member states to adopt at least the core conventions containing certain core rights and they are considered to have adopted these conventions.

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92 This conference was held in Washington in 1919.
93 Convention 1 (1919).
94 Convention 2 (1919).
95 Convention 3 (1919).
96 Convention 4 (1919).
97 Convention 5 (1919).
98 Convention 6 (1919).
99 See also Rodgers et al *The International Labour Organization and the quest for social justice, 1919-2009*.
100 The three main bodies of the ILO are the International Labour Conference, the Governing Body and the International Labour Office. The International Labour Conference is often compared to an international parliament, and sets standards and policies and meets once a year in Geneva. The Governing Body functions as the executive council and meets three times a year to decide on policies and establish the programme and budget. The Labour Office functions as the operational headquarters (ILO date unknown http://www.ilo.org/global/about-the-ilo/how-the-ilo-works/lang--en/index.htm).

It is of the utmost importance that labour standards provide for the changes in the nature of work, and is not "unrealistic" or unconnected from the real world of work.[101] With reference to this, Langille commented on international labour standards and their future role as follows:

> Labor standards will increasingly be seen as purely formal in a legalistic sense, and the whole methodology one that increasingly looks like Easterly's white missionaries spreading the gospel "in the tropics". The predictable result is that "standards" become isolated from the rest of the "house" and that the "supervisory system" is seen as a formal (law on the books) legal exercise that has no traction, and no ability to get traction, in the real world.[102]

He also argued that standards are mostly:

(a) imposed externally and top-down;

(b) a-contextual because they are universal;

(c) comprehensive and detailed;[103]

(d) "hard" law backed by sanctions through real or desired conditionality; and

(e) resistant to alternate strategies.[104]

Trebilcock disagrees with Langille's arguments and states that his characterisation of ILO standards is misconstrued and does not take cognisance of flexibility clauses, and that his notion of universality may even question the concept of universality of human rights.[105] She argues that the very nature of tripartism is to ensure responsiveness to those concerned through a participatory process and also refers to the process of adoption of instruments and the two-thirds majority required here to counter his argument of a top-down approach.[106] According to her, contextualisation is achieved through flexibility clauses, as countries cannot be singled out in instruments.[107] Her support for universality is embedded in its ability to "promote empowerment that may grow out of human freedom".[108]

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101 See Langille 2010 *CLLPJ* 535.

102 See Langille 2010 *CLLPJ* 535.

103 Trebilcock 2010 *CLLPJ*. She argues that for vulnerable workers in the informal economy, including domestic workers, that are in most instances excluded from national legislation, the scope of international standards must be as comprehensive as possible.

104 See Langille 2010 *CLLPJ* 531-541; Trebilcock 2010 *CLLPJ* 554.

105 Trebilcock 2010 *CLLPJ* 555.

106 Trebilcock 2010 *CLLPJ* 555.

107 Trebilcock 2010 *CLLPJ* 555. See para 3.4 below with reference to regional instruments and contextualisation.

108 Trebilcock 2010 *CLLPJ* 559.

The criticism set out above against Langille is certainly not justified in all respects.[109] A number of reform strategies has been implemented by the ILO (as discussed below) to provide for the realities of the new world of work, including their decent work agenda,[110] the focus on social justice and globalisation,[111] the adoption of instruments specifically designed for those in the informal economy and the provision of technical assistance to developing countries supported by various regional offices.

3.3.2 The eight fundamental conventions

South Africa has ratified all eight fundamental conventions. These conventions are briefly discussed below:

(1) The Forced Labour Convention 29 (1930)[112]

This convention applies to all persons and deal with the elimination of forced labour. Informal economy workers and specifically women and children are often victims of forced labour.[113]

(2) The Freedom of Association and the Protection of the Right to Organise Convention 87 (1948)[114]

This convention applies to all workers without distinction, therefore workers in the informal economy have the right to establish organisations of their choosing. The importance of this was highlighted by the ILO director-general in 1991 when he stated the following:

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109 Langille also argues for a bottom-up approach, a shift from a paternalistic approach to an approach that supports assistance (Langille 2010 *CLLJP* 532).

110 See para 3.3.8 below and the ILO Resolution concerning Decent Work and the Informal Economy (2002).

111 Weiss "International labour standards" 6.

112 South Africa ratified this convention on 5 March 1997. See also the Abolition of Forced Labour Convention 105 (1997). South Africa ratified this convention in 1997. This convention is also ratified by all other SADC member states. Brazil and India ratified this convention approximately twenty years after its adoption. As the chapter also considers South Africa's position within the regional framework, the ratification of relevant conventions by countries in the SADC region are also noted. With reference to Chapter 7, discussing the comparative framework, the ratification of Brazil and India is noted (ILO 2017 http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1:0::NO:::).

113 ILO *Decent work and the informal economy* The lack of regulation through labour inspection and the limited access to legal resources of these workers contributes to their vulnerability in respect of forced labour

114 South Africa ratified this convention on 19 February 1996. All other SADC member states have ratified this convention. Brazil and India have not ratified this convention.

> [I]t is only through forming and joining organizations of their own choosing that those employed in the informal sector will be able to generate sufficient pressure to bring about changes in policies, attitudes and procedures that hamper the development of this sector and the improvement of working conditions in it.[115]

The Committee on Freedom of Association (CFA) of the Governing Body of the ILO held that criteria for determining persons covered by this convention are not based on the existence of an employment relationship and should include agricultural workers and the self-employed. The committee further extends the application of this convention to *all workers*, whether they are employed on a permanent or fixed-term basis or as contract employees. Complaints to the CFA can be lodged by a trade union, employers' organisations and also by government. In respect of the informal economy, it is important that trade union or employers' organisations do not have to be registered or recognised nationally by member states.[116]

(3) The Right to Organise and Collective Bargaining Convention 98 (1949)

This convention protects workers who are exercising their right to organise and promotes voluntary collective bargaining.[117] These rights are guaranteed to all workers without distinction and workers in the informal economy should enjoy the protection of this convention.

(4) The Equal Remuneration Convention 100 (1951)

This convention provides for equal remuneration for men and women for work of equal value and applies to all workers including women workers in the informal economy. [118] The question remains: how do states realise these principles for women workers in the informal economy? In 1992, the ILO Committee of Experts specifically mentioned India

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115 ILO *Decent work and the informal economy* 41.

116 ILO *Extending the scope of application of labour law to the informal economy* 60. Chapter 7 of this study illustrates that through voice and representation these workers have been able to improve their working conditions and have been able to influence policies; however, the traditional concept of a trade union may not always be the preferred organisation and MBOs, co-operatives, NGOs and community-based organisations are often more appropriate to address the specific needs of these workers. Restrictive definitions of employees and trade unions in national legislation often exclude workers from establishing organisation of their choosing.

117 South Africa ratified this convention on 19 February 1996. All other SADC member states have ratified this fundamental convention. Brazil ratified this convention as well; however, India has not yet ratified this convention (ILO 2017 http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1:0::NO:::).

118 South Africa ratified this convention on 30 March 2000 and this convention has been ratified by all other member states in the SADC region. Brazil and India have also ratified this convention (ILO 2017 http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1:0::NO:::).

as an example. India provided financial assistance to NGOs to launch a campaign through which women workers in the informal economy were informed about their rights to equal pay.[119]

(5) The Abolition of Forced Labour Convention 105 (1957)

The convention prohibits all forms of forced labour and applies to all workers despite their economic activity. [120] This is important since vulnerable women in the informal economy are often victims of forced labour.

(6) The Discrimination (Employment and Occupation) Convention 111 (1958)

This convention obligates states to ensure that national policies promote equality and eliminate all forms of discrimination. [121] This convention is wide in scope and includes workers in the informal economy; however, on a national level these workers are continually excluded from policies and legislative provisions regulating the promotion of equality and elimination of discrimination.[122] The convention also provides for elimination of discrimination in terms and conditions of employment.[123] Recommendation 111 (1958) states that these terms and conditions also include social security measures and welfare benefits.

(7) The Minimum Age Convention 138 (1973)

This convention together with the Worst Forms of Child Labour Convention 182 (1999)[124] are important instruments for the abolition of child labour, in particular since child labour is a common occurrence in the informal economy; however, an in-depth analysis of child

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119 ILO *Decent work and the informal economy* 43.

120 South Africa ratified this convention on 5 March 1997. All other SADC member states have ratified this convention, as well as India and Brazil (ILO 2017 http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1:0::NO:::).

121 South Africa ratified this convention on 5 March 1997. All other SADC member states as well as. Brazil and India have also ratified this convention (ILO 2017 http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1:0::NO:::).

122 In India, the *Unorganised Sector Workers Social Security Act* of 2008 endeavours to establish policies and programmes to extend social security coverage to these workers. This is an example of how national legislative provisions can be enacted to provide protection to informal economy workers (ILO 2011 http://www.ilo.org/global/standards/WCMS_152909/lang--en/index.htm 91.

123 See article 1.

124 South Africa ratified this convention on 7 June 2000. All SADC member states have ratified this convention. Brazil has ratified the convention and it is in force. India has ratified the convention; however, it will only enter into force on 13 June 2018 together with the Minimum Age Convention 138 (1973); see ILO 2017 http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1:0::NO:::.

labour is beyond the scope of this study.[125] The link between poverty and the informal economy is undeniable and poverty is then often the cause of children being forced to work to contribute to the survival of the family. The HIV and Aids pandemic is one of the root causes of the increase of children who as surviving members of a household are forced to find work in the informal economy.[126] The UN states that in developing countries children in the poorest households are four times more likely not to attend school than those of richer families.[127] Developed countries have nearly achieved the goal of equal enrolment for boys and girls; however, in sub-Saharan Africa only 23% of poor rural girls finish primary school.[128] Inclusive and quality education for all is also one of the UN's Sustainable Development Goals. This convention allows member states to adopt national policies to ensure the effective abolition of child labour and to progressively raise the minimum age of employment.[129] Article 2 calls for member states to specify a national minimum age for employment. The table below illustrates the minimum age as declared by SADC member states as well as by Brazil and India as comparative foreign jurisdictions.[130]

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125 ILO *Decent work and the informal economy*. UNICEF estimates that 150 million children between 5 and 14 years are child labourers and more than a third are working in unsafe conditions (UNESCO/UNICEF *Fixing the broken promises of education for all* 66).

126 ILO *Decent work and the informal economy* 33.

127 UN *The Millennium Development Goals Report 2010*.

128 Currently, approximately 58 million children are still out of school. The fact that 31 million of the 58 million out-of-school children are girls highlights the gender inequality that still exists between boys and girls, as well as their precarious position in many societies. According to available data, 15 million of these 31 million girls will never attend school and it is this group that poses the most difficult challenges for policymakers (UNESCO/UNICEF *Fixing the broken promises of education for all*). Ensuring inclusive and equitable quality education is also one of the UN's sustainable goals. The aim is to ensure that by 2030, boys and girls worldwide complete primary and secondary education. Education is an important factor when considering the empowerment of women workers and access to primary education is a fundamental human right.

129 Article 1.

130 ILO 2017 http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1:0::NO:::. The SADC Code on Social Security, article 16, provides that the minimum age must be 15 years; however, this is subject to exceptions that allow employment in light work that will not harm their health, morals or education. Light work can be performed from the age of 13 and in countries with an undeveloped economy and education facilities light work can be performed from 12 years (see article 7(1)(a)-(b) and (4)). For developing countries an approach that allows for a gradual increase in the minimum age is to be preferred when considering national social and economic circumstances. The ratification of this convention was a slow process and criticism included the fact that even non-detrimental work was prohibited for all children under 15. Currently 170 member states have ratified this convention; however, even some developed countries such as Australia still have not ratified this convention.

Country	Date of ratification	Declaration of national minimum age
Angola	2001	14 years
Botswana	1997	14 years
Brazil	2001	16 years
Democratic Republic of the Congo	2001	14 years
India	2017 *This convention will only enter into force in June 2018.*	14 years
Lesotho	2002	15 years
Madagascar	2000	15 years
Malawi	1999	14 years
Mauritius	1990	15 years
Mozambique	1990	15 years
Namibia	2000	14 years
Seychelles	2000	15 years
South Africa	2000	15 years
Swaziland	2002	15 years
United Republic of Tanzania	1998	14 years
Zambia	1976	15 years
Zimbabwe	2000	14 years

Seven SADC countries have a set minimum age of 14 years. This is only a temporary measure due to an underdeveloped economy and lack of educational facilities. However, these countries should endeavour to increase the minimum age to 15 years.[131] Although

[131] Calitz "The failure of the Minimum Age Convention to eradicate child labour 128.

all SADC countries have ratified this convention, implementation is more problematic because of factors that include severe poverty and a growing informal economy.[132]

(8) The Worst Forms of Child Labour Convention 182 (1999)

This instrument obligates member states to eliminate the worst forms of child labour. [133] It must be noted that in the past the Committee of Experts on the Application of Conventions and Recommendations focused more on the issue of informality and child labour than on informality and employment policies.[134] Countries are required to design and implement specific measures to address child labour in the informal economy and it is important for countries to balance these specific measures with broader system reforms.[135] Although 181 countries have ratified this convention, the ILO estimates that there are still 168 million children engaged in child labour – an even higher estimate than UNICEF's – and 85 million are working in hazardous work conditions.[136] Since 2002 child labour among girls has decreased by 40%.[137] The International Programme on the Elimination of Child Labour (IPEC), established in 1992, is operational in 90 countries and its aim is the progressive elimination of child labour worldwide. An important factor to consider is IPEC's approach towards a sustainable goal that includes the change of social attitudes towards child labour. This approach is more sustainable since root causes are addressed. The statistical decline, specifically among girls, is an indication that the numerous international efforts have produced results.

The eight fundamental conventions are wide in coverage and scope and include workers in the informal economy; however, national policies and legislation of member states habitually exclude these workers from labour and social protection. Although informal economy workers are included in the general scope of coverage of these conventions, the precarious and diverse nature of their employment often calls for specific instruments that

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132 Calitz "The failure of the Minimum Age Convention to eradicate child labour" 129.

133 South Africa ratified this convention on 7 June 2000. All SADC member states have ratified this convention. Brazil has ratified the convention and it is in force. India has ratified the convention; however, it will only enter into force on 13 June 2018 together with the Minimum Age Convention 138 (1973).

134 ILO *Extending the scope of application of labour law to the informal economy* 13.

135 UNESCO/UNICEF *Fixing the broken promises of education for all* 39.These children are particularly vulnerable; however, this study focuses on vulnerable women in the informal economy.

136 ILO 2017 http://www.ilo.org/global/topics/child-labour/lang--en/index.htm. In sub-Saharan Africa, the region with the highest prevalence of child labour, 58 million children are occupied in labour.

137 ILO 2017 http://www.ilo.org/global/topics/child-labour/lang--en/index.htm Child labour in respect of boys only fell by 25%.

address the challenges of the various categories of workers in the informal economy by taking cognisance of the specific challenges and needs they face. Often flexibility clauses within instruments also contribute to the exclusion of vulnerable women workers.[138] Apart from the development and adoption of conventions and recommendations, the ILO's research function in the collection and analysis of information about all employment matters and social affairs is a vital component in providing support to member states, along with the technical assistance provided to member states, specifically to developing countries.[139]

3.3.3 General remarks

The ILO's integrated contemporary vision is that of "decent work" as defined in the ILO Declaration on Social Justice and Fair Globalisation, adopted in 2008. This vision promotes rights at work, employment and social protection through social dialogue and mutual reinforcement.[140] The ILO's constitution supports governance through four factors, namely tripartism,[141] the ratification of conventions and recommendation by national authorities, inspection to ensure enforcement, and collaboration among international bodies. The unique tripartite structure of the ILO highlights the importance of cooperation between governments and workers' and employers' representatives in fostering social and economic progress and provides for democratic participation. The tripartite nature supported by the ILO encourages social dialogue between the parties. The ILO endeavours to bring these various role players together in search of common goals that are beneficial to all parties.[142] This is important when policies are formulated which have to be nationally implemented. This cooperation between governments, employers' and workers' representatives of member states is of particular importance to workers in the informal economy. They need a platform where their voice can be heard, but the representation of employers' and workers' organisations only represent the formal economy, and representation of the growing informal economy is lacking.[143] This is a weakness in the tripartism model of the ILO as the needs of these workers often differ greatly from those of workers in standard employment. Social dialogue can provide for better understanding of their needs and how to provide them with required protection to

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138 Olivier "Gender discrimination in labour law and social security 220.
139 Davies and Woodward *International organizations* 202.
140 Rodgers *et al The International Labour Organization and the quest for social justice, 1919-2009*.
141 Tripartism encourages discussion and supports democratic decisions.
142 Rodgers *et al The International Labour Organization and the quest for social justice, 1919-2009*.
143 Rodgers *et al The International Labour Organization and the quest for social justice, 1919-2009*.

ensure decent work for all.[144] The interests of women workers in the informal economy are often supported by civil society ensuring an integrated approach to extend labour and social protection to these workers; the strength of the tripartite structures in the ILO as they currently are, are inimical to representation by civil societies.[145] It is of paramount importance for the protection of these workers that the ILO reconsiders its current tripartite structure to accommodate the needs of these workers through organisations that are able to mobilise them and to promote their interests.

The ILO has adopted 189 conventions [146] and 204 recommendations; the last recommendation was adopted in 2015 and deals with the transition from the informal economy to the formal economy.[147] The effectiveness of these standards depend largely on the incorporation of these recommendations into national legislation by member states.[148]

3.3.4 The ILO and the informal economy

The ILO used the term "informal sector" for the first time in the 1970s.[149] This term was then used to describe the "activities" of the poor who were unregulated and without labour and social protection.[150] In 1991 at the International Labour Conference the "dilemma" of the informal sector was discussed. The ILO stated the following:

> There can be no question of the ILO helping to promote or develop an informal sector as a convenient, low-cost way of creating employment unless there is at the same time an equal determination to eliminate progressively the worst aspects of exploitation and inhuman working conditions in the sector.[151]

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144 Rodgers *et al The International Labour Organization and the quest for social justice, 1919-2009*.40. The decline in trade union membership also affects representation at this level.

145 It is often through civil societies that vulnerable women workers in the informal economy are able to mobilise themselves. In Indonesia domestic workers started mobilisation through assistance of civil societies, the collaboration of religious organisations and trade unions, which led to a court judgment recommending that parliament pass their Domestic Workers Bill. This example highlights the importance of various role players in the extension of labour and social protection to these workers (UN Research Institute for Social Development 2016 http://www.unrisd.org/80256B3C005BCCF9/(httpAuxPages)/29828AD5F96AC4E0C1257F9C00505F27/$file/RPB20-Domestic%20workers.pdf). See Chapter 7 for a discussion.

146 Of these conventions, 5 have been withdrawn, 23 have interim status and 22 instruments need to be revised.

147 *Transition from the Informal Economy to the Formal Economy Recommendation* 204 (2015).

148 Conventions ratified by member states are binding, whilst recommendations are exhortatory (Davies and Woodward *International organizations* 201).

149 ILO *Decent work and the informal economy* 1.

150 ILO *Decent work and the informal economy* 1.

151 ILO *Decent work and the informal economy* 1.

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 stated that it is not a temporary or residual phenomenon.[152] 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.[153]

The inadequacies of the term "informal sector" was realised and the term "informal economy" was introduced instead; currently the ILO *Recommendation concerning the transition from the informal to the formal economy* contains a comprehensive definition.[154] A comprehensive definition poses many challenges due to the diverse and heterogeneous aspects of the informal economy and the varying needs of the different categories of workers.[155] Characteristics that these workers share include that they are without labour and social protection or adequate protection, and that they display high degrees of vulnerability.[156]

One of the most important questions to be asked is: How can informal economy workers benefit from international standards? The ILO lists the following seven essential securities that these workers are often denied:

(i) labour market securities (adequate employment opportunities through high levels of employment ensured by macroeconomic policies);

(ii) employment securities (protection against arbitrary dismissal, employment stability compatible with economic dynamism);

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152 ILO *Decent work and the informal economy* 1. In developing countries the informal economy is often where work opportunities exist.

153 See p. 6 of the report.

154 See para 1.1 above. 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".

155 For example in the case of domestic workers, the workplace is often also the home of the worker and this increases the dependency on the employer, or the hazardous working conditions of waste pickers, the precarious position of informal traders that face harassment and discriminating practices from local authorities.

156 ILO *Decent work and the informal economy* 3.

(iii) job security (a *niche* designated as an occupation or career, the opportunity to develop a sense of occupation through enhancing competencies);

(iv) work security (protection against accidents and illness at work, through safety and health regulations and for example limits on working time);

(v) skill reproduction security (widespread opportunities to gain and retain skills, through innovative means, including apprenticeships and employment training);

(vi) income security (provision of adequate incomes); and

(vii) representation security (voice and representation and social dialogue).[157]

However, the ILO prefers a more purposeful approach in addressing the precarious position of these workers through the notion of decent work deficits.[158] One of the most important deficits is the lack of voice and representation of workers in the informal economy, in particular of women workers.[159]

3.3.5 The ILO and women workers

Already in its 1919 constitution, the ILO identified the necessity of protecting women as a vulnerable group; however, initially the protection extended was limited and included only regulations around night work and maternity protection.[160] In the beginning the regulatory framework for women workers took the form of recommendations, obviously lacking the legitimacy of conventions.[161] The following include some of the earliest recommendations that provided specific protection to women workers:

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157 ILO *Decent work and the informal economy* 4.

158 These deficits include poor quality, unproductive and unremunerated jobs that are not recognised and protected by law, and inadequate social protection.

159 ILO *Decent work and the informal economy* 4.

160 See the Maternity Protection Convention 3 of 1919 and the Night Work (Women) Convention 4 (1919) that were ratified by 58 countries (ILO 2017 http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1:0::NO:::). The ILO constitution also provided that when issues affecting women are discussed one of the advisors should be a woman. The Night Work Convention was revised and adopted in 1949 to promote equal treatment, together with the Protocol of 1990 to the Night Work (Women) Convention, and 67 countries have ratified the revised convention. The protocol, in article 2, provides protection to women workers before and after childbirth and extends protection against dismissal for reasons related to pregnancy and childbirth. Article 2(3) provides that the income of the women worker shall be maintained at a level sufficient for the upkeep of herself and her child. The 1985 Resolution on Equal Opportunities and Equal Treatment for Men and Women in Employment emphasises the importance of extending maternity protection to vulnerable women workers and the importance of strengthening existing social security measures in respect of maternity protection.

161 Rodgers *et al The International Labour Organization and the quest for social justice, 1919-2009*.

(a) Lead Poisoning (Women and Children) Recommendation 4 (1919)

This recommendation aimed to protect women from the risks involved in work where there could be exposure to lead poisoning and is currently under revision.

(b) Maternity Protection (Agriculture) Recommendation 12 (1921)

This recommendation is currently withdrawn, but provided protection to women workers in agricultural undertakings before and after childbirth.

(c) Night Work of Women (Agriculture) Recommendation 13 (1921)

Member states were encouraged to take measures to provide protection to women workers in agricultural undertakings during night work.[162]

(d) Labour Inspection Recommendation 20 (1923) and Labour Inspection Recommendation 81 (1947)

The 1923 recommendation[163] is the first recommendation that promoted gender equality, by including the principle that states' system of inspection should include women and that women should have equal opportunities of promotion. The 1947 recommendation[164] does not specifically mention women.

(e) Minimum Wage-Fixing Machinery Recommendation 30 (1928)

This recommendation[165] provided for equal pay for men and women for work of equal value and paragraph 2(d) allowed for women representivity where a considerable proportion of women was employed.

(f) Employment Service Recommendation 83 (1948)

Paragraph 4 of this recommendation[166] required that adequate arrangements should be made for the placement of women on the basis of their occupational skills and physical capacities; however, it can be argued that this specific provision tended to class women among the groups to be protected rather than promoted.

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162 Only in 1990 was a gender-neutral convention adopted in respect of night work. See the Night Work Convention 171 (1990).
163 This instrument has interim status.
164 This instrument is up to date.
165 This instrument has interim status.
166 This instrument has interim status.

All of these recommendations focused on protective measures, therefore intrinsically implying inequality rather than the promotion of equal opportunities for women workers. For instance, the Declaration of Philadelphia of 1944 provided the following:

> … all human beings, irrespective of race, creed or sex, have the right to pursue both their material well-being and their spiritual development in conditions of freedom and dignity.

The declaration clearly reflects the progressive development from the earlier recommendations providing only protection to the promotion of gender equality. After the Second World War, the ILO began to consider the challenges in respect of women and the world of work as a human rights issue and a quest for equality.[167] In 1951 the Equal Remuneration Convention[168]was adopted which sought to provide equal pay for men and women for equal work. Thereafter the Discrimination (Employment and Occupation) Convention[169] followed in 1958, where gender was expressly listed as a ground of discrimination. Convention 111 has been ratified by 175 countries and Convention 100 by 173 countries.[170] These two conventions were the first instruments available for ratification, after the initial recommendations protecting the rights of women, to promote equal treatment and the elimination of discrimination, and supported the notion of substantive equality.[171] A number of conventions thereafter recognised the importance of empowerment of women workers and the value of their work.[172] The 1999 Policy on Gender Equality and Mainstreaming focused on specific groups of vulnerable women workers such as homeworkers, domestic workers and migrant workers, and provided for the implementation of programmes and projects aimed at achieving gender equality.[173]

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167 Rodgers *et al The International Labour Organization and the quest for social justice, 1919-2009*.

168 No 100.

169 No 111.

170 ILO 2017 http://www.ilo.org/ dyn/normlex/en/f?p=NORMLEXPUB:1:0::NO:::.

171 Rodgers *et al The International Labour Organization and the quest for social justice, 1919-2009*.

172 The Employment Policy Convention 122 (1964) has been ratified by 111 countries and highlights the importance of freely chosen employment. The Workers with Family Responsibilities Convention 156 (1981) illustrates the progressive development of the ILO in protecting the rights of women workers as this convention, contrary to the earlier Recommendation of 1965, assigns the responsibility of the home and family to both men and women. This is an important factor to consider for women in the informal economy and specifically in the case of care work and domestic work, where their work is often seen as part of their ever day duties. The recognition and awareness for care work by this convention and the development of national policy can be an important tool for women workers to promote gender equality (Rodgers *et al The International Labour Organization and the quest for social justice, 1919-2009*). The convention also embraces an integrated approach by providing for the empowerment of workers, as article 6 provides for the promotion of information and education on the principles of equality.

173 The overall strategy of this policy was the mainstreaming of gender equality into all ILO programmes (ILO date unknown http://www.ilo.org/public/english/gender.htm).

3.3.6 International instruments applicable to women workers in the informal economy

Apart from the eight fundamental conventions, there are a number of ILO instruments applicable to women workers in the informal economy[174] and they are discussed below. These specific instruments and the core conventions reflect that there are international standards that extend general coverage to these workers. The challenges that persist, include the implementation of these standards by member states in national legislation, policies and the enforcement of these standards to ensure adequate protection of these workers. Although these workers are included within the definitional scope of these instruments, general application often disregards the diverse nature of work in the informal economy; moreover, instruments are often not designed to address the specific challenges experienced by categories of these women workers.

3.3.6.1 Declaration on Fundamental Principles and Rights at Work of 1998

This declaration,[175] though not subject to ratification, highlights valuable fundamental rights and principles at work. The declaration commits member states to promote and respect principles and rights in respect of freedom of association, the effective recognition of the right to collective bargaining, the elimination of forced labour and the elimination of discrimination in employment and occupation. This instrument highlights that the abovementioned rights are universal and apply to all states, including developing countries.[176] The universal application of these core rights means that "a lower level of application of labour standards" [177] for workers in the informal economy is not acceptable.[178] However, flexibility or exemption clauses within the convention often allow countries to exclude certain groups from the scope of application as a result of national circumstances, including limited resources. [179] In 2009, before the adoption of the

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174 Instruments with interim status will not be included.

175 The aim of this declaration is to emphasise an integrated approach, highlighting not only the need for economic progress but also the importance of social progress taking account of the diversity of member states. See Declaration on Fundamental Principles and Rights at Work 1998 1.

176 The declaration acknowledges that among the people with special needs even more vulnerable groups exist, such as migrant workers, children and women, people with disabilities and ethnic minorities.

177 ILO *Decent work and the informal economy* 40.

178 Langille criticises the concept of universality and argues for a "more local/contextual/ embedded" approach (Langille 2010 *CLLPJ* 542). See also Weiss "International labour standards" 7.

179 Article 5 para 1 of the Minimum Age Convention 138 (1973) contained a flexibility clause and allows member states to exclude the scope of application with reference to economy and administrative facilities that are insufficiently developed (see para 3.3.2 above). Article 5 para 3 lists the sectors covered by the convention; however, it does not include domestic workers. Brazil

Domestic Workers Convention 180 (2011), the Committee of Experts on the Application of Convention and Recommendations (CEACR) commented specifically on the use of flexibility clauses in conventions with reference to domestic workers.[180] Member states are required to provide a formal declaration of exclusion at the date of ratification.[181] Member states must also endeavour to minimise the exclusion and are not allowed to introduce new exclusions.[182] The report indicated that the reasons for exclusion of domestic workers often entailed the specific nature of the work that required tailor-made solutions and a specific regulatory framework to provide for the challenges innate to domestic work.[183] This declaration is of specific importance to workers in the informal economy as the ILO recognises that the problems of persons with special social needs require more attention and that there are certain groups in the informal economy that are particularly vulnerable and requires special attention.[184]

3.3.6.2 Employment Relations Recommendation 198 (2006)

This recommendation provides guidance to member states in determining the existence of employment relations, specifically in cases of "disguised employment". This recommendation provides that member states must clearly define workers that enjoy protection in terms of national legislative provisions and policies. Homeworkers are often in forms of disguised employment as employers endeavour to circumvent labour laws and this recommendation contains important principles to determine the real nature of the employment relationship. A statutory presumption, introduced by member states in domestic legislation can be an important tool in determining the status of the employment relationship.[185]

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for example initially limited the application of the convention, but national labour legislation of general application is prevalent (ILO *Decent work for domestic workers* para 79).

180 ILO *Decent work for domestic workers* para 73.

181 ILO *Decent work for domestic workers* para 74. The Maternity Protection Convention 183 (2000) and the Termination of Employment Convention 158 (1982) require countries to list excluded categories in their first report; see para 75.

182 ILO *Decent work for domestic workers* para 75.

183 ILO *Decent work for domestic workers* para 82. See para 3.3.6.4 above with reference to the Domestic Workers Convention 189 (2011). This report also indicates that only a few member states used the flexibility clauses to exclude domestic workers (para 82). See also Olivier "Gender discrimination in labour law and social security" 233.

184 See the Declaration on Fundamental Principles and Rights at Work 1998 5.

185 In South Africa the *LRA* and the *BCEA* provide for a rebuttable presumption – see s 200A of the LRA and s 83A of the BCEA. See Chapter 4 for a discussion of the contemporary framework and para 2.5 above.

3.3.6.3 Homework Convention 177 (1996)

This is an example of an instrument that focuses specifically on a category of workers often found in the informal economy.[186] This convention came about due to the efforts of trade unions such as the Self Employed Women's Association[187] (SEWA) in India and other groups and federations, namely the International Union of Food Workers, and the then International Confederation of Free Trade Unions,[188] that highlighted the vulnerable position of these workers and lobbied for international standards to guarantee basic labour right for them. These workers and organisations continued their efforts, despite facing initial resistance from employers' organisations and governments.[189] Many garment and textile workers are subcontracted homeworkers and women represent a large percentage of these workers, many bearing the cumbersome double burden of performing paid work and unpaid care work in their home.[190] Dan Gallin of the Global Labour institute stated the following in this respect:

> It is difficult to conceive of a meaningful strategy to fight poverty without substantially improving the living and working conditions of homeworkers. Homeworkers is where the poor are, millions of them. Those who want to make poverty history would be well advised to use as a point of leverage those standards, like the Home Work Convention, which are specifically designed to address the problems of the poor, and in particularly of poor women, who make up the vast majority of homeworkers.[191]

Homeworkers must be distinguished from domestic workers. Homeworkers work from their own home and domestic workers work in the home of the employer.[192] Ratification of this convention remains low and many homeworkers are unaware of the existence of

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186 Only 10 countries have ratified this convention. None of the Southern African Development Community (SADC) countries have ratified this convention. Statistics in South Africa indicated that homework contributed to a 6% share of urban employment, but South Africa has not ratified this convention. Countries with a vast majority of homeworkers, such as India and Bangladesh, still have to ratify this convention. Brazil also has not ratified this convention (ILO 2017 http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1:0::NO:::). See also the accompanying *Recommendation* 184 (1996).

187 The impact of the SEWA on women workers in the informal economy will be analysed in paras 7.9.1 and 7.9.2 of this study.

188 Now the International Trade Union Confederation.

189 Spooner and Mather *Promoting the ILO Home Work Convention (C177) and the rights of homeworkers* 28. The Employer's Group campaigned for a recommendation rather than a convention.

190 Spooner and Mather *Promoting the ILO Home Work Convention (C177) and the rights of homeworkers* 7.

191 Spooner and Mather *Promoting the ILO Home Work Convention (C177) and the rights of homeworkers* 1.

192 Homeworkers can include a scale of workers form highly skilled and highly paid workers to vulnerable informal economy workers (ILO *The informal economy and decent work* 157).

the convention. According to WIEGO's estimate there are a 100 million home-based workers and more than half of these workers can be found in South Asia; however, not one of the countries in this region has ratified this convention.[193]

Campaigns for the ratification of this convention is important, as it will highlight the valuable economic contribution of these workers, ensure that they are visible and since home work is performed mainly be women, it would promote equality and reduce gender discrimination.[194] Article 1 of the convention excludes independent contractors, as defined by national laws.[195] This is problematic as a large number of these workers may be own-account workers and will fall outside the ambit of this convention.[196] However, this article of the convention does include intermediaries under the definition of employer, and thereby includes a large number of homeworkers who perform work through intermediaries.

Article 4 of this convention promotes equality of treatment in relation to the right to join organisations of their choosing; protection against discrimination in employment; protection in respect of health and occupational safety; remuneration; statutory social protection, including maternity protection; access to training, and minimum age for admission to employment. Article 5 calls for the implementation of national policies by means of laws and regulations, collective agreements, arbitration awards or in any other *appropriate manner* consistent with national practice. This article is an example of a flexibility clause that allows for exclusions within a framework of national practice. The use of the word *appropriate* reflects attempts by the Employers Group to weaken the

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193 Spooner and Mather *Promoting the ILO Home Work Convention (C177) and the rights of homeworkers* 7.

194 Spooner and Mather *Promoting the ILO Home Work Convention (C177) and the rights of homeworkers* 45.

195 Different types of homeworkers include homeworkers who are working on contract for others, self-employed home-based workers and employees of a company working from home. Self-employed home-based workers that have a degree of autonomy and economic independence are excluded from coverage by this convention. This article excludes persons with a degree of economic independence and considers them to be independent contractors. The convention does not apply to all homeworkers and the abovementioned exclusions allow vulnerable workers (in this instance specifically women) to be excluded from the scope of coverage. This limits the effectiveness of this convention and does not promote the Sustainable Development Goals, including the eradication of poverty, gender equality and decent work and economic growth. This exclusion also allows employers to use disguised employment relationships to avoid the scope of protective labour regulation. Homeworkers as a category of workers in the informal economy are vulnerable, despite the degree of autonomy or economic independence.

196 Trebilcock "International Labour Standards and the informal economy".

effect of the convention by introducing flexible phrases.[197] This convention has been an important advocacy and advisory tool in the promotion of rights for homeworkers and is an example of how international instruments can also inspire action by non-governmental organisations to promote the rights of workers and to create an awareness of their precarious position. However, the ratification rate remains low and countries with a high prevalence of home workers have not yet ratified this convention.[198] Specific conventions that provide regulation for categories of workers in the informal economy are preferred. These conventions are not effective if they exclude categories of vulnerable workers from the scope of application.

3.3.6.4 Domestic Workers Convention 189 (2011)

An ILO report in 2016 estimated that there are at least 67 million domestic workers worldwide, but accurate data-keeping on domestic workers is problematic and the real number may be higher.[199] According to the ILO, 83% of all domestic workers are women.[200] These statistics illustrate the significant extent of domestic work and the importance of setting international standards for these workers as promoted by the ILO Domestic Workers Convention.[201] This historic convention, and the accompanying Recommendation 201 (2011) aims at improving the living and working conditions of domestic workers and advancing decent work specifically for these vulnerable workers.[202]

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197 Spooner and Mather *Promoting the ILO Home Work Convention (C177) and the rights of homeworkers* 36.

198 In 2015, 100 homeworkers, representing 24 countries, participated in a global meeting in Delhi, India to draft and adopt the New Delhi Declaration of Home-Based Workers. This was a platform for promoting ratification of the Homework Convention and strengthening non-governmental organisations that endeavour to improve the lives of the workers by recognising their contribution to economies and extending labour and social protection to them. HomeNet Thailand is an example of a national NGO with links to the international Homeworkers Network that advocates for policies and developmental strategies to improve the working conditions of homeworkers and to extend protection in line with the ILO Homework Convention. SEWA in India has also played a major role in achieving better working conditions for these workers. They have achieved this through consultations with the Labour Commissioner and awareness campaigns demanding better conditions for these workers. This illustrates the important role NGOs and trade unions can play in a campaign calling for ratification of conventions that can extend labour and social protection to workers in the informal economy (WIEGO 2015 http://www.wiego.org/informal-economy/occupational-groups/home-based-workers).

199 ILO 2016 http://www.ilo.org/global/topics/domestic-workers/lang--en/index.htm.

200 ILO 2016 http://www.ilo.org/global/topics/domestic-workers/lang--en/index.htm.

201 See also *Recommendation* 201 (2011). Only 24 countries have ratified this convention. South Africa and Mauritius are the only SADC member states that have ratified this convention. India and Brazil have not ratified the convention (ILO 2017 http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1:0::NO:::).

202 In 1936 the ILO committee recommended for the first time that the working conditions of domestic workers deserved attention; it was 75 years later when this convention was finally adopted (ILO *Domestic workers across the world* 14).

Their vulnerability can be ascribed to factors such as their low wages, unequal bargaining power, isolation and the perception that the ability to perform domestic work is innate. Distinctive principles of this convention include the recognition that these workers also deserve labour and social protection and the acceptance of their special characteristics and vulnerabilities. In many countries domestic workers represent a previously disadvantaged group and are therefore often particularly vulnerable to exploitation and discrimination based on multiple grounds, such as gender, race and ethnicity. Internationally and nationally an increased awareness of the economic and social value of domestic work exists as well as an awareness of the need to improve their living and working conditions.

A definition of domestic work remains problematic as these workers do not represent a homogenous group with reference to the nature of their job and their demographic profile.[203] To overcome the problematic nature of a single definition, the Domestic Workers Convention's[204] definition provides for common characteristics of these workers. Article 1 of the convention defines domestic work as follows:

> (a) the term "domestic work" means work performed in or for a household or households; (b) the term "domestic worker" means any person engaged in domestic work within an employment relationship; (c) a person who performs domestic work only occasionally or sporadically and not on an occupational basis is not a domestic worker.

The definition is limited in its scope as it excludes institutional care services. The exclusion of workers who perform domestic work occasionally is problematic for countries such as South Africa, where many domestic workers only perform these duties occasionally and for different employers.[205] It is important to note that the convention applies to all domestic workers, including migrant workers, and that member states are required to promote and protect the human rights of *all* domestic workers.[206] This convention aims at improving the living and working conditions of these workers and advancing decent work for them. Specific provision is made for protection of migrant domestic workers, thereby recognising them as a particularly vulnerable group. Domestic workers must be provided with a written employment contract and conditions and provisions under which they will

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203 ILO *Domestic workers across the world* 14. Their demographic profile includes age, gender and migration status. Domestic workers perform a variety of daily tasks, such as cleaning, cooking, gardening and care duties for elderly people and children.

204 189 (2011).

205 As with the Homework Convention, 177 (1996) article 1 of this convention also limits the scope of its conceptual framework.

206 See articles 2 and 3 of the convention.

be entitled to repatriation. Private employment agencies should be regulated and monitored to avoid abusive practices.[207] Member states are obliged to take measures to cooperate with each other to ensure the effective application of this convention to migrant domestic workers.[208] Regulations and policies should be formulated through social dialogue with all role players.

Recommendation 201 (2011) also provides the following requirements in terms of accommodation:

(a) a separate, private room that is suitably issues than just employment matters furnished, adequately ventilated and equipped with a lock, the key of which should be provided to the domestic worker;

(b) access to suitable sanitary facilities, shared or private;

(c) adequate lighting and, as appropriate, heating and air conditioning in keeping with prevailing conditions within the household; and

(d) meals of good quality and sufficient quantity to the extent reasonable to the cultural and religious requirements, if any, of the domestic worker concerned.[209]

However, these conditions are subjected to national conditions and this allows for a variation of accommodation provided by the Recommendation of what appears basic requirements, and it is submitted that the provisions in the Recommendation should not be subject to any variables.

The regulation of these workers can only be effective if member states include the provisions in national legislation and ensure effective enforcement thereof. The enactment of these standards can be more problematic for developing countries, but the ILO provides support through their various national offices.[210] Furthermore, platforms where the social partners may debate and consult on ways to extend protection should be effectively established. Both the Domestic Workers Convention and the Homeworkers Convention can play an important role in achieving gender equality when considering the feminisation of domestic work and homework, by providing these workers with rights and recognising the value of their work and contribution to families and economies. This will promote

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207 Article 8(1).

208 Article 8(3). Migrant domestic workers are particularly vulnerable; however, an in-depth analysis of the position of migrant women working in the informal economy is beyond the scope of this study.

209 Para 17.

210 Trebilcock "International Labour Standards and the informal economy".

equality and eliminate discrimination on grounds such as gender, race, caste and nationality that is often predominant of this sector.[211]

The convention only entered into force in South Africa on 20 June 2014. South Africa complies with its international obligations in respect of this convention, but the enforcement of these legislative provisions remains problematic.[212] The Philippines was one of the first countries to adopt this convention and the adoption led to the enactment of legislation in 2013, namely, *An Act Instituting Policies for the Protection and Welfare of Domestic Workers* (Republic Act No. 10361). This illustrates the effectiveness that international standards can have, as this act extends labour rights, social security measures, health insurance cover and other benefits and protection to nearly 1,9 million domestic workers. The convention was used as a benchmark by the drafters of this act.[213]

3.3.6.5 Workers with Family Responsibilities Convention 156 (1981) and Workers with Family Responsibilities Recommendation 165 (1981)

This convention and the concomitant recommendation[214] applies to all categories of workers, including workers in the informal economy, and recognises that the problems of workers with family responsibilities are aspects of wider familial and societal issues, which should be taken into account in national policies.[215] Apart from acknowledging the needs of workers with family responsibilities, measures compatible with national conditions should be implemented to develop or promote community services such as childcare. Article 4 provides a flexibility clause that allows for member states to implement certain exclusions with reference to national limitations. The wide scope of coverage of this convention is thus subjected to this exemption clause. The recommendation specifically

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211 ILO *Domestic workers across the world* 14.

212 The position of domestic workers in South Africa will be considered in Chapter 4. Comparative analysis of domestic workers in Brazil and India will be considered in Chapter 6.

213 WIEGO date unknown http://www.wiego.org/informal-economy/occupational-groups/domestic-workers.

214 All branches of economic activity and all categories of workers are covered by this convention and it has been ratified by 44 countries. South Africa has not ratified this convention; Mauritius is the only SADC country that has ratified this convention. Brazil and India have also not ratified this convention (ILO 2017 http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1:0::NO:::).

215 Article 1 provides that the convention applies to men and women workers with family responsibilities. Article 2 provides for an unlimited scope of application to all branches of economic activity and to all categories of workers.

provides that social security benefits should be available to workers with family responsibilities when required.[216]

3.3.6.6 Rural Workers' Organisations Convention 141 (1975) and the Rural Workers' Organisations Recommendation 149 (1975)

This convention recognises that particularly in developing countries, there is a massive underutilisation of land and labour and therefore it is imperative to encourage rural workers to develop free and viable organisations capable of protecting the interests of their members.[217] This is to ensure their effective contribution to economic and social development.

This convention applies to all types of organisations of rural workers, including organisations not restricted to, but representative of, rural workers.

A rural worker is defined in article 2 as follows:

> any person engaged in agriculture, handicrafts or a related occupation in a rural area, whether as a wage earner or a self-employed person such as a sharecropper or a small owner-occupier who derives his or her main income from agriculture, who works the land him- or herself, with the help of family or with occasional outside labour.

This convention contains important provisions for informal economy workers as many of these workers will be covered by the definition in article 2. The inclusion of rural workers' organisations makes the convention wider in scope than the traditional trade union concept, and an important factor to consider, as many of these workers often elect organisations, such as MBOs, cooperatives, NGOs and community-based organisations to represent them, as these are better suited to address their specific needs.[218] Article 5 provides that countries that ratify this convention must adopt and carry out a policy of active encouragement of these organisations, with a view to eliminate obstacles, including such legislative and administrative discrimination against rural organisations and their members as may exist. This means that governments can for example provide for less stringent and affordable registration procedures for these rural workers' organisations or exempt them from registration procedures. The use of a wider notion than the traditional

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216 See part VI, paras 27-31. The recommendation also provides that member states may take account of national resources with reference to availability of social security arrangements. See para 31.

217 South Africa has not ratified this convention and only one SADC country, namely Zambia, has ratified this convention, despite a high number of rural workers in other SADC countries. Overall 40 countries have ratified this convention, including Brazil and India (ILO http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1:0::NO:::).

218 See Chapter 7.

trade union concept in this regard recognises that rural workers and other informal economy workers often do not have the means to comply with formalistic procedures required for the registration of trade unions. Due to the diverse nature of work, diverse bargaining partners and the very distinct challenges faced by these workers, worker organisations are often better equipped to represent these workers. These organisations must also often address wider issues than just employment matters with reference to these workers to improve their livelihoods.[219] The Freedom of Association and the Protection of the Right to Organise Convention 87 (1948) and the Domestic Workers Convention 189 (2011) also refer to "representative organisations of workers".[220] International instruments that provide universal coverage to "workers" must then also provide for worker organisations, thereby recognising that the traditional notion of a trade union is not always the preferred organisation for workers.

The recommendation contains important principles in enabling these organisations to contribute to the social and economic development of rural workers and highlights the importance of adapting existing laws to the specific needs of these workers.[221] These instruments are important as rural women workers (due to the remoteness of their workplace) are among the hardest to reach workers in the informal economy. The following important principles in respect of the organisation of rural workers can be distilled from these instruments, namely:

- the value of strong and independent organisations;
- the advantages of collaboration with mainstream trade unions;
- elimination of discrimination;
- the benefits of social dialogue on all levels;
- the diverse needs of these workers; and
- the value of an integrated approach, including the legal and economic empowerment and the importance of links with international organisations.[222]

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219 See Chapter 7.

220 Article 13(2); see also para 3.3.6.4 above.

221 See *Rural Workers' Organisation Recommendation* 149 (1975).

222 Rural Workers' Organisations Convention 141 (1975) and the Rural Workers' Organisations Recommendation 149 (1975). See Chapter 7.

3.3.6.7 Indigenous and Tribal Peoples Convention 169 (1989)

This convention provides standards on labour, safety and health, vocational training, traditional occupations and social security.[223] It does not directly address the informal economy, but does include workers in the informal economy, as indigenous and tribal people are often engaged in activities in this particular sector. Furthermore it focuses on mechanisms to facilitate participation by these workers and eliminate and prevent discrimination.[224] Important principles that can be distilled from this convention as applied to women workers in the informal economy, is the theme of social inclusion, dignity and the call for active measures to eliminate and prevent discrimination.[225] Unfortunately the ratification rate is so low that the impact will be limited.[226]

3.3.6.8 Recommendation concerning the Transition from the Informal to the Formal Economy 204 (2015)

The ILO has recently adopted the Recommendation concerning the Transition from the Informal to the Formal Economy.[227] The increasing links between the informal and formal economy are due to global competition, production chains across national borders and erosion of state power.[228] The recommendation provides guidance to members to:

(a) facilitate the transition of workers and economic units from the informal to the formal economy, while respecting workers' fundamental rights and ensuring opportunities for income security, livelihoods and entrepreneurship;

(b) promote the creation, preservation and sustainability of enterprises and decent jobs in the formal economy and the coherence of macroeconomic, employment, social protection and other social policies; and

(c) prevent the informalisation of formal economy jobs.[229]

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223 This convention has been ratified by only 22 countries, including Brazil. None of the SADC member states have ratified this convention. India is also not party to this convention (ILO 2017 http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1:0::NO:::).

224 See articles 2 and 3.

225 Trebilcock "International Labour Standards and the informal economy". See also article 2 with reference to equality within national laws and the promotion of the full realisation of social, economic and cultural rights with due regard to the specific cultural identity, customs and traditions of the people. Article 3 provides for the full enjoyment of human rights without discrimination.

226 ILO 2017 http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1:0::NO:::.

227 The text of the recommendation was adopted on 12 June 2015 by the International Labour Conference. Although recommendations cannot be ratified, after being adopted, they are subject to the ILO's supervisory system according to article 19(6)(d) of the ILO constitution.

228 Trebilcock "International Labour Standards and the informal economy".

229 See para 1.

The scope of application of this recommendation is wide and includes own-account workers; members of cooperatives and of social and solidarity economy units; contributing family members and employees in informal employment in or for formal enterprises.[230] This also includes workers in subcontracting positions and in supply chains.[231]

The recommendation provides for the following important guiding principles to be considered when members design strategies to facilitate the transition:

(i) diversity of characteristics;[232]
(ii) the circumstances and the needs of specific workers in the informal economy;
(iii) the necessity to address diversity through tailored approaches;
(iv) the effective promotion and protection of human rights;
(v) the fulfilment of decent work for all; and
(vi) the promotion of gender equality and non-discrimination and the need to pay special attention to specific vulnerable groups such as women, young, migrants and older people.[233]

An evaluation of these guiding principles will therefore mean that formalisation for these workers should include legal recognition as workers and also legal protection as workers with due consideration of specific characteristics associated with categories of work in the informal economy. An integrated and sustainable approach should include the legal and economic empowerment of these workers.[234]

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230 Para 4.
231 Para 4(c).
232 Informal workers include economic units, wage workers, and self-employed workers who are often own-account workers and also in global supply chains. The transition for self-employed workers should not just entail the costs involved in the formalisation, such as registration and licensing costs, but also legal protection and standing, economic rights and social protection. For informal wage workers the transition should also entail a focus on the employer and the employer's compliance with labour regulation (WIEGO *Transitioning from the informal to the formal economy*).
233 See para 7 of the recommendation. A special focus on vulnerable groups in the informal economy, such as women, will include specific protection for these workers and will encompass maternity leave, childcare facilities, specific healthcare, measures to eliminate discrimination, abuse and harassment of these workers and the creation of a safe and healthy workplace. Domestic workers are also listed as a vulnerable group as are persons living with HIV and AIDS or who are affected by HIV or AIDS (para 7(i)).
234 A sustainable approach to formalisation should include social dialogue and an involvement in decision-making processes, good governance, access to resources, access to public services, a supportive policy environment and the establishment of new forums to facilitate a process of social dialogue. An economic sector that promotes social inclusion and the values of social responsibility can play a vital role in the transition of these workers to the formal economy. This will entail consensus on the role of governments at various levels as well as the responsibility of government at these levels (WIEGO *Transitioning from the informal to the formal economy*).

These principles acknowledge the diversity of characteristics of these workers and the necessity to address the diversity through tailor-made approaches. It is important that endeavours to facilitate the transition from the informal economy to the formal economy focus on sector- or category-specific demands around formalisation.[235] This will require an analysis of the different sectors, for example, domestic workers, informal traders and waste pickers.[236] These principles are also important when policy makers consider the extension of labour and social protection to these works. The recommendation calls for an integrated policy framework.[237] The proposed framework must address *inter alia* the following:

(a) the promotion of strategies with reference to sustainable development, eradication of poverty, inclusive growth and the creation of decent jobs in the formal economy;[238]

(b) a national legislative and regulatory framework, including minimum wage policies;[239]

(c) the realisation and promotion of fundamental principle and rights at work;[240]

(d) the organisation and representation of employers[241] and workers to promote social dialogue;[242]

(e) the promotion of equality and elimination of discrimination at the workplace;[243]

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235 The value of work and the contribution to the economy by all women workers in the informal economy must be recognised. Although very diverse in nature, groups of these women workers may face common challenges, for example, domestic workers, informal traders and waste pickers have indicated that they all require a workplace free from harassment. In the initiation of the transition to the formal economy, common goals may be a valuable starting point as a common ground, rather than a focus on the diverse characteristics of these workers.

236 WIEGO *Transitioning from the informal to the formal economy.*

237 Para 11.

238 Para 11(a).

239 Para 11(b) and (r). According to the recommendation countries should design policies that are in line with the Employment Policy Convention 122 (1964) (para 14) This convention has been ratified by 111 countries. Countries that have ratified the Convention include Brazil, India, Madagascar, Mozambique and Zambia (ILO 2017 http://www.ilo.org/dyn/ normlex/en/f?p=NORMLEXPUB:1:0::NO:::). Countries should have decent, productive and freely chosen employment as an objective of their strategies. The convention requires policies to ensure work for all who are available and seeking work, and the work must be productive. (Article 2).

240 Para (d).

241 The concept of employer in this regard should be expanded to include other bargaining partners, such as local authorities in respect of certain categories of workers such as waste pickers and informal traders.

242 Para (e).

243 Para (f).

(f) the promotion of entrepreneurship, micro-, small- and medium-sized enterprises and cooperatives and other social and solidarity economic units;[244]

(g) access to education, skills development, financial services, business services, markets, infrastructure and technology;[245]

(h) the establishment of and the extension of social security coverage and effective safety and health policies;[246]

(i) an effective framework for labour inspection;[247] and

(j) effective access to justice.[248]

Paragraph 15 of the recommendation provides for tripartite consultations, based on the traditional ILO structure of consultations to promote the implementation of an employment policy framework. However, informal workers such as waste pickers and informal traders as own-account workers, often require consultation with other role players outside the ILO tripartite paradigm. The recommendation also provides that social protection floors must consider the specific needs and circumstances of informal economy workers.[249] This supports a notion of tailor-made coverage rather than a mere extension of existing social security measures. Progressive extension requires and adaptation of administrative requirements, a new contribution and benefit structure with due regard to the capacities of these workers.[250] This is also in line with a notion of substantive equality to consider specific socio-economic circumstance of a vulnerable group, such as women workers.

This instrument also provides for worker organisations, federations and confederations as preferred by the workers.[251] However, paragraph 34 refers to representative employers'

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244 Para (g).
245 See paras (h)-(l). These provisions are particularly important to women workers in the informal economy. Multiple grounds of discrimination based on race, gender and caste often impact on their access to economic resources.
246 See paras (n) and (p).
247 Para (q). With reference to the enforcement of labour rights in the informal economy, an effective labour inspection framework is important to provide vulnerable workers with adequate protection.
248 Gender inequalities within communities and at workplace level often impact on women's access to justice.
249 Para 19.
250 Para 20.
251 Para 31.

organisations where informal traders and waste pickers do not have a distinctive employer relationship; various other bargaining partners include state representatives.

Through the effective promotion and protection of human rights these workers could enjoy legal empowerment and gain an opportunity to participate and compete on equal terms. It is unfortunate that the recommendation in paragraph 16 appears to diminish the obligations placed on member states in the ILO Declaration on Fundamental Principles and Rights at Work to respect, promote and realise these principles and rights and the obligation to enforce the core conventions on all workers by stating that member states *should* take measures to respect, promote and realise the fundamental principles for those in the informal economy.[252] Perhaps in an attempt to redeem itself, the recommendation provides in paragraph 41 as follows:

> Nothing in the Recommendation should be construed as reducing the protections afforded to those in the informal economy by other instruments of the International Labour Organization.

Apart from the adoption of this recommendation by the ILO, the actual implementation of principles will be vital. Countries could identify a group of informal workers, such as domestic workers, waste pickers[253] or informal traders and initiate the transition through policies and strategies containing the above principles. In South Africa, during the apartheid era, domestic workers were excluded from labour and social protection; however, this changed in 1994 with a new democracy and a rights-based constitutional dispensation. Domestic workers, in most instances, now enjoy the same protection as all employees in South Africa. Since 2002 domestic workers in South Africa have been covered by a designated *Sectoral Determination* 7 of 2002 providing for terms and conditions of employment.[254] The extension of labour and social protection to domestic workers illustrates how the transition can be facilitated through the identification of a group of workers and addressing their specific needs. Domestic workers in South Africa

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252 The declaration provides that member states, even if they have not ratified the core conventions, have an obligation, arising out of their ILO membership, to respect, promote and to realise these principles concerning fundamental rights. Routh *et al Workers in the global informal economy* 101.

253 A transition for waste pickers from informality to formality can include monthly payments by local authorities for waste collection, transport and recycling by local authorities. This approach formalises the recognition and remuneration of waste pickers as categories of workers deserving of protection. See paras 5.6, 6.3.1.2 and 6.3.2.3 of this study.

254 The sectoral determination provides for prescribed minimum wages, regulates hours of work, leave and termination of employment. Regulation by a sectoral determination highlights the uniqueness of the nature of domestic work and the need for specific regulation. The sectoral determination was issued in terms of s 51(1) of the *BCEA.* See chapter 4 in respect of the regulation of protection for domestic workers in South Africa.

are still excluded from the scope of the *Compensation for Occupational Injuries and Diseases Act* (*COIDA*)[255] and due to many challenges in respect of the enforcement of these rights, are still *de facto* not covered or insufficiently covered by formal arrangements.[256]

The ILO's goal is to move out of informality through the creation of formal employment opportunities; however, this goal does not take cognisance of the fact that a number of workers in the informal economy are there by choice and want to stay in the informal economy.[257] When considering this transition, stakeholders should support an integrated approach that includes social, personal and often regional factors.[258] In addition to the facilitation of this transition, the ILO should also strive to promote decent work within the informal economy as a long-term goal, thus the transition should be seen as a continuous process of strengthening the rights and protection of these workers.[259] The concept of formality should include the legal and economic empowerment of these workers and not merely impose the costs involved in becoming formal.[260] It must also be noted that formality may not always be the answer to all challenges faced by workers in the informal economy, and as stated by Albin:[261] "… it is important not to glorify formality as the answer to all labour problems". The fact remains that there are also workers in the formal economy that do not enjoy adequate labour and social protection. Informality clearly means different things to different people and the content can differ from country to country. The ILO's understanding of the informal economy in the recommendation is criticised because it does not distinguish between the impact of informality on the various workers, the root causes and the fact that formalisation should be concerned with the content of the law, rather than the scope and application.[262] Guha-Khasnobis, Kanbur and Ostrom[263] state

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255 130 of 1993.

256 In *Majola v Moonsamy* (2004) 25 ILJ 153 (CCMA) and *Motaung v Issa* (2007) 28 *ILJ* 1351 (CCMA), domestic workers during unfair dismissals proceedings indicated that their employers did not comply with Sectoral Determination 7 with reference to prescribed wages or hours of work. See para 1(2)(a) for the definition given for "informal economy". See Chapter 4 in respect of the regulation of protection for domestic workers in South Africa.

257 In a study in Nepal, involving women entrepreneurs, 37% indicated that it is their choice to work in the informal economy and that they supported a notion of financial independence (Xheneti and Karki *Transitioning into the formal* 2).

258 Xheneti and Karki *Transitioning into the formal* 3.

259 WIEGO *Transitioning from the informal to the formal economy*.

260 WIEGO *Transitioning from the informal to the formal economy*.

261 Albin 2012/2013 *CLLPH* 5.

262 La Hovary "A new international labour standard for formalising the informal economy?" 102.

263 Guha-Khasnobis, Kanbur and Ostrom "Beyond formality and informality".

> … that it should not be about a transition to the formal economy, but rather a transition beyond concepts such as formality and informality and that a more sustainable approach will entail an understanding of the realities of the economic activities of these precarious workers.

The adoption of this recommendation can be seen as a landmark in the pursuit of decent work for those in the informal economy; however, a better approach would support the abandonment of concepts such as informality and formality and renewed focus on the underlying nature of work and the economic activities of vulnerable workers.[264]

3.3.6.9 Labour Inspection Convention 81 (1947)

This instrument is important for women workers in the informal economy, such as domestic workers.[265] Although domestic workers in South Africa are mostly covered by legislative provisions, the enforcement of these provisions remain challenging due to the lack of efficient labour inspection which is caused by the limited numbers of inspectors, lack of adequate training and lack of resources. It is important that labour inspection applies to all workplaces where the legal provisions relating to conditions of work and protection of workers are enforceable.[266] The informal economy poses many challenges for labour inspection, such as the remote nature of the workplace in rural areas, the intimate nature of the private workplace in respect of domestic workers, the invisible forms of work in certain sectors such as homework, and the diverse nature of the employment relationship of these workers.[267] Labour inspectors, however, play a very important role in the actual provision of labour and social protection to workers in the informal economy. This would include the empowerment of these workers and employers through awareness campaigns of applicable standards and provisions.[268] To strengthen and enhance labour inspection in the informal economy, links with stakeholders and role players such as MBOs and civil society can be a valuable tool in the enforcement of standards. National legislation normally provides for the appointment and functions of

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264 La Hovary "A new international labour standard for formalising the informal economy?" 103. See Chapters 4, 5 and 8 for the evaluation of the validity of this transitional approach and a proposal for more nuanced approaches.

265 This governance convention has been ratified by 145 countries, including South Africa, Angola, the Democratic Republic of the Congo, Lesotho, Madagascar, Mauritius, Mozambique, Malawi, Seychelles, the United Republic of Tanzania, Zambia and Zimbabwe. Brazil has ratified the convention, as well as India. India has excluded part II of the convention (ILO 2017 http://www.ilo.org/dyn/normlex/en/f?p=NORMLEXPUB:1:0::NO:::). See also the Labour Inspection (Agriculture) Convention 129 (1969). and Labour Inspection Recommendation 81 (1947).

266 See articles 1 and 2 of the convention.

267 ILO *The informal economy and decent work*.

268 ILO *The informal economy and decent work*.

labour inspectors.[269] Despite the value and importance of labour inspection specifically for women workers in the informal economy, the ILO reports that certain developing countries allocate less than 1% of their budget to labour inspection.[270] The enforcement of labour standards and fundamental rights through labour inspection is part of the decent work strategies for the informal economy, thus highlighting the importance of compliance with this convention to improve the position of workers in the informal economy.[271]

Other relevant conventions and recommendations in respect of employment policies that may apply to informal economy workers include the Employment Policy Convention 122 (1964) and the accompanying Employment Policy (Supplementary Provisions) Recommendation 169 (1984),[272] the Human Resource Development Recommendation 195 (2004),[273] the Labour Statistics Convention 160 (1985),[274] the Job Creation in Small

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269 In South Africa, the *Basic Conditions of Employment Act* 75 of 1997 provides for the appointment and functions of labour inspectors as well as their powers of entry and powers to question and inspect (see ss 63-66). See also para 4.3.4 below.

270 ILO *The informal economy and decent work.*

271 In Brazil the strengthening of labour inspection was one of the factors that contributed to the creation of more employment in the formal sector (ILO *The informal economy and decent work*).

272 According to this convention, member states shall pursue an active policy to promote full productive employment and freely chosen employment. (Article 1). Article 3 encourages social dialogue with role players in the discussions about applicable policy measures. The Committee of Experts on the Application of Conventions and Recommendations have indicated that countries, such as the Philippines, Uganda and Venezuela have indicated some dialogue under article 3 with workers in the informal economy. It must also be noted that countries have indicated that they face many challenges in actually reaching these workers (see Schlyter *International labour standards and the informal sector*). Para 9 of this recommendation can be seen as the predecessor for the Recommendation Concerning the Transition from the Informal to the Formal Economy 204 as this paragraph provides for member states to take measures to enable the progressive transfer from the informal economy to the formal economy. This earlier provision indicates the ILO's perhaps unnecessary obsession with this transition not considering that a percentage of these workers are working in the informal economy by choice. The recommendation contains specific provisions in para V for the "informal sector" in paras 27-29. Here the recommendation highlights the importance of the informal economy in respect of job creation.

273 This recommendation supports the empowerment of workers in the informal economy and underlines the importance of an integrated approach economy by providing that members should promote access to education, training and lifelong learning in para 5. An important provision for women workers is the promotion of equal opportunities in the education, training and life-long learning.

274 Member states undertake to collect and compile basic statistics.

and Medium Sized Enterprises Recommendation 189 (1998)[275] and the Promotion of Cooperatives Recommendation 193 (2002).[276]

Migrant women workers are often found in the informal economy and represent a particularly vulnerable group of workers.[277] Although an in-depth analysis of the position of these workers is beyond the scope of this study, it must be noted that there are various international conventions applicable to these workers. These conventions and recommendations are the Migration for Employment Convention (as revised) 97 (1949) and the Migrant Workers Recommendation 151 (1975), [278] the Migrant Workers (Supplementary Provisions) Convention 143 (1975) and its Recommendation (No 151), and the Private Employment Agencies Convention 181 (1997). The ILO Multilateral Framework on labour migration provides for non-binding principles and guidelines in support of a rights-based approach to migrations. Important guidelines for migrant domestic workers include the implementation of policies that address the specific vulnerabilities of these workers, including discrimination. Policies should be gender sensitive and address specific problems and abuses these women workers face, including harassment at the place of work.[279]

Principles of equal treatment, non-discrimination and protection of non-citizens can also be found in some other conventions, such as the International Convention on the Protection of the Rights of all Migrant Workers and Members of their Families (1990), the Convention on the Rights of the Child (1990) and the International Covenant on the Elimination of all Forms of Racial Discrimination (1965).

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275 This recommendation underlines the value of adequate representation of workers in the informal economy. Governments should consider simplifying procedures for small- and medium-size enterprises when establishing a business. Cumbersome and expensive procedures will force these enterprises to remain in the informal economy.

276 The recommendation contains provisions in respect of the promotion and strengthening of cooperatives. This is important for the informal economy because of the role that cooperatives can play in the extension of labour and social protection to vulnerable workers.

277 According to the International Labour Organization, women represent around half of the total population of international migrants worldwide and one in every five domestic workers is an international migrant.

278 In terms of article 11 of this convention, "migrant for employment" means "a person who migrates from one country to another with the view of being employed otherwise than for his own account". Although self-employed persons are excluded from the scope of the convention, domestic workers are included. This convention provides for member states to supply medical services for migrants during arrival and departures in host countries, for prevention of discrimination in respect of employment conditions, freedom of association, provision of accommodation and social security (see article 6).

279 See guidelines 4.4 and 4.5.

3.3.7 Social security instruments

The concept of social security and the first international standard-setting activities of the ILO can be traced back to 1919.[280] The preamble of the ILO constitution referred to the prevention of unemployment, the protection of workers against sickness, disease and injury arising out of employment and provision for old age and injury. In the preamble of the constitution specific mention is made of particularly vulnerable groups, such as women and children. During the first twenty years the ILO adopted 14 conventions and 11 recommendations setting international standards in respect of social security.[281] Near the end of the war in 1944, the Declaration of Philadelphia stated that economic, financial and social policies should be integrated and the concept of social security was included among the fundamental principles of work. The declaration actually embraced the wider notion of social protection as it provides for world programmes that will achieve the following:

(i) the extension of social security measures to provide a basic income to all in need of such protection and comprehensive medical care;

(ii) adequate protection for the life and health of workers in all occupations;

(iii) provision of child welfare and maternity protection;

(iv) the provision of adequate nutrition, housing and facilities for recreation and culture; and

(v) the assurance of equality of educational and vocational opportunity.[282]

The declaration was the first international instrument that recognised social security as a human right.[283] The rights-based approach to social security increases accountability of states and thereby also "legitimizing a more progressive and humanistic approach to development".[284]

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

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280 ILO 2011 http://www.ilo.org/global/standards/WCMS_152909/lang--en/index.htm 6.
281 ILO 2011 http://www.ilo.org/global/standards/WCMS_152909/lang--en/index.htm 6.
282 See para III f-j.
283 Regional instruments in respect of the SADC will be discussed in para 3.4 (ILO 2011 http://www.ilo.org/global/standards/WCMS_152909/lang--en/index.htm 65, 68, 69, 70).
284 ILO 2011 http://www.ilo.org/global/standards/WCMS_152909/lang--en/index.htm 73.

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.[285] In 2002, the Supiot group (a multidisciplinary group chaired by prof A Supiot) considered the decent work concept in relation to social security and the increasing informal economy. They recommended that the current standards be adapted and reviewed in line with the decent work concept.[286]

This global campaign continued in 2003 and in 2008. In the ILO Declaration on Social Justice for Fair Globalization social protection was one of the four strategic objectives. Throughout this evolution of the ILO's mandate in respect of social security, the importance of voice and representation, as well as the value of promoting international standards in this field remained. Up till now the ILO has adopted 31 conventions and 24 recommendations in respect of social security, illustrating the importance of social security in respect of the ILO's mandate and activities.[287] The development of the concept of social security in respect of the ILO can be seen in three stages, namely starting out with social insurance, the concept of social security as reflected in the Social Security Convention 102 (1952) and finally the broader concept of social protection.[288] In 1944 the Declaration of Philadelphia did mention additional forms of social benefits and support.[289]

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.[290]

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".[291] The ILO recognises that social protection includes social security, conditions at work, occupational safety, migration and HIV and AIDS policies. Social protection floors are defined as sets of basic social security

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285 ILO 2011 http://www.ilo.org/global/standards/WCMS_152909/lang--en/index.htm 7.
286 Tapiola "Global standards: The policy of the ILO" 46.
287 ILO 2011 http://www.ilo.org/global/standards/WCMS_152909/lang--en/index.htm 8.
288 ILO 2011 http://www.ilo.org/global/standards/WCMS_152909/lang--en/index.htm 9.
289 In part III of the Declaration the provision of adequate nutrition, housing and facilities for recreation and culture is included.
290 ILO 2011 http://www.ilo.org/global/standards/WCMS_152909/lang--en/index.htm 19; Becker, Pennings and Dijkhoff *International standard setting and innovations in social security* 26.
291 ILO 2011 http://www.ilo.org/global/standards/WCMS_152909/lang--en/index.htm 13.

guarantees which secure protection aimed at prevention or alleviating poverty, vulnerability and social exclusion.[292] Extending social protection to workers is vital in realising the fundamental right to social security. A new global partnership, formed for universal social protection, aims to help countries to extend social protection to the poor and vulnerable.[293]

The limited scope of social protection schemes, in particular the specific exclusion of workers in the informal economy, may be ascribed to factors such as the formal sector bias of social insurance schemes, the requirement for the existence of an employer-employee relationship, the low contributory capacity of workers in the informal economy and incompatibility priority needs.[294] Moreover, the abovementioned factors in particular marginalise women workers, if we consider their representation in the informal economy, as well as their lack of access to work in the formal economy.[295]

WIEGO recently highlighted the most pertinent challenges that women workers in the informal economy face in respect of social protection, namely access to high quality and affordable health care, including occupational health and safety; support for caring roles, particularly childcare; and income support for the elderly.[296] Certain categories of women workers in the informal economy may face greater challenges in respect of access to social protection. [297] An informal trader or waste picker may have more difficulties accessing social insurance schemes than a domestic worker with an identifiable employer-employee relationship.[298]

The ILO's strategy to attain social security coverage for all includes a horizontal dimension, namely to extend a set of core social security guarantees by establishing a social protection floor, as well as a vertical dimension that seeks the provision of a wider range

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292 Rodgers *et al The International Labour Organization and the quest for social justice, 1919-2009*. The preamble to the ILO's constitution recognises the need to improve labour conditions through the prevention of unemployment, the protection of workers against sickness, disease and occupational injuries, and provisions for old age. The *Declaration of Philadelphia* recognises social security as a fundamental principle of work (ILO 2011 http://www.ilo.org/global/standards/WCMS_152909/lang--en/index.htm 8).

293 This global partnership includes the ILO, the World Bank Group, the African Union, and the European Commission (ILO 2016 http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_525544/lang--en/index.htm).

294 Mpedi "Informal sector: Introduction" 289.

295 Olivier "Gender discrimination in labour law and social security 219.

296 WIEGO date unknown http://www.wiego.org/wiego/core-programmes/social-protection.

297 Yasmeen 2016 http://www.wiego.org/blog/%E2%80%9C-expression-%E2%80%98social-protection%E2%80%99-didn%E2%80%99t-really-exist-20-years-ago%E2%80%9D.

298 Yasmeen 2016 http://www.wiego.org/blog/%E2%80%9C-expression-%E2%80%98social-protection%E2%80%99-didn%E2%80%99t-really-exist-20-years-ago%E2%80%9D.

of benefits and extension of coverage in line with the existing social security conventions, through a gradual approach.[299] This has led to the adoption of the Social Protection Floors Recommendation 202 (2012) which is an important instrument when considering the extension of social protection to vulnerable (women) workers in the informal economy. A principal aim of this instrument is the social inclusion of those in the informal economy.[300] The recommendation promotes innovative measures to be implemented within a national framework rather than concrete standards; this is 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.[301] In this regard developing and middle-income countries with limited resources, including financial resources, may progressively establish tailor-made lower cost schemes to provide for vulnerable workers in the informal economy.[302] Nevertheless, an integrated approach is required and this will require, for example, that apart from just providing cash transfers to women as mothers, empowerment and skill development programmes must be established to develop skills and enhance women's opportunities for access to labour markets.[303]

The preamble recognises the value of social security as a 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 undeniably recognises the link between sustainable social security systems and the transition to formal employment. Article 3 recommends that member states apply important principles such as non-discrimination and gender equality and that they demonstrate a responsiveness to special needs. This requirement to be responsive to special needs 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.

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299 ILO 2011 http://www.ilo.org/global/standards/WCMS_152909/lang--en/index.htm 124.

300 Para 1(e).

301 See article 1. See also Dijkhoff and Mpedi "Recommendation on Social Protection Floors and basic principles for innovative solutions" 6.

302 Olivier"Expanding the boundaries of social protection to informal economy workers in developing countries".

303 See also Dijkhoff and Mpedi "Recommendation on Social Protection Floors and basic principles for innovative solutions" 6.

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,[304] and a basic income for older persons.[305] 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 diverse methods and approaches in respect of financing mechanisms and delivery systems.[306] 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.[307] Through technical assistance the ILO has supported development of social protection floors in a number of countries.[308]

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 benefits scheme for women in the informal economy in Ghana;[309]
- India considers a social security package, with a basic set of guarantees for all;
- Lesotho considers national healthcare (see their *National Health Insurance Bill*);[310]

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

305 See article 5.

306 See article 3.

307 Pennings "Historical and theoretical background of standard setting in social security" 28.

308 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 *Building social protection floors for all*).

309 The objective to also promote maternal health- and childcare is linked to the Millennium Development Goals. 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 MBOs and other international organisations such as the Rockefeller Foundation. The importance of voice and representation in the extension of protection to these workers will be considered and discussed in Chapter 7.

310 Lesotho is characterised by poverty and various vulnerabilities of its people, including the endemic nature of HIV and AIDS in the country. It is categorised as a least developed country. Nevertheless

- Madagascar 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 being considered.[311]

Other SADC countries currently considering legal measures to extend protection include the United Republic of Tanzania[312] and Zimbabwe.[313] These examples highlight that healthcare is an important consideration for these countries in their 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 text that is flexible and will appeal to developing countries, they have neglected to provide general criteria to evaluate progress and monitoring, nor is there an obligation to report on this to the ILO.[314] 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 states and vulnerable workers in setting international standards. In countries such as South Africa, where the Constitution[315] provides imperatives for the consideration and application of international law, international social security instruments are more effective.[316]

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this SADC member state has launched a number of initiatives to extend social protection. These measures include a universal old-age pension (OAP), a child grants programme, food security programmes and the Free Primary Education programme. The latter programme aims for the provision of universal free primary education and currently has an enrolment of 84%; one of the highest rates found in sub-Saharan Africa (Olivier 2013 *DSA* 99, 101-102, 108).

311 ILO 2011 http://www.ilo.org/global/standards/WCMS_152909/lang--en/index.htm 125-128.

312 Introduction of a universal old-age pension scheme and access to medical care for all is considered (ILO 2011 http://www.ilo.org/global/standards/WCMS_152909/lang--en/index.htm 128).

313 The introduction of a universal healthcare scheme is considered (ILO 2011 http://www.ilo.org/global/standards/WCMS_152909/lang--en/index.htm 128).

314 Pennings "Historical and theoretical background of standard setting in social security" 28.

315 See ss 39(1), 232 and 233 of the *Constitution of the Republic of South Africa*, 1996.

316 Pennings "Historical and theoretical background of standard setting in social security" 44. Asian countries such Bangladesh, India, Pakistan and Sri Lanka have indicated a constitutional commitment to social security. The constitution of India provides that the state shall strive to promote the welfare of the people by securing a social order informed by justice, economic, social and political factors (article 38). The constitution also provides for early childhood care and education as well as free compulsory education between the ages of 6 and 14 (articles 21A and 45). The state shall also within its limits provide assistance in cases of unemployment, old age, sickness and disablement or cases of undeserved want (article 41), promotion of educational interest of the vulnerable (article 46) and nutrition and public health (article 47). The provision of

In addition to the international instruments a number of international social security agreements, both bilateral and multilateral, also do exist. Often the aim of these agreements is 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.[317] Bilateral and multilateral agreements can play and important role where ILO instruments are not ratified or where universal coverage is not possible due to economic constraints within a country. These agreements can provide a more realistic approach to coverage with consideration of national resources. These agreements can also allow for specific conceptual developments according to vulnerable groups of workers within countries and regions.

3.3.7.1 Key social security conventions applicable to women workers in the informal economy

3.3.7.1.1 The Social Security (Minimum Standards) Convention 102 (1952)

The Social Security (Minimum Standards) Convention 102 (1952) is a comprehensive instrument which includes the nine classic contingencies of social security, namely medical care benefits, sickness benefits, unemployment benefits, old age benefits, employment injury benefits, family benefits, maternity benefits and invalidity and survivors' benefits.[318] This convention sets quantitative standards for minimum protection and targets for social progress; furthermore it promotes equality of treatment of all.[319] For developing countries, it is important that this convention has flexibility clauses for the realisation of these provisions according to national economic development. Article 3, for example, allows for temporary exemptions in respect of persons covered and the rate and duration of benefits, to members whose economy and medical facilities are insufficiently developed.

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maternity leave by the state is also expressly mentioned in article 42 (ILO 2011 http://www.ilo.org/global/standards/WCMS_152909/lang--en/index.htm 102).

317 Mpedi and Nyenti *Towards an instrument for the portability of social security benefits in the Southern African Development Community* 2, 34, 36, 37.

318 The Income Security Recommendation 67 (1944) provides for income security during these contingencies. Provision must be made through social insurance and where that is not available, social assistance should be provided. The recommendation is premised on the employment relationship and although provisions are made for the self-employed, most informal economy workers will not benefit from these principles due to the lack of an employer-employee relationship, low contributory capacity and incompatible priority needs (Mpedi "Informal sector: Introduction" 290).

319 ILO 2011 http://www.ilo.org/global/standards/WCMS_152909/lang--en/index.htm 102.

This convention has not been successful in extending protection to informal economy workers and is therefore not achieving the objective of social protection for all or reducing poverty. The convention allows member states to adhere to minimum standards, but permits for exclusions of persons from the scope of coverage.[320] The convention does not address social risks such as poverty or new risks such as HIV and AIDS.[321] The classic nine risks are not always risks that women in the informal economy experience. With reference to the traditional categories of contingencies and workers in the informal economy such as informal traders and waste pickers, Sankaran states the following:

> For the self-employed in the informal economy, the loss of assets, loss of access to markets and exposures to risks are often reasons for their economic insecurity.[322]

A better approach for developing countries would be to depart from a list of social risks to policy instruments promoting objectives.[323] Such an approach will also allow for innovative and tailor-made designs in the extension of social protection measures to informal economy workers. The *Social Protection Floors Recommendation* 202 (2012) endeavours to fill certain of these gaps in providing for basic needs of all and extending coverage to all. Olivier comments on the narrow conceptual framework of this instrument and other international social security standards of the ILO as follows:

> … the conceptual framework emanating from ILO social security standards, with particular reference to the most eminent and comprehensive instrument, namely the ILO Convention 102 of 1952 on Social Security (Minimum Standards), is reminiscent of an era of conceptual protectionism vis-à-vis females, of male preference and female subordination – this flows amongst others from reliance in the Convention on the essentially male comparator (employment) and (male) breadwinner concepts as a yardstick for determining compliance with the Convention and regulating access to social security benefits, the constant reference to widows and children (as dependants), and the absence of coverage for widowers.[324]

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320 Article 15 part III. Article 67 applies to periodical payments of benefits and article 3, for example, allows for temporary exemptions in respect of persons covered and the rate and duration of benefits, to members whose economy and medical facilities are insufficiently developed. This allows member states to limit the scope of coverage accordingly (Dijkhoff "The guiding role of ILO Convention No. 102" 57).

321 Tapiola "Global standards: The policy of the ILO" 45. Risk-creating conditions are not considered. These include natural disasters and crop failure. Other risks, in particular in sub-Saharan countries, also include wars (Mpedi "Informal sector: Introduction" 291).

322 Sankaran 2012 *CLLPJ* 90.

323 Smit "Institutional framework, legal instruments and legal techniques relating to the promotion of access to social security to informal workers" 199.

324 Olivier "Gender discrimination in labour law and social security" 220.

As a result of the low ratification rate of social security conventions, social security was placed on the 2011 ILO agenda.[325] The informal economy was mentioned as a major obstacle for many countries to ratification of this convention and the ILO recognised that for developing countries, where the majority of workers are in the informal economy, ratification of the convention remains a global challenge in the extension of social protection.[326] It must also be noted that for workers in the informal economy in developing countries, living in poverty is a reality, and providing them with adequate social protection measures will also require improving their standard of living.[327]

3.3.7.1.2 Maternity Protection Convention 183 (2000)

The principles of this convention[328] should include women workers in the informal economy, as the definition of woman includes "any female person without discrimination whatsoever" and the convention applies to all women, including those in atypical forms of dependent work.[329] The wording of this convention does not contain language that limits its application to the formal economy. The convention provides for health protection,[330] maternity leave,[331] leave in the case of illness[332] and other benefits.[333] It must be noted that the Domestic Workers Convention 189 (2011) provides that domestic workers enjoy conditions not less favourable than other workers in respect of maternity.[334] The Maternity Protection Convention does not contain restrictive eligibility criteria. Restrictive criteria such as minimum working hours or a period of continued employment will hinder accessibility and once again exclude a number of vulnerable women workers.[335] The insecurities and often irregular employment conditions associated with work in the informal economy exasperates the collection of social insurance contributions in respect of maternity benefits. It is suggested that in such cases these workers may benefit from

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325 Becker, Pennings and Dijkhoff *International standard-setting and innovations in social security* 25. See also ILO 2011 http://www.ilo.org/global/standards/WCMS_152909/lang--en/index.htm 19.

326 Becker, Pennings and Dijkhoff *International standard setting and innovations in social security* 25.

327 Olivier"Expanding the boundaries of social protection to informal economy workers in developing countries".

328 This convention has been ratified by 54 countries. South Africa has not ratified this convention; the only SADC country that has ratified this convention is the Democratic Republic of Congo. See also Maternity Protection Recommendation 191 (2000).

329 Article 1.

330 Article 3.

331 Article 4. The period of maternity leave is subject to the specification by member states.

332 Article 5.

333 Article 6. Provision is made for cash benefits during this time in accordance with national laws and regulations through social insurance or public funds. Article 6(6) provides for social assistance where women do not qualify for cash benefits in terms of national laws.

334 Article 14(1).

335 ILO *Domestic workers across the world* 86.

public funds and social assistance. Informal economy workers, such as domestic workers, are clearly included under the scope of this convention; however, the actual enforcement of often existing national legislative provisions remain problematic due to the complex and diverse nature of employment and lack of adequate enforcement mechanisms; thus pregnancy often results in job loss.[336]

In 2013 alone 300 000 women globally died from causes related to pregnancy and childbirth,[337] highlighting the importance and value of this convention. Worldwide less than 40% of women in employment are covered by law under mandatory maternity cash benefits. Moreover, due to ineffective enforcement and implementation, effective coverage is even lower.[338] Ensuring effective access to quality maternal health is of particular importance in developing countries where the informal economy accounts for a large proportion of employment, and is an essential prerequisite for the achievement of gender equality.[339] Governments should endeavour to provide universal access to maternal healthcare, specifically for those most vulnerable. Vulnerable women workers in the informal economy also need access to basic services, such as shelter, power, water, basic infrastructure and sanitation. This convention can certainly be a powerful tool in the protection of women workers; unfortunately, ratification of this convention remains low as only 29 countries have ratified this convention.[340] The objectives of the convention are to ensure the safety of pregnant women and their new-borns during maternity and pregnancy and to ensure job security during this time.[341] Protection against dismissal and the right to return to work are also necessary elements of maternity protection.[342] The Social Protection Floors Recommendation[343] also urges member states to provide free prenatal and postnatal medical care for the most vulnerable.[344] In 2015 statistics indicated that less than 40% of women in employment were protected by law under mandatory cash benefit schemes.[345] Extending maternity protection to vulnerable women workers in

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336 ILO *Domestic workers across the world* 85.

337 UN *The Millennium Development Goals Report 2014* 11. See also UN Women *2015 http://progress.unwomen.org/en/2015*. These statistics were made available in the 2015-2016 report. The next report will be launched in 2018.

338 ILO *Social protection for maternity* xi.

339 ILO *Social protection for maternity* xi. Countries such as South Africa, Bangladesh, Brazil, India and Indonesia have extended coverage to previously excluded groups.

340 ILO *Domestic workers across the world* 86.

341 ILO *Domestic workers across the world* 85.

342 ILO *Domestic workers across the world* 91. See para 4.4.1.2 below for the regulation of maternity protection in South Africa.

343 201 (2012).

344 See article 8.

345 ILO *World Social Protection Report 2014-2015* xxiii.

the informal economy will improve their working conditions, income security, and gender equality and simultaneously strengthen their rights as workers, including the right not to be unfairly dismissed.[346]

3.3.7.1.3 Occupational Safety and Health Convention 155 (1981)

Although the Occupational Safety and Health Convention 155 (1981)[347] was designed to provide for workers in the formal economy, strong arguments exist for the extension of national policies to workers in the informal economy. This convention is of particular importance to workers in the informal economy as their place of work determines the risks they face and it often includes unsafe and hazardous conditions. These workers often find themselves exposed to poor conditions of work, lacking sanitary facilities and access to running water, and with low or non-existing health and safety standards.[348] As occupational accidents in this sector are seldom reported, policy-making becomes problematic without accurate statistics. Existing mechanisms can be used by extending the provisions of the convention. The role of the labour inspector could be revisited and labour inspectors could assist with the training and education of workers in respect of health and safety standards.

The importance of universal social protection on the global agenda must not be underestimated. On 21 September 2016 the World Bank Group and the International Labour Organization inaugurated the Global Partnership for Universal Social Protection. This partnership aims to realise a number of benefits, for example, pensions, maternity, disability, and child benefits to all.[349] This is in line with the 2030 Agenda, and Goal 1.3 that requires appropriate national social protection systems and measures for all, including floors, and goal 8 of the then Millennium Developmental Goals to promote sustained, inclusive and sustainable economic growth, full productive work and decent work for all.[350]

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346 ILO *Domestic workers across the world* 86.

347 There are 66 countries that have ratified this convention (ILO date unknown http://www.ilo.org/dyn/normlex/en/f?p=1000:11300:0::NO:11300:P11300_INSTRUMENT_ID:312300).

348 ILO *Domestic workers across the the world* 86.

349 ILO 2016 http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_525544/lang--en/index.htm.

350 ILO 2016 http://www.ilo.org/global/about-the-ilo/newsroom/news/WCMS_525544/lang--en/index.htm.

3.3.8 Decent work and the informal economy

The ILO has adopted the concept of decent work,[351] which has set four objectives for all, namely, employment opportunities, [352] workers' rights, social protection and representation.[353] These four objectives must be seen as integrated and intrinsic to this concept and not viewed independently.[354] Naturally tensions do exist between these objectives, for example between the creation of employment opportunities and the provision of protection to these workers.

This concept of decent work could be used to provide impetus to the improvement of the precarious position of workers in the informal economy. The notion of "decent work" is an expression of the ILO's integrated approach and provides for a comprehensive foundation which brings all the programmes together and allows developing countries to develop more effective strategies for the achievement of their labour and social goals.[355] However, Theron[356] argues that this concept of decent work is vague and conceptually incoherent, and therefore unable to create a new paradigm for workers. Moreover, he[357] describes the adoption of the concept of decent work by the ILO as a response to its own legitimacy crisis following the defeat of the contract labour convention and the persistently low ratification rate of conventions by developing countries. Le Roux[358] argues that against the backdrop of a transformative constitution, the decent work paradigm can be seen as an issue of social justice, as the concept of decent work poses many questions of social justice rather than labour law questions. The concept of decent work and the framework of transformative constitutionalism may be the basis for vulnerable workers in

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351 According to the ILO, decent work is based on the idea that work is "a source of personal dignity, family stability, peace in the community, democracies that deliver for people and fuels economic growth that expands opportunities for productive jobs and enterprise development". The goal is to promote decent work along the entire continuum from the informal to the formal end of the economy, and in development-orientated, poverty-reduction and gender-equitable ways (ILO *The ILO at work: Development results 2012-2013*).

352 For the informal economy this means access to information that improves the capacities of these workers to find employment opportunities, and integrated policies that promote their economic activities and growth strategies (ILO *The informal economy and decent work* 11).

353 ILO Resolution Concerning Decent Work and the Informal Economy (2002) para 2.

354 Theron 2014 *ILJ* 1833.

355 Rodgers *et al The International Labour Organization and the quest for social justice, 1919-2009*.

356 Theron 2014 *ILJ* 1833.

357 Theron 2014 *ILJ* 1833.

358 Le Roux "Advancing domestic workers' rights in a context of transformative constitutionalism" 31, 55.

the informal economy in South Africa, to be empowered to challenge the injustices of poverty that they face.[359]

The 2002 Resolution concerning Decent Work in the Informal Economy reached important conclusions about the informal economy such as the "conceptual difficulties" arising from the extreme diverse nature of the informal economy, the variation of challenges across national, rural and urban areas, the lack of protection and representation that contributes to the poverty of many of these workers, the degrees of vulnerability of these workers, the importance of governance in proper regulation of the informal economy, the fact that women are among the most vulnerable groups in the informal economy and the challenges in respect of the legal and economic empowerment of these women workers. The successful implementation of any decent work programme is dependent on an in-depth understanding of the nature of the informal economy.

The ILO Director at the time, Juan Somavia, stated the following:

> … it is in the informal economy and among the poor that needs are the greatest. If we claim universality (that) "all those who work have rights at work" then we are obliged to tackle these issues.[360]

As it is clear that vulnerable groups (including women, children and migrants) are often found working in the informal economy, it seems that reducing decent work deficits in the informal economy will definitely improve the working conditions of these workers. The heterogeneous nature of workers in the informal economy means that these workers should be able to express the concept of decent work in relation to their specific needs.[361]

It is important to link decent work initiatives to other labour and social protection initiatives. The ILO is committed to make decent work a reality for all and this is clearly illustrated by the recent adoption of the ILO Domestic Workers Convention 189 (2011) and the supporting Recommendation 201.

The ILO has developed an integrated framework to facilitate transition to formality and decent work. The decent work strategies for the informal economy are as follows:

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359 Le Roux "Advancing domestic workers' rights in a context of transformative constitutionalism 56.

360 ILO 2002 http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---relconf/---reloff/documents/meetingdocument/wcms_080105.pdf 10.

361 Theron 2014 *ILJ* 1836. See also Chapters 4, 5, 6 and 7 with reference to the specific challenges and vulnerabilities of domestic workers, informal traders and waste pickers.

(i) growth strategies and quality employment generation;[362]

(ii) a regulatory environment, including labour standards and core rights;[363]

(iii) organisation, representation and social dialogue;

(iv) equality and the informal economy;[364]

(v) entrepreneurship, skills, finance, management, access to markets;

(vi) extending social protection, including social security and social transfers; and

(vii) local (rural and urban) development strategies.[365]

The International Labour Conference prefers a progressive approach, which according to them implies starting with the informal economy (as this is where most new job creation has taken place recently and as the decent work deficits are most pronounced in this sphere).[366] The adoption of the ILO Recommendation concerning the Transition from the Informal to the Formal Economy[367] reflects the abovementioned progressive approach of the ILO. Through the concept of decent work, an integrated framework is provided to analyse the challenges facing the informal economy and decent work.[368] The strategy adopted is to achieve the goal of decent work through firstly, and in the immediate term, giving priority to reducing decent work deficits in the informal economy through ensuring that those who are currently working in that sphere are recognised in the law and have legal and social protection, representation and voice; secondly, and in the short and medium term, to encourage and enable a movement upwards from the informal economy to the more formal protected and decent parts of the continuum; and thirdly, and in the longer term, creating enough employment opportunities that are formal, protected and decent for all workers and employers.[369]

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362 An integrated approach is of the utmost importance to achieve this strategy and should include skills training, access to financial markets and market information (ILO 2002 Resolution and Conclusions concerning Decent Work and the Informal Economy 11). According to the ILO, economic growth is a key factor in reducing informality; however, in some instances informality can persist despite economic growth (ILO *The informal economy and decent work* 64).

363 This includes the enforcement of international labour standards and core rights.

364 This includes equality based on gender, ethnicity, race, caste, disability and age.

365 ILO *Growth, employment and decent work in the least developed countries*.

366 See para 1.4 above.

367 204 of 2015.

368 ILO *The informal economy and decent work* 12.

369 ILO *Decent work and the informal economy* 2.

This third long-term strategy may be viewed as controversial. The premise of this strategy is that new jobs should not ideally be created in the informal economy. In other words, decent work hopes for more than a job at any price or under any circumstances; the focus is on better quality jobs in the upper end of the continuum. This requires that the "root causes" of informality, informalisation and externalisation are tackled. It focuses less on extending protection to those in the informal economy and concentrates on a process of legalisation to bring informal workers and undertakings within the legal framework to be registered, recognised and protected. The adoption of Recommendation concerning the Transition from the Informal to the Formal Economy formalises this third long-term strategy and though this transition may be possible in certain instances, the recommendation does not consider the fact that there are workers who are in the informal economy by choice and through preference. When considering the precarious position of workers in the informal economy, an integrated approach is of paramount importance. This approach must consider measures to extend labour and social protection through innovative measures. The legal and economic empowerment[370] of these workers is essential when considering sustainable solutions and the strengthening of support services that are important to workers. It is submitted that this third pillar of a decent work strategy can only be realistic, and then only in the long term, if the root causes are accurately identified and analysed. Root causes include national policies that constrain employment creation in the formal economy, legal and institutional obstacles that prevent this transition to the formal economy or continuous employment in the formal economy, the absence or lack of access to effective market and non-market institutions, demographic trends, the HIV and AIDS pandemic, gender inequality and discrimination against women and the lack of voice and representation.[371] This would require far more statistical and empirical research and reporting than what is currently available and the lack of reliable data hinders the efforts to extend both labour and social protection to informal economy workers.

3.3.9 Enforcement of standards

The ILO has a unique way of supervising international labour standards. Governments must report to the Committee of Experts in respect of ratified conventions.[372] The

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370 This includes the investment in knowledge and skills of these workers.

371 ILO *Decent work and the informal economy* 5.

372 The committee can make observations or direct requests. Observations entail comments with regards to the application of a convention by a member state, whilst direct requests refer to

tripartite structure allows employers' and workers' organisations to receive copies of these reports and comment on them highlighting the democratic process that the ILO supports through its tripartite structure.[373] ILO conventions are legal instruments and once ratified by member states are legally binding. Recommendations are not binding, but do promote key principles and can sometimes be more effective than conventions in standard setting in developing countries by providing guidelines to realise objectives. In respect of the enforcements of conventions, the ILO relies on its supervisory mechanism and technical assistance. Enforcement mechanisms of the ILO has been described as "sunshine, carrot and stick" mechanisms.[374] When a state is not respecting a ratified convention, complaints can be made by another state that has ratified the convention, by delegates to the International Labour Conference and by employers' and workers' organisations. [375] Unfortunately conventions also have a soft nature that can be problematic when considering the legal effect of instruments and sanctions in cases of non-compliance. This

technical questions (ILO *Extending the scope of application of labour law to the informal economy* 11).

373 See Rodgers *et al The International Labour Organization and the quest for social justice, 1919-2009* on the right to receive copies and comment on government reports.

374 The "sunshine" method refers to the supervision of conventions, the standard reporting process and *ad hoc* procedures for complaints by any of the tripartite role players. The "carrots" method refers to the provision of technical assistance by the ILO. This method is specifically beneficial to developing countries in realising the standards. Lastly the "stick" method can be used, whereby the constitution of the ILO provides for a complaints procedure, and ultimately this can result in economic and other sanctions (Dupper "Migrant workers and the right to social security" 40-42).

375 Article 24 of the ILO constitution allows for employers' and workers' organisations to make representations. This complaints mechanism is distinctive and also allows for complaints from these parties in respect of violations of basic principles of freedom of association when the relevant state has not even ratified the applicable convention (Rodgers *et al The International Labour Organization and the quest for social justice, 1919-2009*). The CEACR required India required India to reply to comments on the Rural Workers' Organisations Convention 141 (1975) outside the reporting cycle (ILO *Application of International Labour Standards 2017(1)* 17). With reference to South Africa, the CEACR noted concerns with reference to the Minimum Age Convention 138 (1973). These concerns included the persistent engagement of children in specifically agriculture. The Committee requested South Africa to endeavor to progressively eliminate child labour in the country and to eliminate the worst forms of child labour. See also Worst Forms of Child Labour Convention 182 (1999). South Africa is requested to report and provide information on measures taken with reference to the above. (ILO *Application of International Labour Standards 2017(1)* 229-330). The Committee requested comprehensive reporting from India with reference to the Labour Inspection Convention 81 (1947). Specifically, the state was requested to ensure consultation with all social partners about amendments to labour legislation to ensure compliance with the above convention (ILO *Application of International Labour Standards 2017(1)* 462.)

soft nature entails the lack of a functioning court,[376] and the possibility of denouncing conventions.[377]

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 and[378] the reporting obligations and administrative responsibilities can be cumbersome. Valid criticism against the supervisory bodies of the ILO specifically includes that "western values" are applied and an inflexible approach towards the application of standards.[379] However, governments can start by removing all obstacles to the free organisation of these workers. Ratification of certain conventions, such as convention 102 remains problematic due to the fact that certain provisions, for example article 15, requires the availability of adequate statistics and this is a big problem for many member states.[380] Furthermore, platforms where the social partners may debate and consult on ways to extend protection should be established and made effective. The participation of these workers in the planning and implementation of programmes to extend protection is vital for the success of such programmes. Certain ILO conventions allow ratifying countries to enact standards in a manner responsive to national conditions and technical assistance is available to help countries with the implementation of standards.[381] It is also important to

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376 The ILO constitution in articles 31-34 provides for complaints to the International Court of Justice; however, these provisions have never been used (Dijkhoff "The guiding role of ILO Convention No. 102" 66).

377 Dijkhoff "The guiding role of ILO Convention No. 102" 66-67. Countries have the opportunity to denounce treaties once every ten years after they has entered into force. The commitment to treaties is not perpetual; however, it must be noted that none of the member states have denounced any of the normative social security instruments. Article 82 of Convention 102 provides that a member that has ratified this convention, may after 10 years denounce the convention or certain parts of the convention, through communication to the Director-General of the ILO office. Such a denunciation will then be registered.

378 Rodgers *et al The International Labour Organization and the quest for social justice, 1919-2009.*

379 Rodgers *et al The International Labour Organization and the quest for social justice, 1919-2009*.

380 Dijkhoff "The guiding role of ILO Convention No. 102" 53.

381 Rodgers *et al The International Labour Organization and the quest for social justice, 1919-2009*. Flexibility clauses in international instruments include the exemption of certain economic sectors, progressive extension and implementation of standards and application of a convention in national laws subject to national conditions (Trebilcock "International labour standards and the informal economy"). In respect of the extension of social security coverage the ILO has extended technical assistance to countries such as Lesotho, Mozambique, Swaziland, Uganda and Zimbabwe. These services entail assistance in conducting studies and draft policies to implement benefits, the promotion of social dialogue within a framework of social insurance and creating administrative bodies and policy advice (ILO 2011 http://www.ilo.org/global/standards/WCMS_152909/lang--en/index.htm 239-240).

note the ILO promotes the notion that an integrated approach to decent work means that economic and social policies must be considered together.[382]

3.4 Regional instruments

Regional instruments can play an important role with reference to the extension of labour and social protection to vulnerable workers such as women in the informal economy. If we consider criticism against international standards such as "top-down and one size fits all", regional instruments are designed for the local circumstances and member states have a direct self-interest.[383] In many instances regional instruments are designed to address challenges specific to a region. Many regional instruments in the African Union and in the SADC were designed based on international standards and a number of similarities exist.[384]

3.4.1 The African Union

The African Union (AU) was established by section 2 of the *Constitutive Act* that came into force in 2011.[385] The vison of the AU includes an integrated, prosperous and peaceful Africa driven by its own citizens and representing a dynamic force in the global arena.[386] AU member states are divided into regions and the Southern African region includes the following SADC states, Angola, Botswana, Lesotho, Malawi, Mozambique, Namibia, South Africa, Swaziland, Zambia and Zimbabwe. SADC states such as Mauritius, Seychelles, Madagascar and Tanzania are included in the Eastern African region and the Democratic Republic of the Congo under Central Africa. The AU also has strong links with the UN and a dedicated office was established in 2010.[387]

Article 3 of the *Constitutive Act*[388] provides for objectives and these objectives highlight the importance of human rights in accordance with the *African Charter on Human and*

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382 Rodgers *et al The International Labour Organization and the quest for social justice, 1919-2009*.
383 See Langille 2010 *CLLPJ* 533.
384 Olivier "International labour and social security standards" 21.
385 This was the result of a decision by its predecessor, the Organisation of African Unity, to establish a new organisation (AU 2016 http://www.au.int/en).
386 AU 2016 http://www.au.int/en.
387 The partnership was formalised in a Cooperation Agreement in 1990. Other partnerships do exist and include the Africa-European Union partnership, the Africa South-America Summit, and the African Indian partnership (AU 2016 http://www.au.int/en). The African Union also has a cooperation agreement with India. It covers cooperation in areas such as economic matters, education, skills development and health (AU 2017 https://au.int/sites/default/files/pages/31829-file-african-union-handbook-2017-edited.pdf 177).
388 The *Constitutive Act* was adopted by the Assembly of Heads of State in July 2000 and came into force in 2001 (African Union 2016 http://www.au.int/en).

People's Rights,[389] as well as other human rights instruments.[390] The importance and explicit recognition of human rights can also be seen in the objectives of promoting sustainable development at economic, social and cultural levels, ensuring the effective participation of women in decision making in all levels and the promotion of health in the region.[391] In respect of women workers in the informal economy, article 4 creates a framework within which the AU must function, and this includes the promotion of gender equality, respect for human rights and the rule of law, respect for democratic principles, and the development of social justice.[392] The AU has established numerous organs to monitor and enforce its instruments and to promote its focus on human rights.[393]

The AU Agenda 2063 includes the following aspirations:

(a) a prosperous Africa based on inclusive growth and sustainable development;[394]

(b) an integrated continent, politically united, based on the ideals of Pan Africanism and the vision of Africa's renaissance;[395]

(c) an Africa of good governance, respect for human rights and the rule of law;[396]

(d) a peaceful and secure Africa;

(e) an Africa with strong cultural identity, common heritage, values and ethics;

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389 The charter was adopted in 1981 and entered into force in 1986.

390 Article 3 provides for the objectives of the Union, including (a) the achievement of the Charter of the United Nations and the Universal Declaration, greater unity and solidarity in the region; (b) accelerating political and socio-economic integration of the continent; (c) encouraging international cooperation within an international framework established by the Charter of the United Nations and the Universal Declaration of Human Rights; and (d) cooperation with international partners with reference to the promotion of good health.

391 See article 3 of the Protocol on Amendments to the Constitutive Act.

392 See also the Protocol on Amendments to the Constitutive Act of the African Union.

393 Article 5(1) provides for a number of AU decision making and policy organs (see Mpedi and Nyenti *Key international, regional and national instruments regulating social security in SADC* 51, 54).

394 This includes the eradication of poverty in the region and social and economic transformation. See African Union Agenda 2063 (AU 2016 http://www.au.int/en/agenda2063).

395 This includes the elimination of all forms of discrimination (AU 2016 http://www.au.int/enagenda2063).

396 This aspiration includes gender equality, respect for human rights, justice and the rule of law (AU 2016 http://www.au.int/enagenda2063).

(f) an Africa whose development is people driven, relying on the potential of African people, especially its women and youth, and caring for children;[397] and

(g) Africa as a strong, united resilient and influential global player and partner.[398]

The African Union adopted a detailed first 10 year implementation plan for pursuing the above aspirations.[399] Priorities areas identified include employment generation for women, decent work, social protection and women empowerment. With reference to social security, the 2023 national targets include that at least 20% of workers in the informal economy and rural labour have access to social security and social protection packages for vulnerable groups.[400] With reference to social security strategies this will entail the implementation of a Social Protection Policy for Africa, the implementation of the UN Social Protection Floor Initiative[401] and ILO Social Protection Norms.[402]

In respect of women in the informal economy the above aspirations are important, specifically the realisation of the potential of women and the respect for human rights. Two important commissions in respect of human rights were established, namely the African Commission on Human and People's Rights[403] and the African Committee of Experts on the Rights and Welfare of the Child.[404] A Directorate of Women, Gender and Development was established as well to promote gender equality in the region and supervise the development and harmonisation of gender-related policies.[405] In respect of

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397 The empowerment of women in all spheres of life is envisaged, including access to purport, access to markets, access to financial resources, equal access to health and education and equal access to all rights, including human rights (African Union 2016 http://www.au.int/enagenda2063).

398 African Union 2016 http://www.au.int/enagenda2063.

399 Member states must use the implementation plan as a framework for national visions, develop policy guidelines with reference to the plan and ensure that legislatures adopt the Agenda for purposes of economic, social and political development in the region. Reporting structures are also established with reference to the Agenda (AUC 2015 http://www.un.org/en/africa/osaa/pdf/au/agenda2063-first10yearimplementation.pdf).

400 Process action involved in this regard includes available information on vulnerable households and minimum social protection for vulnerable people (AUC 2015 http://www.un.org/en/africa/osaa/pdf/au/agenda2063-first10yearimplementation.pdf).

401 This initiative is driven by UN agencies and other developmental role players to promote universal access to essential social services and transfers (ILO date unknown http://www.ilo.org/secsoc/areas-of-work/policy-development-and-applied-research/social-protection-floor/lang--en/index.htm).

402 AUC 2015 http://www.un.org/en/africa/osaa/pdf/au/agenda2063-first10yearimplementation.pdf.

403 See article 30 of the African Charter on Human and People's Rights. This commission was established in 1987 to oversee and interpret the African Charter on Human and People's Rights and the promotion and protection of these human and people's rights (AU2016 http://www.au.int/en).

404 See article 32 of the African Charter on the Rights and Welfare of the Child.

405 AU 2016.http://www.au.int/en.

an integrated and sustainable approach towards gender equality, the Directorate supports the empowerment of women through training on gender policies and instruments. The Department of Social Affairs is responsible for the promotion of health, labour, employment, migration and social development in the region.[406] With regard to the representation of vulnerable women workers, the Economic, Social and Cultural Council provides an opportunity for members' civil society organisations to be involved and play an active role in the AU's policies, programmes and principles.[407] These members include social groups representing women. Women workers in the informal economy often prefer civil society groups to represent their needs as they are more sensitive to their diverse and specific needs and challenges. A Fund for African Women also exists in the region and this fund supports small and community-based women's organisations and initiatives to fight poverty, empower women and promote equality.[408]

For vulnerable women in the region, the New Partnership for Africa's Development (NEPAD) agency, situated in South Africa, is of specific importance as it forms the Pan-African strategic framework for the socio-economic development of Africa. Its objectives include the alleviation of poverty and the empowerment of women.[409] Empowerment of women in the region is a high priority and a specialised agency of the AU was established, namely the International Centre for Girls' and Women's Education in Africa (CIEFFA).[410] This agency promotes education of women and girls. The African Women's Decade (2010-2020) Make Every Women Count, promotes gender equality and empowerment of women and has adopted a grassroots approach that combines a top-down and bottom-up approach.[411] Important focus areas identify challenges that many women in the region face, such as:

(a) eradication of poverty;

(b) food security;

(c) health, maternal mortality and HIV and AIDS;

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406 The department has numerous divisions, including a division for labour, employment and migration, HIV and AIDs and social welfare (AU 2016 http://www.au.int/en).

407 AU 2016 http://www.au.int/en.

408 AU 2016 http://www.au.int/en.

409 AU 2016 http://www.au.int/en.

410 AU 2016 http://www.au.int/en.

411 UN NGLS 2010 https://www.unngls.org/index.php/un-ngls_news_archives/2010/749-african-women%E2%80%99s-decade-2010-2020-officially-launched-on-international-day-of-rural-women.

(d) violence against women;

(e) governance and legal protection;

(f) finance and gender budgets; and

(g) women in decision making positions.[412]

Member states are required to establish committees representative of various role players within communities to establish programmes to promote the focus areas. Regular reporting structures endeavour to hold African governments accountable to commitments made with reference to gender equality.[413]

The AU places high value on international standards and an AU Commission on International Law (AUCIL) was established in 2009. Its objectives include activities that is relevant to the codification and progressive development of international law in the region.[414]

3.4.1.1 The African Charter on Human and People's Rights (1981)

The African Charter on Human and People's Rights[415] provides in article 1 that member states must give effect to the provisions in the Charter through national legislation. Article 2 provides for equal enjoyment of rights and a prohibition of discrimination on listed grounds such as sex and race. In terms of applicable provisions for women workers in the informal economy in the region, articles 10 and 11 provide for freedom of association and the right to assemble. These regional provisions can be a valuable tool in organising these workers when national legislative provisions are limited in scope, as they can serve as a benchmark. The only direct provision in respect of labour can be found in article 15 and provides for the right to work under equitable conditions and equal pay for equal work. Rights in respect of social protection include the right to physical and mental health, the

412 UN NGLS 2010 https://www.un-ngls.org. These areas were selected with reference to the thirteen critical areas identified by the Beijing Platform of Action and the then Millennium Developmental Goals.

413 Reporting allows for the monitoring of progress in the African Union and evidence of examples of best practices with reference to gender equality (MEWC2016 http://makeeverywomancount.org/images/stories/documents/MEWC__AWDMidTermReview_2016.pdf?platform=hootsuite 2).

414 Article 4 of the AUCIL's statute. Member states retain national legislative powers.

415 The Charter entered into force in 1986. All SADC member states have ratified this instrument (ACHPR 2017 https://au.int/en/documents/20170210/introduction-african-union-commission-international-law).

provision of medical assistance when needed[416] and the right to education in article 17. Article 18 highlights the value of family life and obligates the state to ensure the elimination of discrimination against women in line with applicable international instruments. This is the only article in the charter that specifically refers to women. Drafters of the Charter are criticised for the inadequate protection of women rights in the charter and the fact that women are only mentioned in the family context, thereby contributing to the unequal burden of women with regards to family responsibilities.[417]

With reference to the rights in the Charter, the African Commission stated the following in *SERAC v Nigeria*:[418]

> Clearly collective rights, environmental rights, and economic and social rights are essential elements of human rights in Africa. The African Commission will apply any of the diverse rights contained in the Charter. It welcomes the opportunity to make clear that there is no right that cannot be made effective.[419]

An interesting feature of the Charter is that it places responsibilities on individuals in respect of the harmonious development of family life, thereby establishing a framework of multi-actor responsibilities to realise these rights.[420] There is no distinction in the Charter between civil/political and social/economic rights and there is no expressed right to social security.[421]

The Charter contains "clawback"[422] clauses as opposed to "derogation clauses".[423] It provides that states, individuals and organisations may complain to the African

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416 Articles 16(1) and (2).

417 Ayeni "Introduction and preliminary overview of findings" 7.

418 Communication 115/96: the Social and Economic Rights Action Centre and the Centre for Economic and Social Rights/Nigeria.

419 Para 68. See also Mpedi and Nyenti *Key international, regional and national instruments regulating social security in the SADC* 56.

420 Article 27. See also Mpedi and Nyenti *Key international, regional and national instruments regulating social security in the SADC* 56.

421 See also Mpedi and Nyenti *Key international, regional and national instruments regulating social security in the SADC* 56.

422 See Gittleman 1982 *VirgJIL* 691. In *Commission Nationale des Droits de l'Homme et des Libertés v Chad* (2000) AHRLR 66 (ACHPR 1995) para 21 the judge stated: "The African Charter, unlike other human rights instruments, does not allow for state parties to derogate from their treaty obligations during emergency situations. Thus, even civil war in Chad cannot be used as an excuse by the state violating or permitting violations of rights in the African Charter. The fact that the Charter does not allow derogation is highlighted as a unique feature when compared to other international human rights instruments (Ayeni "Introduction and preliminary overview of findings" 6).

423 These clauses limit a state's conduct by determining when the derogation is permitted and rights are defined as non-derogable. Derogation clauses normally allow for derogation in times of emergency where lives are in danger (Gittleman 1982 *VirgJIL* 692).

Commission on Human and People's Rights (ACHPR) that a state party has violated rights in the Charter.[424] The ACHPR can then make recommendations to the state party involved and to the AU Assembly.[425] Reporting structures by state parties are regulated in article 62, and state parties must report every two years on legislative and other measures taken to realise the rights in the Charter. The concluding observations issued by the Commission are merely recommendations.[426] Although the findings and observations are not binding, states do take note and national[427] and regional courts[428] have been influenced by the Charter and the Commission.[429]

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424 See articles 48-49.

425 AU 2017 https://au.int/sites/default/files/pages/31829-file-african-union-handbook-2017-edited.pdf.

426 AU 2017 https://au.int/sites/default/files/pages/31829-file-african-union-handbook-2017-edited.pdf.

427 See for instance *Molefi Ts'epe v The Independent Electoral Commission* (20050 AHRLR) 136 (LeCa 2005), heard in the Court of Appeal in Lesotho. The appeal was based on a constitutional challenge to legislative provisions relating to the first democratic local government elections (para 1). In para 20 reference is made to the African Charter on Human and Peoples' Rights to support the notion of substantive equality and specifically to article 2 that protects equality and the protection of specific vulnerable groups such as women with reference to the elimination of discrimination. After the court interpreted Lesotho's international obligations (reference was also made to CEDAW and the ICCPR) it concluded that the Constitution supports both substantive and formal equality (para 22). In *DE v RH* 2015 5 SA 83 (CC) (the case dealt with a delictual claim against a third part based on adultery), the court in para 45-49 makes reference to article 18 of the Charter where state parties are bound to protect and assist the family. The court also stated that article 18, in line with our Constitution, has equal application in same-sex unions and heterosexual marriages. In this case the court interpreted article 18 with reference to the specific facts and held that the Charter does not require state parties to strengthen a marriage that has dissolved by itself (para 49). In *Dawood v Minister of Home affairs: Shalabi v Minister of Home Affairs; Thomas v Minister of Home Affairs* 2000 3 SA 936, para 29 refers to international human rights law and specifically to article 18 of the Charter. These cases dealt with foreign spouses married to lawful residents and the circumstances in which they can reside in the country, whilst awaiting permits.

428 See *Mike Campbell (Pty)Ltd v Republic of Zimbabwe* (2/2007) [2008] SADCT (28 November 2008). The SADC Tribunal referred to two other decisions of the African Commission on Human and People's Rights, namely *Constitutional Rights Project, Civil Liberties Organisation and Media Rights Agenda v Nigeria* Comm. No. 140/94,141/94, 145/95 (1999) and the *Zimbabwe Human Rights NGO Forum v Zimbabwe*, Comm. No. (2002).

429 For a discussion of the impact of the African Charter on domestic human rights in Africa see ACHPR 2018 http://www.achpr.org/instruments/achpr/impact-on-domestic-human-rights/. Civil society organisations and NGOs in the region use the Charter and the *Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa* as a framework for their activities. In Lesotho these organisations include: Women and Law in Southern Africa (WLSA), Federation of Women Lawyers (FIDA) and the Lesotho Council of NGOs (LCN). See also Hlatshwayo "The impact of the African Charter and the Maputo protocol in Lesotho" 141.

3.4.1.2 The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa (2003)

The Protocol to the African Charter on Human and Peoples' Rights on the Rights of Women in Africa[430] is an important regional instrument for all women in the region and includes girls within its scope.[431] Important provisions for women workers in the informal economy are as follows:

(a) state parties are obliged to combat all forms of discrimination against women in legislative and constitutional provisions as well as in institutional and other measures;[432]

(b) policies must be gender sensitive;[433]

(c) corrective and positive action by states is required to eliminate and prevent discrimination;[434]

(d) an integrated approach is supported by obligating state parties to change social and cultural patterns through empowerment and communication strategies;[435]

(e) the importance of the right to dignity in the elimination of discrimination is highlighted;[436]

(f) the equal treatment of women in respect of refugee status is emphasised;[437]

(g) the legal empowerment of women is promoted;[438]

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430 All SADC Member states have ratified this instrument (ACHPR 2017 http//www.achpr.org/instruments). The effect of the Protocol in South Africa is illustrated in specific legislation that endeavours to give effect to this instrument and includes the following: the *Choice on Termination Of Pregnancy Amendment Act* 8 of 2004; the *Sexual Offences and Related Matters Amendment Act* 32 of 2006 and the *Civil Union Act* 17 of 2006 (Motlhasedi and Du Toit "The impact of the African Charter and the Maputo Protocol in South Africa" 231).

431 Article 1(k). It is a legally binding document, supplementary to the *African Charter on Human Rights*. After the adoption of the Protocol, the AU adopted the AU *Solemn Declaration on Gender Equality in Africa*. This document is not binding, but states have committed to promote and protect women's rights (Viljoen 2009 *WashLJCRSJ* 11, 12, 14).

432 Article 2(1)(a). See also MEWC 2016 http://makeeverywomancount.org/images/stories/documents/MEWC_AWDMidTermReview_2016.pdf?platform=hootsuit 10.

433 Article 2(c).

434 Article 2(d).

435 Article 2(2).

436 Article 3.

437 Article 4(k).

438 Article 8.

(h) all economic activities of women are, promoted and supported, specifically in the informal sector and value of work by women at home is recognised and maternity protection promoted;[439]

(i) social protection measures include aspects of health care,[440] food security, including clean drinking water and the right to adequate housing;[441]

(j) economic empowerment includes the promotion of women's access to control over and product resources and access to credit;[442] and

(k) social protection measures for elderly women, women with disabilities and vulnerable women.[443]

This protocol contains valuable principles and support for the legal and economic empowerment of women as a sustainable approach to gender equality. It also endeavours to change deep-rooted societal norms and prejudices through public awareness and formal and informal educational programmes.[444] A unique feature of the Protocol is that

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439 Article 13. In 2015 the UN Women's Eastern and Southern African Regional Office launched an initiative to increase the awareness of technology among women and to improve economic empowerment through engagement in markets and trade (UN Women ESARO 2016 http://www.unwomen.org/-/media/headquarters/attachments/sections/library/publications/2016/esar-report-2012-2015_un-women-transforming-equality.pdf?la=en&vs=5253). In 2011 Nigeria launched a Women Economic Empowerment Programme to combat gender inequality and poverty. One hundred women were trained. The training incorporated business finance skills and marketing. This was done within the framework of article 13 of the Protocol (AU Echo 2015 https://au.int/sites/default/files/documents/31358-doc-au_echo_january_2015.pdf). Countries in the region that have shown a decrease in maternal mortality include Algeria, Central African Republic, Ethiopia and Somalia (MEWC 2016 http://makeeverywomancount.org/images/stories/documents/MEWC_AWDMidTermReview_2016.pdf?platform=hootsuite 11).

440 Article 14. Access to antiretroviral drugs in the region has increased in many countries, for example in Rwanda, Burundi and Mauritius (MEWC 2016 http://makeeverywomancount.org/images/stories/documents/MEWC__AWDMidTermReview_2016.pdf?platform=hootsuite 11).

441 Article 15.

442 Article 19. The African Women's Decade, inspired by the Beijing Platform for Action in 1995, launched in 2010, aims to improve the commitments of state parties in the region with reference to gender equality and women's empowerment; see MEWC 2016 http://makeeverywomancount.org/images/stories/documents/MEWC__AWDMidTermReview_2016.pdf?platform=hootsuite 2. Countries in the region have made significant progress with reference to the economic empowerment of women. In Cameroon, women's labour force participation increased to 63,6% in 2014 from 54% in 2010. In Botswana unemployment among women was estimated at 20% for 2013/2014. Statistics South Africa indicated in 2017 that 44 out of every 100 employed persons are women; however, this implies that gender representivity is still below 50% (Stats SA 2017 http://www.statssa.gov.za/?p=10325).

443 See articles 22, 23 and 24.

444 These principles have promoted the advancement of women's rights in the region and a gender focus framework reflects this. It includes the *Constitutive Act* of the African Union (see article 4), the AU Protocol on Women's Rights, the Solemn Declaration on Gender Equality in Africa, the Africa Women's Decade and the Fund for African Women (MEWC 2016

it clearly addresses and highlights the challenges faced by African women, which is not the case in the Convention on the Elimination of All Forms of Discrimination Against Women (CEDAW).[445] The success of the Protocol will also depend on awareness and advocacy campaigns as well as on its effect on legal reform and litigation.[446] Viljoen recognises the importance of the Protocol, but expresses concern with reference to its effectiveness when he states the following:

> It is women's fundamental subordination embedded in socio-economic and cultural structures that underlies the denial of their rights, not the dearth of legal guarantees reaffirming their rights, Obviously the Protocol will not change this situation overnight, but it may contribute to its gradual reversal.[447]

3.4.1.3 Other AU instruments

AU instruments dealing with migrants in the region include the OAU Convention Governing the Aspects of Refugee Problems in Africa (1969).[448] The rights of children are governed by the African Charter on the Rights and Welfare of Children (1990).[449] The Social Policy

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http://makeeverywomancount.org/images/stories/documents/MEWC__AWDMidTermReview_2016.pdf?platform=hootsuite 7). In *Ramuhovhi v President of the Republic of South Africa* 2016 (6) SA 210 (LT), the court declared that the provisions of s 7(1) of the *Recognition of Customary Marriages Act* 120 of 1998 unjustifiably discriminates against women in polygamous customary marriages with reference to gender, race and ethnic or social origin. The court in paragraph 34 referred to regional treaties ratified by South Africa and mentioned the Protocol. In *Gumede v President of the Republic of South Africa* 2009 3 SA 152 (CC) the court declared s 7(1) of the *Recognition of Customary Marriages Act* 120 of 1998 invalid (with reference to monogamous customary marriages). The court referred to an international treaty obligation with reference to the elimination of discrimination against women and specifically to articles 2, 6 and 7 of the Protocol (para 21). In *Bothma v Els* 2010 2 SA 622 (CC) the court dealt with the issue of a permanent stay of prosecution with reference to an allegation of rape that occurred 39 years earlier. Sachs J stated: "The need for courts to give an effective response to rape, especially the rape of young girls, has been emphasised throughout the world." In support of this statement reference is made to article 4(1) and (2) of the Protocol and the preamble and article 16(1) of the African Charter on the Rights and Welfare of the Child.

445 Viljoen 2009 *WashLJCRSJ* 46.

446 Viljoen 2009 *WashLJCRSJ* 46.

447 Viljoen 2009 *WashLJCRSJ* 46.

448 In respect of internally displaced persons the African Union's Convention for the Protection and Assistance of Internally Displaced Persons in Africa (2009) is applicable.

449 This instrument provides for the protection and promotion of children's rights within an African framework (see Mpedi and Nyenti *Key international, regional and national instruments regulating social security in the SADC* 60). Every child has the right to education (article 11(1)) and state parties must take appropriate measures to achieve the full realisation of this right, which includes to provide free and compulsory education and to take measures in respects of female children to ensure equal access to education (see article 11(3)(a) and (e)). Article 14 obligates state Parties to reduce the infant and child mortality rate and provide healthcare, also to expectant and nursing mothers. To ensure a sustainable approach, the article calls for health service programmes to be incorporated into national plans as well as participation of all role players, including community leaders and non-governmental organisations. Article 15 prohibits economic exploitation work that is hazardous for children both in the formal and informal economy in line with ILO instruments.

Framework for Africa (2008) is not a legally binding document; however, it endeavours to create a framework that supports other programmes and policy indicatives such as the Poverty Reduction Strategy Papers, the New Partnership for Africa's Development and furthermore to address previously excluded issues in this respect.[450]

Other instruments that promote social protection and specifically cover health issues include the Ouagadougou Declaration and Plan of Action (2000),[451] the Africa Health Strategy (2016-2030),[452] the Abuja Declaration on HIV/AIDS, Tuberculosis and Other Related Infectious Diseases (2001),[453] the Maputo Declaration on HIV and AIDS, Tuberculosis, Malaria and Other Related Infectious Diseases (2003)[454] and the Gaborone Declaration on a Road Map Towards Universal Access to Prevention and Treatment and

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450 See also Mpedi and Nyenti *Key international, regional and national instruments regulating social security in the SADC* 72. See also the Livingstone and Yaoundé Calls for Action (2006) that recognise that social protection is both a right and has an empowerment agenda component and that addressing inequality through social protection is an integral part of the growth agenda.

451 The aim of this declaration is to empower people and to promote decent work for all in line with the ILO Decent Work Agenda through the promotion of social protection for all. The *Ouagadougou Plan of Action on Employment Promotion and Poverty Alleviation* targets the informal economy and has as a goal the provision of a minimum package that includes healthcare, old age protection, maternity protection and protection according to occupational hazards in sectors. See also the *Charter of Social Action* (1999).

452 The objective of this strategy is to provide strategic direction to the region to improve health sectors and address the challenges to reducing Africa's burden of disease. An important feature of this strategy is the recognition of health as a human right and the role of social protection in the alleviation of poverty, combatting inequality and vulnerabilities. Member states are required to incorporate the core strategies into their policies. Roles and responsibilities are allocated to various role players, including the African Union Commission, the NEPAD Agency, member states and civil societies. The support of various role players is vital for the achievement of an integrated, inclusive and prosperous Africa, free from the many health burdens associated with the region. Despite the many challenges in the region, progress has been made. The HIV treatment in Africa has increased more than hundredfold from 2000-2013 and the malaria mortality rate has declined by 66% during this period. In respect of women it is important to note that between 1990 and 2013 the average maternal mortality rate in Africa declined from 990 deaths per 100 000 live births in 1990 to 510 per 100 000 live births in 2013. Progress has been made in respect of the infant mortality rate; however, the neonatal mortality rate remains high. See the *Africa Health Strategy 2016-2030* (AU 2017 https://au.int/sites/default/files/documents/24098-au_ahs_strategy_clean.pdf).

453 Important principles of this Declaration applicable to women include the recognition of their vulnerability in the HIV transmission of mother to child, the fact that women and children are particularly vulnerable to HIV infection and the fact that economic and social inequalities and their stereotyped gender roles leave them subordinate to men. These challenges in respect of HIV and AIDS and other infectious diseases are to be faced though a comprehensive multisectoral strategy involving all relevant role players, including civil society, trade unions and women's organisations. See also Mpedi and Nyenti *Key international, regional and national instruments regulating social security in the SADC* 78.

454 This Declaration reaffirms the commitments in the other *Abuja Declarations* as well as the commitment to intensify all efforts for the implementation of the declarations dealing with these diseases. See the *Maputo Declaration on HIV and AIDS, Tuberculosis, Malaria and Other Related Infectious Diseases* (2003).

Care (2005).[455] These instruments are examples of region-specific responses to health issues as opposed to international instruments addressing global issues and underline the appropriateness of regional instruments in this regard.

The Social Protection Plan for the Informal Economy and Rural Workers 2011-2015 (SPIREWORK) specifically identifies informal economy workers, including rural workers, as vulnerable, poor and often excluded from social security and adequate social protection. The notion that the informal economy is without social protection forms part of the definitional context in this plan. Another key principle is the acknowledgment that tailor made social insurance schemes might be better suited to deal with the specific needs of the informal economy and that equity in healthcare is a core principle in Africa's health strategy.[456] The document also highlights the unsafe working conditions of these workers and the challenges of sexual harassment and violence against woman.[457] Implementation for improving, strengthening and extending social protection to the informal economy entails the removal of administrative, legal, fiscal and other obstacles and the facilitation of employment creation. Employment creation in this instance is supported by an integrated approach and includes the empowerment of these workers as it involves access to training, credit advisory services, applicable legislation, social protection and enhanced technology.[458] This document also highlights the importance of regional instruments in dealing with challenges specific to the region as it highlights the challenges that developing countries face in the implementation of ILO social security instruments. These instruments often refer to the nine classic risks of social security that are in general not the only risks relevant to the informal economy.

The lack of adequate social protection of these workers is then ascribed to the following factors:

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455 This document strives towards the achievement of the Millennium Development Goals through sustainable access to prevention, treatment and care. The member states of the African Union commit themselves to the distribution of free insecticide-treated bed nets for pregnant women and children under five years of age, as part of an integrated healthcare delivery system. See the *Gaborone Declaration on a Road Map towards Universal Access to Prevention and Treatment and Care* (2005).

456 AU 2011 https://new-ndpc-static.s3.amazonaws.com/pubication/AU+SocialProtectPlanInfoEcon&RuralWorkers_2011.pdf 10, 12.

457 AU 2011 https://new-ndpc-static.s3.amazonaws.com/pubication/AU+SocialProtectPlanInfoEcon&RuralWorkers_2011.pdf 6.

458 AU 2011 https://new-ndpc-static.s3.amazonaws.com/pubication/AU+SocialProtectPlanInfoEcon&RuralWorkers_2011.pdf 15.

(a) weak knowledge of, data and statistics on the specific coverage and needs of the different categories of these workers;

(b) the low contributory capacity;

(c) legal barriers; and

(d) administrative and procedural challenges.[459]

The *Social Protection Plan for the Informal Economy and Rural Workers 2011-2015* displays a clear understanding of the challenges and needs of the informal economy in that it provides for innovative and tailor-made social protection plans to accommodate workers within a very dynamic and diverse informal economy and not the mere extension of social security schemes applicable to the formal economy.[460] Tailor-made social protection measures recognises that many workers in the informal economy are self-employed and there are no employer contributions available; that their income is low and irregular and this impacts on contributions, and that these workers may require a different benefit structure from those workers in the formal economy. The diversity of the informal economy allows member states to adopt a cluster approach in respect of the implementation of this plan.[461] The vulnerability of women and children is highlighted and a core principle is to eliminate these vulnerabilities and insecurities.[462] The Plan recognises that when extending social protection, (in this specific instance a minimum social protection package) representation, organisation and empowerment of these workers are essential, as well as advocacy and recognition and policy dialogue.[463] This document addresses the essential elements that are required in the extension of social protection in the informal economy and allows for an integrated approach that includes empowerment and social dialogue. It is an example of a tailor-made approach recognising the distinct challenges of workers in the informal economy and addressing these challenges accordingly. It is important to note that it also recognises that the provision of social protection to the informal economy poses a multidimensional challenge and that this would require addressing various issues such as deficits in representation and

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459 AU 2011 https://new-ndpc-static.s3.amazonaws.com/pubication/AU+SocialProtectPlan InfoEcon&RuralWorkers_2011.pdf 18.

460 AU 2011 https://new-ndpc-static.s3.amazonaws.com/pubication/AU+SocialProtectPlan InfoEcon&RuralWorkers_2011.pdf 18.

461 See also Mpedi and Nyenti *Key international, regional and national instruments regulating social security in the SADC* 82.

462 The *Social Protection Plan for the Informal Economy and Rural Workers 2011-2015* 26.

463 The *Social Protection Plan for the Informal Economy and Rural Workers 2011-2015* 28.

organisation, assets capital protection, legal, political and social constraints. A prominent feature of AU instruments, including the Social Protection Plan, is the acknowledgement of the value and role of civil society organisations in the extension of social protection measures to these workers as well as the empowerment of these workers in accordance with a more sustainable approach.[464] The AU instruments discussed above address the specific challenges faced by women in the Region, such as HIV and AIDS,[465] whereas international instruments are often not as clear and precise with reference to distinct challenges and vulnerabilities experienced by women in the region. The manner of regulation by the AU supports Langille's pleas for less detailed instruments and more general principles with reference to international instruments.[466] Regional regulation also supports "a shift from the universal to the local/contextual/embedded" approach.[467]

3.4.2 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.[468] This marked the transfer from a coordination conference into a community.[469] Initially it was part of the motivation to reduce dependency on the then apartheid regime in South Africa.[470] Their vision, based on common values and principles, is one of a regional community, the improvement of standards of living, the alleviation of poverty, promotion of freedom and social justice, and peace and security for all people. Article 3 of the SADC Treaty (1992) affords the

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464 AU 2011 https://new-ndpc-static.s3.amazonaws.com/pubication/AU+SocialProtectPlanInfo Econ&RuralWorkers_2011.pdf. Civil society organisations are required to lead the advocacy and capacity building activities at all levels in respect of the social protection minimum package.

465 See also article 14 of the Protocol to the African Charter on Human and People's Rights on the Rights of women in Africa.

466 Langille 2010 *CLLPJ* 541.

467 Langille 2010 *CLLPJ* 542. The African Charter on Human and People's Rights provides for contextualisation within the region and this includes provisions such as the individual's duty to preserve and strengthen the African cultural values and the promotion of African unity; see article 29(7) and (8). The Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa recognises the occurrence of wars and conflicts in the region and defines violence against women to include acts perpetrated during such times (article 1). The Protocol also recognises that there are countries in the region where the death penalty is still allowed and therefore provides for a stay of execution for pregnant or nursing women (article 4(j)). In line with this local, contextual approach, harmful practices are dealt with in the Protocol where it provides for legislative prohibitions on female genital mutilation, scarification and medicalisation of female genital mutilation (article 5(b)).

468 The following member states are part of the SADC community: 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 date unknown http://www.sadc.int/member-states/).

469 Mpedi and Nyenti 2012 *SADC LJ* 165.

470 SADC date unknown http://www.sadc.int/member-states/.

SADC legal personality and provides that the SADC is an international organisation.[471] The treaty is binding on all SADC member states.[472] 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 the standard and quality of life of the people as well as support for the socially disadvantaged in the region through integration.[473] Areas of cooperation include social welfare, social and human development and special programmes that are crucial for the extension of social protection to vulnerable workers. The objectives of the SADC are not merely political and economic, but also include social objectives. The *SADC Treaty* also provides for a Regional Indicative Strategic Development Plan that prioritises strategies of SADC. Article 4 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.[474] Adoption of these programmes by member states can be achieved through agreement. 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 women workers in the region, article 21(3)(f) is relevant since it states that one of these areas that require cooperation is social welfare and this certainly embraces the notions of social protection, decent work for all and social integration in the region.[475] To achieve this objective, member states will have to cooperate in respect of an appropriate legal

471 See articles 3(1) and (2).
472 Mpedi and Nyenti *Key International, regional and national instruments regulating social security in the SADC* 89.
473 See article 5(1).
474 Mpedi and Nyenti 2012 *SADC LJ* 166.
475 Mpedi and Nyenti 2012 *SADC LJ* 167.

framework,[476] the undertaking of an institutional framework[477] and the implementation of a programmatic framework.[478]

The labour market in this region is characterised by high unemployment rates and an informal employment rate as high as 90% in certain countries.[479] More women are unemployed than men and despite certain interventions as discussed below, women remain in irregular and low-paid jobs and are mostly responsible for care work in the region.[480] Statistics indicate that informal employment in reporting countries in sub-Saharan Africa accounts for a large share of non-agricultural employment; for instance, in South Africa this is 33%. Statistical trends indicate that women are often predominantly present in the informal economy in this region.[481] It must also be noted that in 2013 Nigeria reported that over 174 000 new jobs were created and that the informal economy contributed 53% to this growth.[482] This certainly highlights the importance of the informal economy in this region and the fact that member states must design and implement measures to protect these workers.[483]

Gender-sensitive and anti-discrimination regional instruments in the SADC community can play an important role in the extension of labour and social protection to women workers

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476 The legal framework can be modelled on the SADC Treaty or other regional instruments such as protocols with reference to the implementation of the Treaty (Mpedi and Nyenti 2012 *SADC LJ* 167).

477 The SADC Treaty provides in article 9 for the Institutional Framework in this regard and this includes the Summit Heads of State of Government, the Council of Ministers, Commissions, the Standing Committee of Officials and the Secretariat. Four Directorates were formed and include Social and Human Development and Special Programmes, and Food, Agriculture and Natural Resources (Mpedi and Nyenti 2012 *SADC LJ* 179).

478 Mpedi and Nyenti 2012 *SADC LJ* 167. See Kaime 2004 *AfrSR* 113. Specific programmes must be implemented to promote this agenda. The Protocol on Employment and Labour provides member states with strategies and guidelines for the achievement of social protection; however, a two-thirds ratification majority by member states is required for implementation.

479 Olivier "Gender discrimination in labour law and social security" 228.

480 Olivier "Gender discrimination in labour law and social security" 228.

481 The South African Cross Border Trade Association has indicated that 72% of their members are women (Mirand 2015 http://old.osisa.org/buwa/economic-justice/regional/women-working-informal-economy-challenges-and-policy-considerations). Factors that contribute to the high prevalence of women in the informal economy in this region include the fact that more women are in engaged in precarious employment, work in the informal economy is easier accessible than formal employment and designed to accommodate the needs of these women workers as their place of employment is often their home or the streets. Lack of skills, opportunities and experience as well as high levels of illiteracy contribute to this. It should also be noted that many of these workers prefer to work in the informal economy.

482 Omomia *Business Day* 1.

483 The fact that the majority of women in this region is engaged in the informal economy and underrepresented in the formal economy can be ascribed to "historical marginalisation of women and patriarchal societies" (Olivier "Gender discrimination in labour law and social security" 236).

in the informal economy. Although countries in the region, such as South Africa, have a legislative framework that promotes equality, including substantive equality, the scope of labour legislation is often limited to those in formal employment.[484] With reference to social protection measures, various challenges exist for women workers. These include narrow conceptual frameworks within existing social security schemes, limited access to social insurance schemes that often cover only those in formal employment, and inadequate maternity protection,[485] specifically for women workers in the informal economy.[486]

Instruments that impact on the social and labour protection of workers include the SADC Treaty,[487] Charter of Fundamental Social Rights,[488] the Code on Social Security,[489] the Draft Protocol on the Facilitation of Movement of Persons,[490] the Declaration on Gender and Development,[491] the Protocol on Health,[492] the Protocol on Employment and Labour,[493] the Code on HIV and AIDS and Employment in SADC[494] and the Protocol on Education and Training.[495]

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484 See the South African Constitution, s 9 and the *EEA* 55 of 1998. See Chapter 6 for a detailed discussion. The Constitution of the Republic of Malawi (1994) in article 20(1) and (2) prohibits discrimination and mandates legislation to be enacted to address inequalities in society (Olivier "Gender discrimination in labour law and social security" 229).

485 SADC member states (see South Africa, Zambia, Zimbabwe, Malawi and Mozambique) do provide maternity protection within a labour law or social security framework, however often this is based on conceptual coverage within the legislative framework (Olivier "Gender discrimination in labour law and social security" 238. Self-employed women workers, such as informal traders and waste pickers, do not enjoy and maternity benefits due to the nature of their work. See para 4.4.1.2 below with reference to maternity protection in South Africa.

486 Olivier "Gender Discrimination in labour law and social security" 231, 232.

487 (1992).

488 (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.

489 (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.

490 (2005).

491 (1997).

492 (1999).

493 Signed in 2014.

494 (1997).

495 (1997).

3.4.2.1 Charter of the Fundamental Social Rights in SADC (2003)

The Charter of the Fundamental Social Rights in SADC was adopted in 2003 with the objective to facilitate, through social dialogue with role players,[496] a spirit that enhances harmonious labour relations in the region. The Charter provides a legal framework for harmonised programmes to achieve this and confirms a number of the objectives of the Treaty.[497] The Charter copies the tripartite structure of the ILO and apart from the harmonisation of legal, economic and social policies, also provides for the promotion of labour policies; the provision of a framework for regional cooperation and the collection and dissemination of labour market information;[498] the harmonisation of social security schemes, and the regulation of health and safety standards.[499] This integrated approach to objectives also provides for development of institutional capacities which is particularly important in developing countries when considering the extension of labour and social protection to vulnerable workers in the informal economy. Article 3 reinforces the constitution of the ILO, the Declaration of Philadelphia and other applicable international instruments. SADC members have ratified all eight core ILO conventions and in 2011 it was agreed by member states that the improved compliance with ratified conventions must now be prioritised.[500] This provision is of importance to woman workers in the informal economy without adequate social protection as it could translate to the extension of at least a basic social protection floor as required by the Social Protection Floors Recommendation (2012).[501] This could include minimum essential levels of service.[502]

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496 Included are government representatives, workers' organisations and representatives of employers of all member states.

497 See article 5 of the Treaty for objectices such as the achievement of development and economic growth, the alleviation of poverty, the enhancement of the standard and quality of life and the provision of support to the socially disadvantaged through regional integration (Olivier and Kalula "Regional social security" 664).

498 In 2007, the establishment of a SADC Labour Market Information System was approved. This is extremely important in respect of labour market policies and legislative and regulatory reforms and will complement efforts by the ILO to obtain accurate statistics specifically for those working in the informal economy (SADC 2013 http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/genericdocument/wcms_379400.pdf 12.

499 Health and safety standards are often a major challenge for women workers in the informal economy, whether they are informal traders, homeworkers or domestic workers.

500 SADC 2013 http://www.ilo.org/wcmsp5/groups/public/---ed_protect/---protrav/---migrant/documents/genericdocument/wcms_379400.pdf 16.

501 Nyenti and Mpedi 2012 *PER* 252.

502 Nyenti and Mpedi 2012 *PER* 253. This includes access to public services such as water, health and sanitation. See also Dijkhoff and Mpedi "Recommendation on Social Protection Floors and basic principles for innovative solutions" 5.

In support of the applicable ILO instruments article 4 regulates freedom of association and the right to organise as well as to establish trade unions. This provision is based on the traditional concept of trade unions and does not take cognisance of the fact that trade unions can prove ineffective in respect of organising workers in the informal economy. It does not provide for the establishment of other sustainable organisations often better equipped to deal with the challenges faced by workers in the informal economy, such as MBOs, cooperatives, NGOs and community-based organisations. These organisations for women workers in the informal economy do exist and provide an important vehicle for the voice and representation of these workers. Therefore it is of the utmost importance that governments recognise and support such organisations.

Important provisions in the Charter for women workers in the informal economy include the provisions in respect of gender equality,[503] equal opportunities,[504] and the development of reasonable measures to enable women to reconcile their occupational and family responsibilities.[505] According to the Charter, the right to social protection is accorded to every worker and it is not linked to the status or type of employment. This means that all workers in the region, even those in the informal economy, do have a right to social protection. An improvement of working and living conditions should include paid maternity leave.[506] The implementation of the Charter is the responsibility of the national tripartite institutions and regional structures, and member states must report regularly on progress to the Secretariat.[507]

3.4.2.2 Code on Social Security (2007)

In article 1 the Code on Social Security (2007) recognises the broader concept of social protection and its objective to enhance human welfare. Principles underlying the development of social security systems in the region include solidarity and redistribution, multi-actor responsibility and variable geometry, and introducing flexibility in the achievement of social protection for all in the region.[508] Apart from the right to social security,[509] social assistance, social services and allowances,[510] and social insurance,[511]

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503 Article 6(a).
504 Article 6(b).
505 Article 6(c).
506 Article 11(a).
507 Articles 16(1) and (2).
508 Article 2. See also Nyenti and Mpedi 2012 *PER* 257.
509 Article 4.
510 Article 5.
511 Article 6.

the code allows for an integrated approach in respect of social protection and provides that member states should recognise indirect forms of support related to health, education, transport, water and electricity, and housing. Once again this integrated approach to social protection can be beneficial to women workers in the informal economy as opposed to a narrow interpretation of social security premised on the traditional employee-employer relationship. Particular mention of gender equality, the specific needs of women, the economic empowerment of women and the promotion of policies to assist women with all their responsibilities, provide an important framework to ensure social protection and gender equality of these workers.[512] Member states must also ensure that national social security does not contain discriminatory provisions based on gender.[513] The Code also makes provision for the protection of migrant workers.[514]

3.4.2.3 Protocol on Employment and Labour (2014)

The Protocol on Employment and Labour was signed in 2014 and will be implemented on reaching ratification by two-thirds of the member states.[515] Included in the definition of vulnerable workers are women and informal economy workers.[516] This instrument also underlines the respect for fundamental and basic human rights as reflected in international, regional and national instruments and the importance of decent work in the eradication of poverty.[517] Gender equality, regional cooperation, the setting of minimum standards on employment and labour, social security and safety and health at work are important objectives of this protocol.[518] In respect of the informal economy the objective of promoting employment and income-generating opportunities for particular vulnerable groups on the basis of achieving full, freely chosen productive and decent employment can be an important tool in the extension of labour and social protection. The protocol ensures freedom of association,[519] equal treatment,[520] employment and remuneration,[521] the improvement of working and living conditions,[522] decent work in line with the SADC

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512 Article 13.
513 Article 13(2). Legislation must also be aligned with the 1997 SADC Declaration on Gender Development and the 1999 Plan of Action for Gender in the SADC.
514 Article 17.
515 Mpedi and Nyenti *Key International, regional and national instruments regulating social security in the SADC* 105.
516 Article 1.
517 Articles 2(b) and (c).
518 Articles 4(a), (c) and (d).
519 Article 6. Unfortunately the article only provides for trade unions and no provision is made for other workers' organisations.
520 Article 7.
521 Article 8.
522 Article 9.

Decent Work Programme,[523] social protection,[524] occupational safety and health,[525] health care,[526] retirement provisions and protection of elderly persons,[527] unemployment and underemployment,[528] maternity and paternity benefits,[529] persons with disabilities[530] and the protection of children and young persons[531] and migrant workers.[532]

It is encouraging that nearly all the SADC instruments provide for reasonable measures to assist women to reconcile their occupational and family obligations.[533] Article 21 makes specific provision for informal employment and rural workers and includes the labour and social protection of these workers. State parties must have a comprehensive regulatory mechanism to promote decent work and the productivity of informal and rural enterprise. The promotion of productivity is supported by an integrated approach through supportive and regulatory measures and policies, hence embracing the fact that workers in the informal economy must often rely on various role players to access capital, resources and sector-specific services.[534] The most valuable provision is the recognition and promotion of membership-based organisations to partake in social dialogue when considering policies and regulatory frameworks for these workers.[535] This section acknowledges that the need of these workers may differ from those in regular employment and that special provisions are often required to provide these workers with adequate labour and social protection.

3.4.2.4 Protocol on Gender and Development (2008)

The Protocol on Gender and Development (2008) commits member states to acknowledge that gender equality is a fundamental human right.[536] All member states have ratified the UN Convention on the Elimination of All Forms of Discrimination against Women. The

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523 Article 10.
524 Article 11.This article establishes the right to adequate social protection to every worker.
525 Article 12.
526 Article 13. This article qualifies the scope by providing adequate healthcare to residents.
527 Article 14.
528 Article 15.
529 Article 16. This provision is important for women workers in the informal economy as member states must ensure maternity protection to all employed women, including those in atypical or dependent work. It also prohibits discrimination on the ground of maternity status (article 16(5)).
530 Article 17. Specific provision is made for social protection measures for people living with HIV and AIDS.
531 Article 18.
532 Article 19.
533 Article 4(c).
534 Article 20(b).
535 Article 20(c).
536 Article 4 calls for gender equality to be enshrined in the *constitution*s of member states.

protocol is an important document considering the role that patriarchal systems have played in contributing to gender-based discrimination in this region.[537] Article 3 calls for the harmonisation of various instruments to accelerate the implementation of the protocol. These instruments include the Convention of the Rights of the Child (1989), the Millennium Development Goals (2000) and UN Security Resolution 1325 on Women, Peace and Security (2000). The protocol highlights the precarious position of women in the region in respect of new risks such as HIV and AIDS, human trafficking, the feminisation of poverty and gender-based violence.[538] The protocol defines the informal economy as a portion of a country's economy that lies outside of any formal regulatory environment. This protocol is important for women workers in the SADC region as it provides for the empowerment for women,[539] the elimination for discrimination and the achievement of gender equality through encouraging and harmonising development and implementation of gender responsive legislation, policies, programmes and projects.[540] State parties are obliged to adopt policies in respect of the burden of multiple roles performed by women.[541] Women often have to balance various responsibilities such as responsibilities of sole provider and childcare and often also care of the elderly. The perception also exists that the ability to perform domestic work is innate to women. The nature of their work, such as care work, domestic work and other home-based work often result in a lack of worker identity as this kind of work is seen as part of their everyday duties.[542] The protocol specifically mentions the recognition of the economic value and the protection of other workers in agriculture and domestic work. This is an important consideration as many of these sectors account for a large number of informal economy workers in the region.

International Development in 2011 indicated that the value of trade conducted by women in the region is approximately USD 7 billion.[543] The economic and social value of the contribution by women in this respect is not recognised or valued, therefor article 16 can play an important role in highlighting the value of the different roles performed by women. The protocol supports an integrated approach and it is of the utmost importance to

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537 Mirand 2015 http://old.osisa.org/buwa/economic-justice/regional/women-working-informal-economy-challenges-and-policy-considerations.

538 SADC Protocol on Gender and Development 2013.

539 Through empowerment, vulnerable and precarious position workers could gain opportunities to participate and compete on equal terms. Article 17 specifically regulates the economic empowerment of women in the region.

540 Article 3(a) SADC *Protocol on Gender and Development.* This also includes protection and benefits to women during maternity leave. See article 19(4).

541 Article 16.

542 Bonner and Spooner 2011 *IPSJ* 89.

543 Article 19(2)(c).

provide these women with the ability to gain access to resources, the means to influence the wider policy and thereby enabling them to shape their livelihood and lives. This document is progressive in nature as it endeavours to influence policies and social practices by supporting public awareness programmes aimed at changing behaviour and eradicating gender-based violence.[544] This protocol, in pursuing gender equality, also ensures that the empowerment of these women is a core focus area.

3.4.2.5 Protocol on Health (1999)

The SADC *Protocol on Health* was signed in 1999 to coordinate regional efforts to prevent, control and eradicate communicable and non-communicable diseases through mutual support wherever possible.[545] Co-ordination, promotion and education are key themes through this protocol. This SADC instrument once again identifies vulnerable groups such as women and children and provides for common strategies to address their health needs.[546] The protocol provides for various institutional mechanisms to ensure the effective implementation of this instrument.[547]

3.4.2.6 Code on HIV/AIDS and Employment (1997)

The SADC Code on HIV/AIDS and Employment is a non-binding instrument; it thus provides policy considerations and guiding principles to ensure a workplace without discrimination against individuals living with HIV and AIDS.[548] The code provides guidelines to member states on how to address HIV and AIDS in the workplace and ensure effective implementation. Member states are urged to incorporate these principles in national legislation. In its scope the code covers all employees and prospective employees. The narrow scope of coverage and the non-binding nature of this code leaves many women workers vulnerable and without adequate protection. Any policy document or binding instrument regulating HIV and AIDs is of particular importance for women workers in the region, since the minister of health in Zimbabwe indicated in 2005 that women and girls are twice more affected by HIV and AIDS compared to the male part of the

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544 Article 21.
545 Article 3 lists the objectives.
546 Article 3(g).
547 Article 4 provides for the establishment of the Health Sector Co-ordinating Unit, Health Sector Committee of Ministers, the Health Sector Committee of Senior Officials as well as Technical Subcommittees.
548 This is achieved for example through providing access to job opportunities, medical testing at work, privacy, job security, occupational benefits and education and awareness programmes, including prevention programmes.

population.[549] In both Zimbabwe and Botswana a large number of women are occupied in cross-border trading, and studies have indicated that these traders are more susceptible to HIV and AIDS, as a result of gender inequality, time spent at border posts which are high transmission zones, accommodation and transport challenges and limited access to healthcare and healthcare facilities.[550] An urgent need exists for SADC member states to consider the plight of these women workers, as informal border trade contributes to the economy of the various member states and it is a source of income for many poor and vulnerable women. The code is vague and of a non-binding nature; current regional regulations on HIV and AIDS are weak; these traders are not formally recognised in policies, and their specific needs are not addressed.

The SADC HIV and AIDS Strategic Framework 2010-2015 does focus on the harmonisation of cross-border health policies. It identifies these workers as a specific vulnerable group and requires action to address the needs of the mobile population.[551] Member states must consider appropriate educational health programmes, intervention strategies and adequate healthcare facilities at these border posts as these posts are in effect the workplace of many of these workers, and combatting this pandemic is certainly the responsibility of member states.[552] This framework document recognises the value of an integrated approach and that the combination of HIV and AIDS, poverty and food insecurities threatens the livelihood of many households.[553]

Other applicable instruments in this region include the Maseru Declaration on HIV and AIDS (2003) and the Abuja Declaration on HIV and AIDS, Tuberculosis and Other Related Infectious Diseases (2001).[554]

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549 Kureba 2015 *IOSR-JHSS* 65.

550 In 2009 the United Nations Development Fund for Women found that 70% of informal cross-border traders are female (see also Kureba 2015 *IOSR-JHSS* 65).

551 SADC 2009 http://www.sadc.int/files/4213/5435/8109/SADCHIVandAIDSStrategyFramework 2010-2015.pdf 2, 28. This framework requires member states to establish a sustainable response to these challenges and a reporting structure in respect of their targets.

552 Kureba 2015 *IOSR-JHSS* 65.

553 SADC2009 http://www.sadc.int/files/4213/5435/8109/SADCHIVandAIDSStrategyFramework 2010-2015.pdf 10.

554 SADC 2009 http://www.sadc.int/files/4213/5435/8109/SADCHIVandAIDSStrategyFramework 2010-2015.pdf 14.

Policies and programmes regulating the issue of HIV and AIDS must be mainstreamed throughout the region as the adverse effect of HIV and AIDS on social, political and economic development in this region is one of the greatest challenges.[555]

3.4.2.7 Code of Conduct on Child Labour (2000)

The SADC has also developed a Code of Conduct on Child Labour after a study was conducted on the high prevalence of child labour in the region and it was found that 40% of all children in Africa between the ages of 5 and 14 are engaged in economic activities.[556] Article 4 provides for the design of strategies and policies that will include the collection of information for developmental priorities and monitoring, legislation and enforcement,[557] education and training,[558] health, welfare and social protection,[559] advocacy and public awareness,[560] and poverty alleviation.[561] Although a high percentage of child labour does indeed occur in the informal economy, the protection of children in the informal economy falls outside the ambit of this study.

Regional regulation in the SADC region has a clear antidiscriminatory focus and many instruments focus on gender equality, the empowerment of women and various initiatives to ensure sustainable development. Nevertheless various challenges remain in respect of regional regulation, such as high levels of poverty, HIV and AIDS, conflict and wars, the various levels of natural resources in SADC countries, the diverse levels of development and industrialisation in member states, increased debts incurred by SADC countries and continued reliance on international aid.[562]

3.5 Conclusion

International and regional instruments can play an important role in the labour and social protection of women workers in the informal economy. The ILO extends coverage to non-

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555 SADC 2009 http://www.sadc.int/files/4213/5435/8109/SADCHIVandAIDSStrategyFramework 2010-2015.pdf 2.

556 SADC 2000 http://www.sadc.int/files/9713/5293/3508/Code_of_Conduct_Child_Labour.pdf.

557 Member states are required to review existing legislation and ensure that it is in line with international instruments.

558 The importance of access to quality and affordable education is highlighted as one of the most pertinent instruments in the elimination of child labour.

559 This calls for national health programmes aimed at primary healthcare as well as maternal and child health programmes.

560 The importance of public awareness and the role other non-governmental stakeholders is highlighted.

561 Poverty is acknowledged as the leading cause for child labour and thus the importance of poverty alleviation strategies is emphasised.

562 Olivier and Kalula "Regional social security" 677, 678.

standard workers through specific conventions for the general acceptance, promotion and extension of protection to these workers. The ILO should prioritise a campaign focusing on ratification related to the protection of non-standard workers. The international standards set by the ILO could serve as a roadmap to direct policy and legislative responses. The ILO *Employment Relations Recommendation* highlights important principles in terms of international standard setting, but to be effective member states must include relevant principles in national legislation, policies and codes. Such implementation must always occur in consultation with representative organisations. The effectiveness of the ILO depends on the implementation of standards into domestic legislation.[563] This enables the progressive move from soft law and merely prescriptive regulations to binding provisions. The incorporation of international standards into binding provisions also promotes and strengthens the enforcement of these standards. Without this legislative base, the ILO relies solely on soft law, prescriptive regulations and codes.[564]

The tripartite structure of the ILO needs to be re-examined in the light of the decline in trade union membership and the increasingly valuable role other actors such as NGOs, MBOs and civil society play in the promotion of decent work for workers in the informal economy. The ILO in its quest for decent work for all must adapt to the changes in labour structures and this means that trade unions and employers' organisations that currently represent big enterprises can no longer suffice to the exclusion of other groups such as homemakers, domestic workers and the self-employed, specifically those in the informal economy.[565]

The ILO's 2010 Report provides a number of important principles to be considered when extending the scope of labour law to workers in the informal economy.[566] These principles recognise that the success of tailor-made approaches and innovative designs must be initiated at national but also at local levels, such as municipalities, and must include dialogue with social partners and that the focus of these approaches must include vulnerable groups in the informal economy, such as women.[567] The report indicates that international standards for the informal economy should function as a road map for countries to guide their policies.

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563 The 1969 Nobel price citation lauded the ILO for its impact on legislation in countries (Davies and Woodward *International organizations* 206).

564 Davies and Woodward *International organizations* 206.

565 Davies and Woodward *International organizations* 209.

566 ILO *Extending the scope of application of labour law to the informal economy* 6.

567 ILO *Extending the scope of application of labour law to the informal economy* 6.

When one considers the applicable regional instruments of the AU and the SADC they contain provisions that address the specific challenges in the region as opposed to international instruments that are more generic. Regional instruments can therefore be more effective in addressing specific challenges that workers in a region may face. Both AU and SADC instruments contain a number of important provisions for women workers in the informal economy, such as the promotion of gender equality in all legislative provisions, programmes and policies; the recognition of fundamental human rights; the eradication of poverty, and decent work for all.

Regional instruments do not function in isolation and highlight the importance of international standards. They support the implementation of these standards in national legislation. The empowerment of women is a key theme in most regional instruments and they generally support an integrated approach to the provision of labour and social protection for these vulnerable women workers. A number of these instruments highlight the importance of assisting women with family responsibilities as well as the recognition of the value of their contribution to the economy in respect of care work and domestic work. This is of particular importance in regions characterised by patriarchal societies. These instruments endeavour to change societal norms by highlighting these principles.

Regional instruments, as discussed above, address the specific challenges faced by women in the region, such as HIV and AIDS,[568] whereas international instruments are often not as clear and precise with reference to distinct challenges and vulnerabilities experienced by women in this region. The manner of regulation by the regional instruments supports Langille's pleas for less detailed instruments and more general principles with reference to international instruments.[569]

The world of work has changed and in some instances a realisation now exists that certain forms of work are now a reality and not a passing occurrence, and it is of the utmost importance that international and regional regulation provides for this, including work in the informal economy. Specific vulnerable groups and challenges have been identified by both international and regional regulators and must now be addressed to ensure that "those who work have rights at work".[570] If we consider Sen's capability approach with reference to vulnerable women workers, labour and social protection regulation should

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568 See also article 14 of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa.

569 Langille 2010 *CLLPJ* 541.

570 ILO Decent work and the informal economy.

encompass a developmental framework specifically for developing countries. In this regard international and regional regulation must promote freedoms through the enhancement of capabilities of these workers.[571] International and regional instruments can function as key strategic tool to address inequalities in the workplace by increasing the capabilities of vulnerable groups, such as women, through empowerment initiatives.[572]

Implementation and enforcement in the region remain problematic. A large number of regional instruments are not binding and are less effective. The AU faces many challenges in respect of the realisation of human rights, such as inadequate resources, lack of political support and appropriate enforcement mechanisms, and the many challenges that the region faces, namely poverty, unemployment, disease and conflict.[573]

Although enforcement remains problematic, AU instruments contain important integrated principles in respect of the empowerment of vulnerable women and if these principles can be realised it will contribute to the protection of these workers in the region. The AU and SADC will have to address issues, such as enforcement mechanisms and report structures, as well as the implementation of international standards in notational legislation.[574]

An important question is how international and regional standards are viewed by countries and why regional standards are developed at all.[575] If we argue that workers in the informal economy require innovative and tailor-made solutions to address their specific needs, then regional standards are probably better designed to extend the required labour and social protection to them, if one considers the common characteristics of a region.[576] However, the technical assistance provided by the ILO to developing countries in respect of labour and social protection has on numerous occasions resulted in the extension of protection to women workers in the informal economy. Global partnerships are vital when considering decent work for all and achieving the Sustainable Development Goals. In Zambia, for example, a four-year partnership between the government and UN agencies led by the ILO, partnering with multinational companies, has created 2500 decent green

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571 Kolben "Labour regulation, capabilities and democracy" 60. See also para 2.2.3 above.

572 Kolben "Labour regulation, capabilities and democracy" 70.

573 Mpedi and Nyenti *Key international, regional and national instruments regulating social security in the SADC* 113.

574 A major challenge for both SADC and the AU remain the different development stages and governance models in the different member states (Mpedi and Nyenti *Key international, regional and national instruments regulating social security in the SADC* 85).

575 Pennings "Historical and theoretical background of standard setting in social security" 41.

576 Pennings "Historical and theoretical background of standard setting in social security" 42

jobs for young women and men, improving their living conditions.[577] The extension of social protection programmes in Mozambique from 183 000 households in 2008 to 427 000 in 2014 was the result of a partnership between the ILO, the World Food Programme and the United Nations Children's Fund (UNICEF).

International and regional standards must not become mere symbolic instruments with no reflection or enforcement in national legislation, policies and programmes.[578] If this is allowed, the impact of these standards will remain ineffective and a mere showcase for international organisations and member states. The purpose of labour regulation must be to improve the lives of workers with reference to the concept of work and specifically decent work.[579] This purpose also is in line with Sen's human capability approach which claims that human freedom entails the capacity to lead a life people value.[580] It is important that international labour standards are not unrealistic but standards that are connected to the new world of work.[581] Although there are those who call for a "radical change" in the activities of the ILO, there have been a number of reform strategies to align the organisation with the new world of work and to extend protection to those who are particularly vulnerable, such as women workers in the informal economy.[582] These include the Decent Work Agenda and the Declaration on Social Justice and Fair Globalization (2008).[583] Specific instruments to provide for vulnerable workers in the informal economy have been adopted, such as the Homework Convention, the Domestic Workers Convention and recently the Recommendation concerning the Transition from the Informal to the Formal Economy. The ILO is also playing an increasingly important role in providing technical assistance to developing countries supported by country offices.

The specific focus of UN Women on gender equality and the empowerment of women combined with efforts to reach the Sustainable Developmental Goals have improved the lives of various groups of women in the world. Part of this success can be ascribed to the fact that in their quest for equality, they have formed links with various role players at different levels, such as governments, international and national organisations, trade unions and other workers' organisations and civil societies. Results have certainly been

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577 ILO *The ILO at work: Results 2014-2015* 2016 19.

578 For example, Mexico has ratified 70 conventions, but none of these have been implemented (Moreno "The informal sector in Mexico" 301).

579 See Langille 2010 *CLLPJ* 525.

580 See para 2.2.3 above; Sen *Development as freedom* 293; Langille 2010 *CLLPJ* 525.

581 See Langille 2010 *CLLPJ* 535.

582 Weiss "International labour standards" 7.

583 Weiss "International labour standards" 6.

produced by the Sustainable Developmental Goals as 29 countries with a combined population of more than 770 million girls and women have adopted a gender-responsive policy framework for the economic empowerment of women, and countries have ratified ILO conventions in a pursuit of achieving gender equality and decent work in respect of these goals.[584] UN Women have adopted a number of important strategies. The first includes a participatory and integrated approach that allows for representation from various stakeholders. For example the High-Level Panel on Women's Economic Empowerment includes representatives from state parties, academics and various international organisations. When considering the global imperative of empowerment of women, partnerships at regional, national and international level are of paramount importance to ensure sustainability. UN Women strengthen these linkages at various levels through advocacy campaigns that highlight the challenges women face across the world and creates an awareness of the plight of women. Important features of these campaigns are the recognition that structural inequalities must be addressed as well as inherent gender norms and campaigns highlight challenges such as violence against women, child marriages and female genital mutilation.[585] The overarching theme is gender equality and this is a pre-condition for all other goals.

The success of international and regional institutions and instruments depend on cooperation and support of all role players to end poverty and to ensure prosperity for all.

584 UN Women 2015 http://progress.unwomen.org/en/2015 13.
585 UN Women 2015 https://progress.unwomen.org/en/2015.

CHAPTER 4
THE CONTEMPORARY NATIONAL LEGAL FRAMEWORK

4.1 Introduction

South Africa is categorised by the World Bank as an upper middle-income country and is one of the largest economies in Africa.[1] In February 2018, the population was estimated at just more than 56 million and more than half of the population were women.[2] The country held its first democratic elections in 1994 and adopted one of the most progressive constitutions in the world, including a Bill of Rights imbued with values such as human dignity, equality and freedom. However, even after its government being elected democratically and the adoption of the Constitution, South Africa remains one of the most unequal societies in the world, where persistent high levels of poverty are a reality as well as income and gender inequalities. Inequality and poverty in South Africa still represent its apartheid past, as black African women are particularly vulnerable in this respect. It is also estimated that more than 7 million people live with HIV and AIDS in the country and the prevalence is nearly twice as high among women.[3] Poverty, gender inequality and their status within communities contribute to the vulnerability of women in South Africa.

Since the first democratic elections a number of legislative measures and policies have been implemented to achieve social justice and transformation of a very divided and unequal society created by an apartheid legacy.

The vision statement of the National Development Plan of 2030 states the following:

> We, the people of South Africa, have journeyed far since the long lines of our first democratic election on 27 April 1994, when we elected a government for us all. Now in 2030 we live in a country which we have remade… We have received the mixed legacy of inequalities in opportunity and in where we have lived, but we have agreed to change our narrative of conquest, oppression, resistance … Our efforts, not so much those of others, make us stronger. Then we are patient for the results of our efforts. This kind of patience gives birth to our new work ethic. In this work ethic we ground our dreams. We have built our own houses. We are confident and self-sufficient. We are traders. We are inventors. We are workers. We create companies. We set up stalls. We are studious. We are gardeners. We feel a call to serve.[4]

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1 The World Bank 2017 https://data.worldbank.org/income-level/middle-income.
2 Country meters 2017 http://countrymeters.info/en/South_Africa.
3 Stats SA Mid-year population estimates 2017 http://www.statssa.gov.za/publications/P0302/P03022017.pdf.
4 Republic of South Africa *National Development Plan 2030* 12-22.

The National Development Plan thus envisages a transformed society for 2030, where all will be equal in a country that has been transformed.

The aim of this chapter is to consider the South African regulatory framework; in particular the labour and social protection legislative framework with specific reference to domestic workers. Domestic workers are included within the conceptual framework of labour legislation in South Africa. Informal traders and waste pickers in most instances remain excluded from labour legislation as they are not covered by the definition of "employee" and are therefore particularly vulnerable. In Chapter 6 the position of informal traders and waste pickers will be analysed with reference to by-laws and other applicable legislation outside the scope of labour legislation in a comparative framework.[5]

4.2 The South African labour market

South Africa is characterised by high unemployment levels. Although informal employment represents a small percentage of overall employment in South Africa, it still contributes to poverty reduction.[6] The following table provides an overview of the South African labour market in 2017.

Table 4.1 Overview of the South African labour market, 2017

	Apr-Jun 2016 (in thousands)	**Jan-Mar 2017** (in thousands)	**Apr-June 2017** (in thousands)
Population between 15-64 years	36 591	37 061	37 217
Labour force	21 179	22 426	22 277
Employed	15 545	16 212	16 100
Formal sector (excluding agriculture)	10 917	11 337	11 193
Informal sector (excluding agriculture)	2 507	2 681	2761
Rates %	**%**	**%**	**%**

5 See para 1.2 above for the scope with reference to categories of workers in the informal economy.
6 Chen 2017 https://oecd-development-matters.org/2017/04/04/the-informal-economy-in-african-cities-key-to-inclusive-and-sustainable-urban-development/.

Unemployment	26,6	27,7	27,7
Labour force participation	57,9	60,5	59,9

Source: Stats SA *Quarterly Labour Force Survey: Quarter 3 2017*[7]

The following table provides the most recent statistics with reference to the categories of workers in the informal economy in South Africa.

Table 4.2 Categories of workers in the informal economy in South Africa

Categories of workers	**Male**	**Female**	**Total**
Street food vendors and related works	110 525	246 424	356 949
Street vendors: non-food products	74 672	90 846	165 518
Shoe cleaning and other elementary street services occupations	28 418	10 627	39 045
Domestic helpers and cleaners	52 074	993 489	1 045 563
Garbage collectors[8]	41 286	15 113	56 399

Source: Stats SA *Quarterly Labour Force Survey: Quarter 1 2017*[9]

It is clear from the above statistics that more women are domestic workers and informal traders than men. The position of women waste pickers is particularly precarious and due to the difficult conditions as well as the hardships and strenuous nature associated with this work, women are less represented in this category. Obtaining accurate statistics for workers in the informal economy is challenging and it is submitted that in reality these figures are much higher.[10] The statistics for the second quarter of 2017 indicated that the unemployment rate[11] would be even higher were it not for the informal economy which contributes 8% to the national Gross Domestic Product (GDP) and currently employs 27% of those active in the economy.[12]

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7 Stats SA 2017 https://www.statssa.gov.za/publications/P0211/P02113rdQuarter2017.pdf.

8 This occupation is only described as an elementary occupation which requires knowledge and experience of simple and routine tasks. Included here are scavengers of garbage dumps, paper, carton and garbage bins (Stats SA 2017 https://www.statssa.gov.za/publications/ P0211/P02113rdQuarter2017.pdf).

9 Stats SA 2017 https://www.statssa.gov.za/publications/P0211/P02113rdQuarter2017.pdf

10 Rogan and Cichello 2017 http://www.wiego.org/blog/can-informal-employment-actually-reduce-poverty.

11 See para 1.1 above.

12 Stats SA 2017 https://www.statssa.gov.za/publications/P0211/P02112ndQuarter2017.pdf.

Stats SA defines informal employment as follows:

> Informal employment identifies persons who are in precarious employment situations irrespective of whether or not the entity for which they work is in the formal or informal sector. Persons in informal employment therefore comprise all persons in the informal sector, employees in the formal sector, and persons working in private households who are not entitled to basic benefits such as pension or medical aid contributions from their employer and who do not have a written contract. Informal sector: the informal sector has the following two components:
>
> i) Employees working in establishments that employ fewer than five employees, who do not deduct income tax from their salary/wages; and
>
> ii) Employers, own-account workers and persons helping unpaid in their household business who are not registered for either income tax or value added tax.[13]

This definition is wide in scope and endeavours to cover vulnerable workers with low or irregular wages, those employed by small enterprises, as well as workers without adequate social security. It is submitted that domestic workers, informal traders and waste pickers must be included in this category. A determining criterion in respect of this definition is the precarious nature of the employment situation.

At first glance an analysis of statistics can be misleading as household income from the informal economy is 9%, and 7% in respect of social grants, whilst 57% results from formal income.[14] Although informal income reflects at 9%, it accounts for 14% of the income that sustains households above the poverty line.[15] However, this is not a true reflection of the impact that the abovementioned incomes (from the informal economy and social assistance) have in respect of reducing extreme poverty within households that are unable to meet basic food needs.[16] Studies have indicated that the contribution of those in the informal economy to poverty reduction is often higher than their contribution to overall household income.[17] The important role of the informal economy is highlighted by the high unemployment rate and the fact that this sector often provides work during times of high unemployment. In 2016, it was estimated that the informal economy

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13 Stats SA 2017 httpS://www.statssa.gov.za/publications/P0211/P02113rdQuarter2017.pdf.

14 Rogan and Cichello 2017 http://www.wiego.org/blog/can-informal-employment-actually-reduce-poverty.

15 Rogan and Cichello 2017 http://www.wiego.org/blog/can-informal-employment-actually-reduce-poverty.

16 Earnings in respect of formal employment are of course also much higher and regular than those in the informal economy (Rogan and Cichello 2017 http://www.wiego.org/blog/can-informal-employment-actually-reduce-poverty).

17 Rogan and Cichello 2017 http://www.wiego.org/blog/can-informal-employment-actually-reduce-poverty.

contributes between 7% and 20% to the economy; however, as many activities in the informal economy are not recorded, it is suggested that its values are actually much higher.[18] The informal economy's important role in the alleviation of poverty cannot be underestimated and policy makers must consider this impact. Role players must prioritise adequate labour and social protection for these workers. Protecting workers in the informal economy is vital in respect of the Sustainable Development Goals,[19] and specifically in respect of poverty reduction, decent work and gender equality as in many countries large percentages of the workers in the informal economy are women.[20]

In South Africa, unlike in other SADC countries, the informal economy is relatively small but coupled with high rates of unemployment. In the SADC region, despite the increasing growth of the informal economy, labour and social protection is limited to those in formal employment.[21] South Africa is often seen as an important regional force in Africa in respect of economic and political power and is recognised for its progressive constitutional framework and its jurisprudence that has followed suit.[22]

The paradigm of transformative constitutionalism is important for workers in the informal economy and legal reform can contribute to social change. The lack of adequate labour and social protection for many of these women workers is often a direct result of the system of apartheid, specifically in respect of access to resources, such as housing, basic services and the lack of access to education experienced by many black women in this country and these factors have contributed to pervasive poverty and inequalities. Through the Bill of Rights an enabling framework must emerge to protect vulnerable women workers in South Africa.[23]

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18 Times Live 2016 https://www.timeslive.co.za/news/south-africa/2016-01-11-informal-sector-is-saving-millions-from-poverty/.

19 See para 3.2.2 above.

20 Rogan and Cichello 2017 WIEGO http://www.wiego.org/blog/can-informal-employment-actually-reduce-poverty.

21 Kalula, Okorafor and Bamu "Towards an effective regulatory framework for labour rights and social protection in Southern Africa" 25.

22 Ryklief "Retail and hospitality in South Africa organised by trade union of formal workers to demand equal pay and benefits" 48.

23 Le Roux "Advancing domestic workers rights in a context of transformative constitutionalism" 32.

4.3 The South African legal framework with reference to labour and specific social protection measures

4.3.1 Introduction

Current labour legislation in South Africa is the product of the democratically elected post-apartheid government, and is founded on the constitutional values of human dignity, equality and freedom.[24] The employment relationship is regulated by a number of statutes and codes and represents to a large extent compliance with South Africa's international obligations.

Domestic workers in South Africa are predominantly women and represent a previously disadvantaged group. Before our constitutional dispensation, domestic workers in South Africa were expressly excluded from labour legislation.[25] This exclusion contributed to the fact that domestic work in South Africa was and remains unrecognised and undervalued. The ratification of ILO Convention 189 required South Africa to re-evaluate its labour and social protection provisions for domestic workers to ascertain compliance with its international obligations. Currently domestic workers are indeed afforded the constitutional right to fair labour practices and are included in all labour legislation in South Africa, in terms of the *LRA*, the *EEA* and the *BCEA*, as they fall within the scope of the definition of "employee" in the various acts; however, various challenges do persist. A sectoral determination in terms of the *BCEA* was issued to specifically provide for conditions of employment in this sector.[26] They are also included under the scope of the Unemployment Insurance Fund (UIF), but remain excluded from the *Compensation of Occupational Injuries and Diseases Act* 130 of 1993. These workers are in theory covered by labour legislation, as they fall within the conceptual framework of labour legislation,[27] but in practice, the enforcement is problematic. Their exclusion from legislative protection during apartheid[28] contributed to their current vulnerable position, as many domestic workers still live in poverty, have limited educational opportunities and lack access to resources. However, it appears that domestic workers in South Africa are at present in a

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24 Section 1.

25 Domestic workers were excluded from the scope of the *LRA* 28 of 1956, the *BCEA* 3 of 1983 and the *Wage Act* 5 of 1957.

26 Sectoral Determination 7: Domestic Workers.

27 Domestic workers are included in the definition of "employee" in labour legislation in South Africa.

28 Section 2 of the *Wage Act* 5 of 1957 limited the application of the act to exclude persons in domestic service in private households. The *BCEA* 3 of 1983 and the *LRA* 28 of 1956 also specifically excluded these workers from their application.

better position than most, as globally only 10% are covered by laws similar to those of other employees and 30% are without any coverage at all.[29]

4.3.2 The Constitution of the Republic of South Africa, 1996

The South African constitutional framework has been outlined in paragraph 1.3 above.[30] Discussions on constitutional provisions in this chapter will entail specific references to the enabling provisions with regard to the labour and social protection of these women workers. Apart from the notion of transformative constitutionalism, constitutional provisions will be discussed as an integrated part of the contemporary framework.

The South African constitution is transformative in nature.[31] Although the purpose of this study is not to include a comprehensive analysis of this concept, it should evaluate its nature in respect of the realisation of rights for women workers in the informal economy and examine whether it has any role to play in the extension of labour and social protection for these workers, albeit through the enforcement of rights through the courts, through an interpretation of an existing framework, or through the legislature. Le Roux[32] distinguishes three notions of transformative constitutionalism with reference to scholarly works and judgments that emanated from the constitutional court. In the constitutional case *S v Makwanyane*,[33] the court highlighted the importance of this new equal democratic society and its break with its apartheid past.[34] The first scholar's opinion that Le Roux refers to in this respect is Klare. Klare initially promoted social change through rights-based judicial activism,[35] but later ascribed failure of this concept to the

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29 Du Toit and Huysamen "Implementing domestic workers' labour rights in a framework of transformative constitutionalism"67.

30 See also para 2.2.4 above.

31 See s 9, the equality clause. The Constitution also promotes substantive equality. S 1 provides for values such as human dignity equality and freedom. Our Constitution also provides for socio-economic rights and these rights encompass the wider notion of social protection; see s 26 (the right to have access to adequate housing), s 27 (the right to have access to health care services, sufficient food and water and social security). S 27(2) provides that the state must take measures to realise these rights within available resources. S 29 (on the right to education) also supports the wider notion of social protection for all. S 7(2) binds the state to fulfil these rights and s 8 regulates its vertical and horizontal application. These rights clearly envisage transformation; see also para 1.3 above for the constitutional framework.

32 Le Roux "Advancing domestic workers" rights in a context of transformative constitutionalism" 47.

33 1995 3 SA 391 (CC).

34 Para 261.

35 See *Jafta v Schoeman; Van Rooyen v Stolz* 2005 (2) SA 140 (CC). This case dealt with a sale in execution of houses, because the owners had not paid their debts and the question arose whether the removal of their security of tenure violated s 26 of the Constitution as well as the validity of relevant sections of the *Magistrates' Court Act* 32 of 1944. The first appellant in this matter was a vulnerable woman, unemployed and ill, with only limited primary education (para 3). The second appellant was also a poor, unemployed, uneducated woman. Both these women represented and

conservative nature of our legal framework. However, I submit that there have been a number of cases in respect of informal workers where their rights have been enforced, and these judgments did indeed have the effect of bringing about social change.[36] It is submitted that civil society and other social movements play an important role in respect of assisting these vulnerable workers in respect of legal empowerment and in the subsequent enforcement of their rights. This transformation is rooted in different forces and instrumental means, including the courts and the legislature and the interpretation of legislation.[37] Various forces and means may also support different outcomes in respect of transformation.[38] The second scholar that Le Roux refers to is Sunstein,[39] with specific mention of the *Grootboom* judgment. This scholar highlights the value and importance of socio-economic rights, but supports the notion of deference rather than judicial activism.[40] This places the duties and responsibilities for the realisation of these rights on the legislature in support of the doctrine of separation of powers. The *Grootboom* judgment, although seen as a landmark judgment for the poor, posed many enforcement challenges and enforcement was only realised after an unreasonably long time as result of a vague court order. Thirdly, Le Roux refers to Fraser's theory of social justice.[41] If we apply this theory to workers in the informal economy, questions about decent work deficits are questions about social justice and include notions such as dignity and equality.[42] Transformative adjudication has an important role to play in the alleviation of poverty which should not be underestimated. These workers often suffer from multidimensional discrimination based on race, class and gender and the concept of social justice encompasses important issues such as dignity, non-discrimination and gender equality. Through this notion a new paradigm can be created to provide decent work to these women workers.

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suffered from the inequalities caused by the apartheid regime. The litigants were poor and extremely vulnerable members of society.

36 See also para 2.2.4 above as well as Chapters 5 and 6 for cases concerning informal economy workers and the enforcement of rights.

37 Le Roux "Advancing domestic workers' rights in a context of transformative constitutionalism" 46.

38 Le Roux "Advancing domestic workers' rights in a context of transformative constitutionalism" 46.

39 Sunstein *Social and economic rights? Lessons from South Africa*. Sunstein recognises the importance of constitutional protection of these rights and admires the court's balanced approach in *Grootboom* as follows: "The distinctive virtue of the Court's approach is that it is respectful of democratic prerogatives and of the limited nature of public resources, while also requiring special deliberative attention to those whose minimal needs are not being met."

40 Le Roux "Advancing domestic workers' rights in a context of transformative constitutionalism" 50.

41 Le Roux "Advancing domestic workers' rights in a context of transformative constitutionalism" 54. This theory is analysed and discussed in para 2.4 above with reference to women workers in the informal economy.

42 Le Roux "Advancing domestic workers' rights in a context of transformative constitutionalism" 54.

It is important to note that the court in the *Jafta*[43] judgment provided that any claim based on socio-economic rights is intrinsically linked to the right to human dignity, confirming the *Grootboom* approach.[44] Vulnerable women workers in the informal economy without adequate social protection don't enjoy human dignity.

The legislative provisions in South Africa, against the constitutional framework of fair labour practices for everyone, is not sufficient to provide adequate labour and social protection to women workers in the informal economy. The former UN Secretary-General Ban Ki Moon stated the following in this respect:

> Experience shows that economic growth on its own is not sufficient. We must do more to empower individuals through decent work, support people through social protection and ensure the voices of the poor and marginalised are heard.[45]

To provide protection to these women, ensure their dignity and address the root causes and the disadvantages that they suffer, various other constitutional rights must be considered, including the following:

- the right to equality,[46]
- the right to human dignity,[47]
- the right to freedom of association,[48]
- the right to choose your trade,[49]
- the right to housing,[50]
- the right to social security, food, water and health,[51]
- children's rights,[52]

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43 *Jafta v Schoeman; Van Rooyen v Stolz* 2005 2 SA 140 (CC).

44 Para 21.

45 Ban Ki Moon 2014 https://www.un.org/sg/en/content/sg/statement/2014-02-20/secretary-generals-message-world-day-social-justice-scroll-down.

46 Section 9. It is also submitted that the notion of substantive equality is of paramount importance to these women in the various categories of informal work.

47 Section 10. An integral part of decent work, equality and adequate social protection is the notion of dignity.

48 Section 18. The traditional concept of trade unions in labour legislation is not always the appropriate vehicle for mobilisation of these workers, and various other organisations must be recognised. Without the support of an institutional framework, sustainable mobilisation and organisations for these workers remain impeded.

49 Section 22.

50 Section 26. This is extremely important for the achieving gender equality. This includes the economic empowerment of these women in respect of access to resources.

51 Section 27. Without adequate social protection equality and decent work cannot be achieved,

52 Section 28. Childcare is an important consideration for these women.

- the right to education,[53] and
- the right to have access to courts.[54]

It is submitted that all these rights must be considered holistically to ensure that they are recognised as workers who live their life with human dignity and enjoy decent work.[55] It is important to note the South African courts' reliance on the notions of human dignity and unfair discrimination.

The South African courts have been willing to recognise the value of domestic work and thereby have been promoting social justice.[56] In *Stratford v Investec Bank Ltd,*[57] the Constitutional Court held that "employees" in section 9(4A) of the *Insolvency Act* 24 of 1936[58] includes domestic workers. The court preferred a reasonable interpretation that promotes the spirit, purport and objects of the Bill of Rights.[59] The court held that the term "employee" in section 9(4A) is unqualified and includes domestic workers as the concept does not distinguish between domestic employees and other employees of the debtor.[60] The inclusion of domestic workers in the concept of "employee" in this section protects their human dignity and is an interpretation that is required by section 39(2) of the Constitution.[61] Domestic workers in South Africa represent a previously disadvantaged group and the value of their work is not recognised; they are often subjected to prejudice and stereotyping by society. This is illustrated by facts in *Standard Bank of SA Ltd v Caster Transport CC*.[62] This case dealt with sheriff's returns of service with reference to three

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53 Section 29. Many women workers in the informal economy represent previously disadvantaged groups and did not have access to even basic education.

54 Section 34. Legal empowerment is an important component in the extension of labour and social protection and this must include awareness campaigns in respect of these rights. In the enforcement of their rights these workers must have access to courts or other tribunals or forums.

55 Le Roux "Advancing domestic workers' rights in a context of transformative constitutionalism" 60.

56 Blackett and Tiemeni "Regulatory innovation in the governance of decent work for domestic workers in South Africa" 11.

57 [2014] ZACC 38.

58 Section 9(4A) states: "When a petition is presented to the court, the petitioner must furnish a copy of the petition– (i) to every registered trade union that, as far as the petitioner can reasonable ascertain, represents and of the debtors employees; and (ii) to the employee themselves– (aa) by affixing a copy of the petition to any notice board to which the petitioner and the employee have access inside the debtor's premises; or (bb) if there is no access to the premises by the petitioner and the employees, by affixing a copy of the petition to the front gate of the premises, where applicable, failing which to the front door of the premises from which the debtor conducted any business at the time of the presentation of the petition.

59 Para 19.

60 Para 21.

61 Para 35-36.

62 [2014] ZAGPPHC 314. The court dealt with three matters in this regard, namely the *Standard Bank* case, *Absa Bank Ltd v Zayd* (case number 4444/2014) and *Absa Bank Ltd v Zuma* (case number 12737/2014).

matters. In each instance the return indicated that service was effected on a domestic worker. Only the first name of the worker appeared on the return and then a reference to her as a domestic worker.[63] The court highlighted the fact that the returns of service did not refer to the marital status or the surnames of the recipients, and in all three cases they were African women cited as domestic workers.[64] This conduct by the sheriff's office was described as "undignified, demeaning and in clear violation of section 10 of the Constitution".[65] The court stated in this regard:

> As a nation we emerge from a disgraceful and painful past, where an irrational system of institutionalized racism was visited upon indigenous African people, where adult African women and men were contemptuously (and still are, in some instances) referred to as "girls" and "boys". The contents of the returns of service in these matters are reminiscent of that era and conjure up deeply painful memories for the majority of the citizens of our country.[66]

The court ordered the sheriffs to verify the surnames and marital status of the recipients and in each case to provide them with a written apology. This judgment is a clear indication by our courts that stereotyping and prejudice with reference to these workers will not be tolerated. The judgment also supports the notion of transformative constitutionalism and endeavours to reconcile the injustice of the apartheid regime and promote social justice. The order for apologies by the court is in line with a therapeutic jurisprudence approach.[67] This approach recognises that laws impact on the emotional life of people and the therapeutic consequences that can flow from legal rules, legal procedure and the different roles of legal actors.[68] This approach focuses on the well-being of all citizens and supports constitutional values such as human dignity, equality and freedom and promotes social justice.[69] With reference to the above court order it supports this approach as it clearly recognised an element of social responsibility to be

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63 In this case, the recipient was cited as "Bongiwe, a domestic helper".

64 Para 3.

65 Para 3.

66 Para 4.

67 Therapeutic jurisprudence concentrates on the law's impact on emotional life and psychological wellbeing. It is a perspective that regards the law (rules of law, legal procedures, and roles of legal actors) itself as a social force that often produces therapeutic or antitherapeutic consequences. It does not suggest that therapeutic concerns are more important than other consequences or factors, but it does suggest that the law's role as a potential therapeutic agent should be recognised and systematically studied (Wexler 1999 https://law2.arizona.edu/depts/upr-intj/intj-o.html). This concept was first introduced in the 1990s, and although its foundation is in mental health, its scope has widened to influence several branches of the law, such as employment law, disability law and criminal law.

68 Stolle and Wexler 1997 *PrevLR* 4. See also Fourie 2016 *PER* 4.

69 Fourie 2016 *PER* 4.

part of the law and acknowledged the fact that the legal system must also be seen as a core component of the social fabric of society.[70]

In *Affordable Medicines Trust v Minister of Health RSA*[71] the court once again highlighted the importance of the interrelatedness between human dignity and work and stated the following:

> One's work is part of one's identity and it is constitutive of one's dignity … And there is a relationship between work and the human personality as a whole. It is a relationship that shapes and completes the individual over a lifetime of devoted activity, it is the foundation of a person's existence.[72]

A singular approach that focuses only on a framework of labour rights will not be sustainable, and the above approach supports the ILO decent work agenda of "human development and democratic citizenship", and a social justice paradigm in the quest for poverty alleviation.[73] This integrated and holistic approach that includes various rights, including socio-economic rights, represents a sustainable approach to decent work. In 2011, the then Director of the ILO, Juan Somavia, best described this as follows:

> The goal of decent work is best expressed through the eyes of people. It is about your job and future prospects; about your working conditions; about balancing work and family life, putting your kids through school or getting them out of child labour. It is about gender equality, equal recognition, and enabling women to make choices and take control of their lives. It is about your personal abilities to compete in the market place, keep up with new technological skills and remain healthy. It is about developing your entrepreneurial skills, about receiving a fair share of the wealth that you have helped to create and not being discriminated against; it is about having a voice in your workplace and your community. In the most extreme situations it is about moving from subsistence to existence. For many, it is the primary route out of poverty. For many more, it is about realizing personal aspirations in their daily existence and about solidarity with others. And everywhere, and for everybody, decent work is about securing human dignity. But to bridge reality and aspiration, we need to start by confronting the global decent work deficit. It is expressed in the absence of sufficient employment opportunities, inadequate social protection, the denial of rights at work and shortcomings in social dialogue. It is a measure of the gap between the world that we work in and the hopes that people have for a better life.[74]

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70 Davies 2015 *ActJur* 175.
71 2006 3 SA 247 (CC).
72 Para 59.
73 Le Roux "Advancing domestic workers' rights in a context of transformative constitutionalism" 60.
74 ILO 2011 http://www.ilo.org/public/english/standards/relm/ilc89rep-i-a htm 7.

4.3.3 The Labour Relations Act 66 of 1995

The *Labour Relations Act* 66 of 1995[75] was enacted to give effect to the fundamental rights in section 23 of the Constitution and provides protection to workers that fall within the scope of the definition of "employee" as set out in section 213.[76] Section 1 contains the purpose of the *LRA* and provides the following:

> The purpose of *this Act* is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of *this Act*, which are–
>
> (a) to give effect to and regulate the fundamental rights conferred by section 23 of the *Constitution of the Republic of South Africa*, 1996;
>
> (b) to give effect to obligations incurred by the Republic as a member state of the International Labour Organization;
>
> (c) to provide a framework within which *employees* and their *trade unions*, employers and *employers' organisations* can–
>
> (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and
>
> (ii) formulate industrial policy; and
>
> (d) to promote
>
> (i) orderly collective bargaining;
> (ii) collective bargaining at sectoral level;
> (iii) employee participation in decision making in the workplace; and
> (iv) the effective resolution of labour disputes.

The purpose of the act – to advance economic development and social justice[77] – is particularly important to vulnerable women workers in the informal economy and also in line with the ILO Decent Work Agenda, as well as the UN Sustainable Developmental Goals. The South African framework with reference to collective bargaining and freedom of association and women workers in the informal economy will be analysed in Chapter 7 within the framework of voice and representation.

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75 See also paras 1.3 and 2.5 above.

76 See para 2.5 above for the discussion on the definitional scope of "employee" and the presumption of who is an employee in South African legislation.

77 See para 2.4 above. This concept is important to vulnerable workers as it entails a process of protecting their rights.

4.3.3.1 Unfair dismissals and unfair labour practices

In theory domestic workers enjoy all the rights in the *LRA*; however, in practice they do not enjoy adequate labour protection. Domestic workers do enjoy dismissal protection[78] and protection against unfair labour practices in terms of the *LRA*.[79] These workers also enjoy all the fundamental rights as set out in Chapter 2 of the Constitution. Waste pickers and informal traders, as own-account workers, are excluded from the definition in the *LRA* and thus do not enjoy any protection;[80] it is however submitted that they can benefit from section 23 of the Constitution.[81] It is also accepted that the notion of "worker" in this section is broader than the definition of "employee" in other labour legislation and can include, for example, persons who do not have a formal contract of employment. O'Regan J's generous interpretation in *SA National Defence Union v Minister of Defence*[82] means that section 23(1) can encompass workers who are currently excluded from labour protection under the statutory framework.[83] In *Nehawu v UCT*[84] the court stated with reference to section 23(1) that the focus "is broadly speaking, the relationship between the worker and employer and the continuation of that relationship on terms that are fair to both."[85]

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78 Section 186(1) of the *LRA* defines dismissal, and applicable dismissal definitions for domestic workers include instances where "(a) an employer has terminated employment with or without notice; (b) an *employee* employed in terms of a fixed term contract of employment of employment reasonably expected the employer- (i) to renew a fixed-term contract of employment on the same or similar terms but the employer offered to renew it on less favourable terms or did not renew it; or (ii) to retain the employee in employment on an indefinite basis but otherwise on the same or similar terms as the fixed-term contract, but the employer offered to retain the *employee* on less favourable terms, or did not offer to retain the *employee*; (c) the employer refused to allow an employee to resume work after she- (i) took maternity leave in terms of any law, collective agreement or her contract of employment." S 186(1)(e) includes a constructive dismissal in circumstances where the employer made continued employment intolerable.

79 See Chapter VIII and Schedule 8 in respect of the Code of Good Practice: Dismissal, and Schedule 7 item 30 in respect of processing of disputes about unfair labour practices. Section 185 provides that employees may not be unfairly dismissed or subjected to unfair labour practices.

80 Workers in the informal economy include own-account workers in their own informal enterprises (Vanek *et al Statistics on the informal economy* 5).

81 It is submitted that the scope of s 23(1) is much wider than the scope of s 186(2) of the *LRA* and they could be included under the notion of "everyone" (*SA National Defence Union v Minister of Defence* (1999) 20 *ILJ* 2265 (CC) paras 24 and 27). They should also enjoy the right to form and join trade unions under the auspices of "every worker". However, s 23 further only provides for trade unions as workers' organisations. These workers will then have to rely on s 18, the right to freedom of association, to join and form other workers' organisations that do not fall within the contextual framework of trade unions. It must also be noted that their bargaining partners are often not employers but include public role players such as local authorities.

82 1990 20 *ILJ* 2265 para 25.

83 See para 1.3 above; Cooper "Labour relations" vol 4 4.

84 2003 3 SA 1 (CC) para 40.

85 Emphasis added.

Cooper argues that the above statement brings the concept of "everyone" within the boundaries of an employment relationship. However, she states that "broadly speaking" indicates that the scope of this right must remain flexible. Foreign jurisdictions do not provide valuable guidance in respect of the content and scope of this right.[86] Cooper states that this concept should exclude disputes of interests such as collective bargaining disputes about wages, it can possibly include health and safety rights at work.[87] It is submitted that waste pickers and informal traders that are excluded from the legislative framework of labour and social security legislation may find protection under section 23(1), for example with reference to health and safety issues at their place of work. This argument recognises that such workers are not in a traditional employment relationship and that this right must then be enforced against municipalities since their workplaces include public spaces under the supervision and control of local authorities. It is also submitted that they can rely directly on the constitutional right as they do not have any remedies under other statutes in this regard.[88] The question then is whether the concept in section 23(1) can be interpreted widely enough to make provision for these own-account workers without a distinctive employer.

Dismissal protection in the *LRA* is in line with the ILO Termination of Employment Convention 158 of 1982, and this convention played an important role in respect of the drafting of this section and remains an important interpretation tool for our courts.[89] In line with this convention a valid reason is required for dismissal, and this reason must be based on conduct, capacity or operational requirements, and fair procedural requirements

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86 In India, this right encompasses unfair dismissal and victimisation for trade union activities and in the US it refers mostly to collective practices (Cooper "Labour relations" volume 4 para 53.2). See also for example s 26 of the *Maharashtra Recognition of Trade Unions and Prevention of Unfair Labour Practices Act* of 1971. Schedule II of this Act includes unfair labour practices with reference to the victimisation by employers of employees exercising their right to organise and join trade unions and this includes a refusal to bargain in good faith with a recognised union. Schedule III refers to unfair labour practices committed by trade unions and includes the participation and support for unprotected strikes and acts of violence and intimidation against non-striking employees. Schedule IV regulates unfair labour practices with reference to unfair dismissal by employers and unfair transfers of an employee. This act is applicable to the State of Maharashtra and does not have national application.

87 Cooper "Labour relations" volume 4 14.

88 See *SA National Defence Union v Minister of Defence* 2007 9 BLLR 785 (CC) para 52.

89 Van Niekerk *et al Law@work* 235.

must be met.[90] Any dismissal by an employer based on conduct, capacity and operational requirements must be procedurally[91] and substantially fair.[92]

The act does not stipulate the procedural fairness requirements; however, the Code provides guidelines. It must be noted that the domestic work relationship is unique as it is centred on individuals within a private home and this often constitutes a very intimate relationship. Formal procedural requirements will not be appropriate and in line with the *Avril Elizabeth Home* decision,[93] the code also contemplates something less formal than the criminal justice system. In respect of unfair dismissal disputes the burden of proof is regulated in section 192. This places the onus on the employee to establish the existence of a dismissal[94]and once this has been established, the employer must prove the fairness of the dismissal.[95] Domestic workers will be able to refer dismissal disputes about conduct, capacity[96] and operational requirements, and those instances where the employee does not know the reason, including constructive dismissals, to the Commission for Conciliation,

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90 Section 188.

91 Item 4 of Schedule 8 provides guidelines in this respect which include: an investigation by the employer; notification of the allegations; an opportunity to respond, including a reasonable time to prepare; assistance, and communication of the decision (see item 4(1)). The employer must also inform the employee of his or her right to refer the matter to the appropriate forum (see item 4(2)). In respect of poor work performance the employer must investigate the reasons, provide appropriate evaluation, instruction, training, guidance and counselling and reasonable time to improve. In the case of a domestic worker being dismissed for operational requirements the employer will have to notify the worker and discuss the issues as provided for in s 189. Dismissal of domestic workers of private employers will not fall within the scope of large retrenchments in respect of s 189A.

92 Section 188. Substantive fairness in respect of dismissals for conduct includes: (a) whether the employee contravened a rule or standard regulating conduct in, or of relevance to, the workplace; and (b) if a rule or standard was contravened, whether or not– (i) the rule was valid or reasonable rule or standard (ii) the employee was aware or could reasonably be expected to be aware, of the rule or standard; (iii) the rule or standard has been consistently applied by the employer; and dismissal was the appropriate sanction for contravening the rule or standard (see item 7 of Schedule 8).The consistency of the application of the rule in respect of domestic work may be difficult to determine due to the individual nature of the relationship. In respect of a dismissal based on poor work performance the following must be considered in terms of item 9 of Schedule 8: (a) whether or not the employee failed to meet a performance standard; and if the employee did not meet a required performance standard, whether or not– (i) the employee was aware, or could reasonably be expected to have been aware, of the required performance standard. The employees must also be given a fair opportunity to meet the standard and dismissal must then be an appropriate sanction. In respect of injury and ill health, a determination must be made with reference to the nature of the incapacity which may be permanent or temporary. Item 10 also requires the investigation of alternatives to accommodate the incapacity. In respect of dismissals for operational requirements, the employer must indicate that the dismissal is *bona fid*e and in respect of economical, technological or structural reasons. See also s 213 of the *LRA*.

93 *Avril Elizabeth Home for the Mentally Handicapped v CCMA* 2006 9 BLLR 833 (LC).

94 Section 192(1).

95 Section 192(2).

96 Capacity includes both poor work performance and ill health or injury.

Mediation and Arbitration (CCMA).[97] It is important to note that during conciliation[98] and arbitration proceedings in respect of the fairness of dismissal based on conduct and capacity no legal representation is allowed unless certain requirements are met;[99] this promotes fairness and access to justice in respect of domestic workers that do not have the financial means compared to the employer with reference to obtaining legal representation. Access to the CCMA, as well as limitation on legal representation at this forum, also to a certain extent counteracts the inequality in the relationship between employers and these employees.

If the dismissal is found to be unfair the *LRA* provides for the primary remedies of reinstatement or re-employment.[100] In instances where the dismissal is only procedurally unfair, the employee does not wish for the primary remedies or the employment relationship is intolerable, or no longer possible,[101] a just and equitable order for no more than the equivalent of 12 months' remuneration can be made.[102] Due to the intimate nature of the domestic work relationship in the private home of the employer, it is submitted that compensation will be a more appropriate remedy in most instances. However, it has been stated by the Labour Court that the primary remedies should not be easily refused and a refusal must include careful consideration of the circumstances.[103] Instead of a mere extension of existing legislative provisions, it is submitted that tailor-made remedies with reference to these workers could provide more appropriate solutions.

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97 Section 191(1)(b)(i) states that a dismissal dispute must be referred within 30 days of the final decision. See also s 191(5)(a)(i), 191(5)(a)(ii) and 191(12).

98 Rule 25(1)(a).

99 Rule 25(1)(c). These conditions include: (i) the consent of the commissioner and all parties, (ii) where it will be unreasonable to deny legal representation; (iii) due to the legal issues raised by the dispute; (iv) the complexities of the dispute; (v) public interest; and (vi) the comparative abilities of the parties. The constitutionality of this rule has been tested in two cases, namely *Netherburn Engineering CC t/a Netherburn Ceramics v Mudau* 2009 4 BLLR 299 (LAC) and *CCMA v the Law Society of the Northern Provinces* 2013 34 *ILJ* 2799 (SCA). The Supreme Court of Appeal (SCA) confirmed the Labour Appeal Court's approach and found the rule was sufficiently flexible and not unconstitutional.

100 Section 193.

101 Section 193(2).

102 Section 194(1).

103 *New Clicks SA (Pty) Ltd v CCMA* 2008 29 *ILJ* 1972 (LC).

The concept of an unfair labour practice[104] in the *LRA* is narrower in scope than section 23(1) of the Constitution and only includes actions or omissions by the *employer*.[105] Domestic workers may refer these disputes to the CCMA for conciliation within 90 days of the conduct or omission, and after failed conciliation the matter may be arbitrated.[106] Section 193(4) provides that an arbitrator has a wide discretion to determine the dispute and can make an order that the arbitrator deems reasonable, including an order for compensation, reinstatement and re-employment. It is submitted that most of the cases referred to the CCMA by domestic workers are dismissal disputes.[107] These workers are therefore not exercising their rights with reference to the unfair conduct of the employer with reference to the closed list of unfair labour practices in the *LRA*. Perhaps the practicalities in this regard create barriers with reference to the continuity of the very intimate relationship in a private household. It is also submitted that unfair labour practices such as refusing promotion may have limited application with reference to domestic work. Unfair labour practices in respect of benefits can be applicable to domestic workers; however, the limited referrals in this regard may be indicative of a lack of legal empowerment with reference to their rights in this regard.

Domestic workers also enjoy protection against any automatically unfair dismissals.[108] The employer has two defence grounds, namely an inherent requirement of the job (IROJ) or

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104 Section 186(2) provides as follows: "Unfair labour practices means any unfair conduct or omission that arises between an employer and an *employee* involving– (a) unfair conduct by the employer relating to the promotion, demotion, probation (excluding disputes about dismissals also for a reason relating to probation) or training of an *employee* or relating to the provisions of benefits to an *employee*; (b) the unfair suspension of an *employee* or an unfair disciplinary action short of dismissal in respect of an employee; (c) a failure or refusal by an employer to reinstate or re-employ a former *employee* in terms of any agreement; and an occupational detriment, other than dismissal in contravention of the *Protected Disclosures Act*, 2000 (26 of 2000) on account of the *employee* having made a protected disclosure as defined by the Act." The initial definition of unfair labour practices in the *LRA* of 1956 were wider in scope, and similar to that of s 23(1) of the Constitution. This concept encompasses equity and fairness in the workplace. See also *NEWU v CCMA* 2004 2 BLLR 1238 (LC) para 33(a).

105 In *NEWU v CCMA* 2004 2 BLLR 1238 (LC) the court had to decide the constitutionality of s 182(2) of the *LRA* with reference to the wider scope in s 23(1) of the Constitution. The court confirmed the narrow scope of this section and that it does not include conduct or omissions by the employee against the employer. See para 33(d).

106 Sections 191(1)(ii), (b)(ii) and (5)(a)(iv).

107 Du Toit and Huysamen "Implementing domestic workers' labour rights in a framework of transformative constitutionalism" 92-93. This is based on the last statistics made available by the CCMA in the Annual Report of 2010-2011. The current annual reports do not provide these statistics.

108 See s 187. Automatically unfair dismissals include the following: dismissals contrary to s 5; dismissals with reference to participation or support of a protected strike or protest action; if the reason is the refusal to do the work of striking employees; a refusal to accept a demand in respect of a matter of mutual interest; dismissals for exercising rights in terms of the *LRA* or the

that the employee has reached the normal or agreed retirement age.[109] The burden of proof in respect of this type of dismissal is not specifically regulated in section 192; however, the courts require the employee to prove the dismissal and provide evidence to at least *prima facie* establish the automatically unfair reason or to prove that the dismissal finds application under section 187.[110] This only requires the evidence produced by the employee to "raise a credible possibility" that an automatically unfair dismissal did occur.[111] The primary remedies remain the same; however, compensation in this instance can equal 24 months' remuneration.[112] Specific concerns with reference to domestic workers and section 187 dismissals include the fact that these disputes must be referred to the Labour Court and remedies in this regard are not within the reach of these workers due to the lack of financial resources.[113] This is problematic as section 187 could provide much needed protection required by these women as it specifically prohibits discriminatory dismissals with reference to women workers on the basis of pregnancy or based on race, gender, sex, marital status and family responsibility. It is submitted that provision must be made for vulnerable workers by including referrals in this regard to be determined by the CCMA.

The dismissal and unfair labour practice provisions of the *LRA* have thus been extended to domestic workers and do not reflect a tailor-made approach. Challenges in this regard include the current dispute resolution framework for automatically unfair dismissals where the Labour Court has jurisdiction and the costs involved in these matters are high; thus many domestic workers will not be able to institute proceedings in terms of section 187.[114]

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participation in proceeding in terms of the *LRA*; dismissals related to pregnancy, intended pregnancy, or any reason related to pregnancy; dismissals based on unfair discrimination (directly or indirectly) on the listed grounds including arbitrary grounds; dismissals as a result of a section 197 transfer and a dismissal where the employee made a protected disclosure in terms of the *Protected Disclosures Act* 26 of 2000. With reference to s 187(1)(f) the grounds do not contain a closed list and include race, gender, sex, ethnic or social origin, marital status and family responsibility.

109 Section 187(2)(a) and (b).

110 Van Niekerk *et al Law@work* 271-272. See also *Janda v First National Bank* 2006 12 BLLR 1156 (LC); *Mafomane v Rustenburg Platinum Mines Ltd* 2003 (10) BLLR 999(LC); *De Beer v SA Export Connection CC t/a Global Paws* 2008 1 BLLR 999 (LC) and *POPCRU v Department of Correction Service*s 2010 9 BCLR 921 (LC).

111 *Kroukam v SA Airlink* 2005 12 BLLR 1172 (LAC).

112 Section 194(3).

113 Du Toit and Huysamen "Implementing domestic workers' labour rights in a framework of transformative constitutionalism"93.

114 In an unprecedented case, *Ndlovu v Pather* 2006 27 *ILJ* 2671 (LC), a domestic worker, without representation did refer an alleged automatically unfair dismissal based on pregnancy (s 187(1)(e)), to the Labour Court. Ms Ndlovu testified through an interpreter. The interpreter was Zulu speaking and the applicant was Ndebele speaking and this resulted in miscommunications

The regulation of certain unfair labour practices is furthermore best suited to a formal employment relationship and does not take cognisance of the diverse nature of domestic work. This illustrates the challenges when extending formal legislative provisions to workers in the informal economy without consideration of their distinctive features and the nature of their employment relationship.

4.3.3.2 Vulnerable workers and the recent LRA *amendments*

In 2014 the *LRA* was amended to provide increased protection to vulnerable workers, specifically those in atypical forms of employment. These amendments are in line with the purpose of the *LRA* to advance social justice, to give effect to the fundamental rights in section 23 and also to international obligations. It is also in line with the sustainable developmental goals of gender equality, decent work and the alleviation of poverty.[115] Casual workers, part-time workers, temporary workers and fixed-term contract workers find themselves in atypical forms of work and often also in precarious employment. More women occupy atypical forms of work and extending adequate protection to them promotes gender equality.

The *LRA* amendments sought to extend protection to workers in non-standard employment relationships who earn below the threshold (as determined by the Minister) and who are therefore particularly vulnerable.[116] The current threshold amount is R205 433,30 annually and will include most domestic workers under its application.[117] Specific protection is provided to workers employed through a temporary employment service (TES).[118] It is submitted that domestic workers in South Africa employed by a TES are often in a better placed situation than workers employed by a private employer as

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during her testimony. The court then listened to parts of her testimony in open court. The employer (respondent) did have legal representation in this matter (para 16). The court found that the dismissal was automatically unfair and as he applicant did not seek reinstatement, compensation of 20 months remuneration, amounting to R20 000, was ordered. This judgment illustrates the challenge that domestic workers may experience with reference to formal court procedures. Ms Ndlovu in this instance had to represent herself, whilst the employer enjoyed legal representation. Her testimony was translated by a Zulu-speaking interpreter and this resulted in the omission of certain parts of her testimony (para 16).

115 The Memorandum of Objects Labour Relations Amendment Bill 2012. The amendments are proposed in response to the informalisation of labour, to ensure adequate protection to vulnerable workers and to promote decent work. The amendments also strive to ensure compliance with the country's international obligations and to give effect to the fundamental rights in Chapter 2 of the Constitution.

116 Section 6(3) of the *BCEA*.

117 GN 531 in *GG* 37795 1 July 2014.

118 Section 198 defines a temporary employment service as follows: "(1) … means any person who, for reward, procures for or provides to a client other persons (a) who perform work for the client; and (b) who are remunerated by the temporary employment service.

these employment services are formal businesses and compliance with labour legislation is more probable than in the case of private individual employers.[119]

The amendments endeavour to find a balance between the interests of employers in respect of flexibility but also the need to protect vulnerable employees. The act provides that in this triangular relationship, the TES is the employer of the employee placed with the client.[120] In respect of certain contraventions in terms of a collective agreement, a binding arbitration award, the *BCEA* or sectoral determinations, the TES and the client are held jointly and severally liable. Terms and conditions of employment for domestic workers are regulated by Sectoral Determination 7: Domestic Workers, and any contravention means that the domestic workers may institute proceeding against either the TES or the client or both.[121] The new amendments provide that employees who earn below the threshold (most domestic workers fall in this category) and who are not engaged in a "temporary service"[122] are deemed to be the employees of the client.[123] This means that the employee can for instance refer unfair dismissal or unfair labour practices disputes against the client to the CCMA or applicable bargaining council.[124] This provides vulnerable workers with access to an affordable forum and is in line with the fundamental right to have access to justice. These employees are not allowed to be treated on the whole less favourably than the employees of the client without justification.[125] Sectoral Determination 7 is also applicable to employment services. It provides that the employment service is responsible for the remuneration of the domestic worker, and the employment service and the client are jointly and severally liable if they do not comply with the determination or any provision in the *BCEA*.[126]

The Labour Appeal Court recently had the opportunity to decide on the proper interpretation of section 198A(3)(b)(i).[127] The question before the court was whether this section triggered a dual or sole employment relationship. The question refers to who is

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119 Du Toit and Huysamen "Implementing domestic workers' labour rights in a framework of transformative constitutionalism" 105.
120 Section 198(2).
121 Section 198(4) and (4A).
122 This is defined to mean: work for a client not exceeding 3 months; as a substitute for an employee of the client who is temporarily absent, and if a category of work is determined so by a collective agreement concluded at bargaining council level or by a sectoral determination. See s 198A(1).
123 Section 198A(3)(a).
124 Section 198D(1).
125 Section 198A(5).
126 Clause 29.
127 *NUMSA v Assign Services* (2017) 38 ILJ 1978 (LAC).

the employer, once the specific three-month period is exceeded.[128] The commissioner interpreted the deeming provision to mean that after the three months the client becomes the employer and that this interpretation is in line with the Memorandum of Objects of the Labour Relations Amendment Bill 2012 to provide vulnerable employees with the required protection. The Labour Court set aside the award of the Commissioner on the basis that the commissioner committed a material error in reaching his conclusion and that the TES is the employer for purposes of the *LRA*, and that both parties are bound by their contractual rights and obligations. The Labour Appeal Court (LAC) started its analysis with reference to section 39(2) of the Constitution and sections 1 and 3 of the *LRA* and confirmed the importance of a purposive approach.[129] The court interpreted the act and stated the following:

> What it therefore means is that a placed worker other than the employee referred to in ss (2), earning in excess of the threshold prescribed by the Minister in terms of s(6)(3) of the BCEA, who does work for a client of the TES for a period exceeding three months; who is not working as substitute for an employee of the client; or does not fall into a category of work and for any period determined in a collective agreement referred to in ss (1)(c), is not rendering a temporary employment service for the purpose of s 198(A) and therefore not an employee of a TES.[130]

The LAC stated that the employee is thus the employee of the client for an indefinite time and this approach is in line with the purpose of the amendments, namely to protect these vulnerable employees.[131] The protection offered by section 198A against unfair dismissals and unfair discrimination allows the employee to be fully integrated in the workplace and be treated the same as the other employees of the client.[132] The court also stated that the joint and several liability provision in the section discourages the involvement of the TES in administrative matters after the period of three months.[133] The TES is the employer until the deeming provision is ignited.[134] The purpose of the deeming provision is not to include a section 197 transfer of employment contracts, but to establish a statutory employment relationship between the client and the placed employee.[135] The purpose of the sections is highlighted by the court as having temporary employment services restricted to "true temporary service".[136] The Labour Appeal Court has interpreted the

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128 See s 198A(1)(a) (b).
129 Paras 28, 29, 30 and 31.
130 Para 36.
131 Paras 37, 38 and 39.
132 Para 40.
133 Para 41.
134 Para 42.
135 Para 43
136 Para 43.

provisions to provide protection to a category of vulnerable workers in line with the Constitution and the objects and purpose of the *LRA*. In respect of domestic workers this now means that these workers have statutory remedies against the client under whose discipline and control they work, in respect of dismissal, unfair discrimination and unfair labour practices. These provisions do not apply to informal traders and waste pickers as they are own-account workers and do not fall within the conceptual labour law framework.

The *Employment Services Act* 4 of 2014 provides for the compulsory registration of temporary employment services thereby creating a regulatory framework. The long title of the act provides for the establishment of public employment schemes to promote the employment of vulnerable persons. The notion of a "vulnerable person" is wide in scope and not limited to vulnerable employees,[137] and thus the notion can potentially include waste pickers and street vendors who can be classified as vulnerable persons as they do not have adequate labour and social protection. The act defines work opportunity and work scheme to include self-employment and schemes to set people up in self-employment.[138] Waste pickers and informal traders could benefit from these provisions. Section 6 of the Act provides that the Minister may establish work schemes to enable vulnerable work seekers to be placed in opportunities of self-employment. It is submitted that this can be an enabling provision to allow for schemes to promote self-employment as informal traders and waste pickers. This will also allow for access to education and training of these vulnerable work seekers and in particular for women.[139] Training can include empowerment of these work seekers in respect of access to resources such as credit and other financial resources and also legal empowerment in respect of their rights as own-account workers. This will require the recognition of the value and contribution of both informal traders and waste pickers. Government will have to create a framework that directs vulnerable work seekers through self-employment into these categories. This could also lead to a more formal approach in respect of waste pickers and the services that they provide to local authorities.

The new amendments also provide protection for fixed-term employees in that an employer may not conclude such a contract for longer than three months without a

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137 The Act provides for the same definition of employee as contained in the *BCEA*. See s 1.
138 Section 1.
139 See s 2.

justifiable reason.[140] Employers with less than 10 employees are excluded from the scope of this section and this means that most domestic workers working in a private household are excluded.[141]

4.3.4 The Basic Conditions of Employment Act 75 of 1997 (BCEA)

After the adoption of an interim constitution in 1993, the then enacted *BCEA* for the first time included domestic workers within its scope, thereby incorporating these workers within the legislative framework. Sectoral Determination 7: Domestic Workers was passed in 2002, extending existing provisions in terms of the *BCEA* to domestic workers. The *EEA* and the *LRA* do not contain a specific definition of domestic workers, but the *BCEA* defines a domestic worker in section 1 as

> … an employee who performs domestic work in the home of his or her employer and includes–
>
> (a) a gardener;
>
> (b) a person employed by a household as a driver of a motor vehicle; and
>
> (c) a person who takes care of children, the aged, the sick, the frail or the disabled,
>
> but does not include a farm worker.

This particular definition is also reflected in section 1 of the *Unemployment Insurance Act* 63 of 2001 and the *Unemployment Insurance Contributions Act* 4 of 2002. The scope of this definition includes caregivers in subsection (c). The definition in the Domestic Workers Convention is more indeterminate and refers to a domestic worker as "any person engaged in domestic work within an employment relationship" and therefore excludes workers who work occasionally. In terms of section 51(1), Sectoral Determination 7 was issued by the Minister[142] and applies to all domestic workers in South Africa including

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140 Section 198B. Justifiable reasons include the substitution of a temporary absent employee, increase in volume of work, non-citizens with a limited work permit, and seasonal work See s 198B(4)(a)-(i). Subsection 2(a) excludes high-income earners.

141 Section 198B(2)9(b).

142 In terms of the *BCEA*, the Department of Labour must publish a notice in the *Government Gazette* describing the terms of reference to the investigation into the applicable sector under consideration with reference to a sectoral determination (s 52(3)). After the investigation, a report must be prepared by the Director-General and submitted to the Commission for their consideration (s 54(1) and (2)). Consideration must be given to certain factors, such as the likely impact of the proposed conditions on the current employment, or the creation of employment; the cost of living and the alleviation of poverty (s 54(3)). These factors thus represent a balancing of interests of employer, employees and the wider society and economy with reference to a possible determination.

independent contractors and employees provided through employment services.[143] The determination regulates wages, hours of work, leave and the termination of employment and thus extends the *BCEA* provisions to domestic workers. This determination is an example of an extension of existing provisions to a category of workers in the informal economy, although in its regulation it also recognises specific characteristics of domestic work, such as accommodation, food, and challenges with reference to hours of work.

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 clauses applicable to domestic workers who work less than 24 hours per month 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 employers for less than 24 hours each per 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. Thus if the domestic worker falls pregnant, she will not be able to claim from the Unemployment Insurance Fund and thus will not enjoy adequate maternity protection. This exclusion potentially allows for exploitation of vulnerable workers, as employers may deliberately employ workers for less than the stipulated 24 hours to avoid compliance. This exclusion thus defeats the very purpose of the law to protect vulnerable workers in this regard.[144]

The sectoral determination, unlike the *LRA* and the *EEA*, does include independent contractors within its scope; however, workers who work less than 24 hour per month for one employer are excluded. Theron states that as the *BCEA* specifically excludes independent contractors, it is uncertain how a determination can be issued under the *BCEA* that binds them.[145] This inclusion is however an important provision to prevent employers for using the guise of an independent contractor to avoid their obligations in

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143 Clause 1. Domestic workers in the Philippines are 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 the minimum wage floor, as the Minimum Wage Act of 1948 does not list domestic work specifically (Oelz and Rani *Domestic work, wages, and gender equality* 11).

144 Du Toit and Huysamen "Implementing domestic workers' labour rights in a framework of transformative constitutionalism" 83.

145 Theron "Non-standard employment and labour legislation" 14.

terms of this determination, that includes matters related to wages,[146] particulars of employment,[147] hours of work,[148] leave,[149] and termination of employment.[150] The extension of protection to independent contractors with regards to domestics workers endeavours to protect a particularly vulnerable category of worker within domestic work and gives effect to the constitutional right to fair labour practices as set out in section 23. The distinct and diverse nature of work as well as the challenges faced by informal traders and waste pickers will require more specific regulation and sectoral determination might not be appropriate when it would function as a mere extension of existing provisions. Tailor-made innovative provisions can allow for discretion in the widening of the scope of some definitions and therefore a conceptual framework. Suitable provisions can also address the specific challenges faced by a category of workers and provide appropriate regulation.

Domestic workers often live at their place of work and this is another factor that contributes to the intimate and precarious nature of this distinctive employment

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146 Clauses 2-8. According to clause 2, employers must pay domestic workers the minimum prescribed wages, including hourly workers, according to the prescribed minimum wages. Clause 3 regulates the prescribed annual wage increases. Calculation and manner of payment is regulated in clauses 4 and 5. The employer is also obligated to provide the worker with information about the wages, such as period of payment, and the rate and details about overtime. The employer is not allowed to withhold any payment from the domestic worker in respect of training, supply of work tools, work clothing or any food supplies to the worker whilst at the place of work (clause 7).

147 Clause 9. See also s 29 of the *BCEA*. Both the *BCEA* and the sectoral determination do provide for further explanation by the employer, for instance where the worker is unable to understand the written particulars.

148 Clauses 10-18. The hours of work in clause 10 of the determination correspond with the regulation of ordinary hours in s 9 of the *BCEA.* Provision is made for 45 hours per week, 9 hours per day in a workweek of five days, and 8 hours per day in a longer workweek. Overtime requires an agreement and the overtime allowed in the determination is more than in s 10(1)(b) and provides for a maximum of 15 hours a week, but not more than 12 hours a day. The *BCEA* allows for a collective agreement to increase the overtime to 15 hours a week. It is submitted that the sectoral determination should only allow for 10 hours as is stipulated in the *BCEA*. These workers are vulnerable and there is no motivation for allowing 15 hours overtime per week. A collective agreement allows for trade union representation to negotiate on behalf of the employees on a more equal footing than the individual domestic workers themselves. Payment of overtime is similar to the provision in the *BCEA*, as is payment for work on Sundays and public holidays. See also s 10(3) of the *BCEA* and ss 16 and 18. Meal intervals stipulated in clause 15 aresimilar to those in s 14, it furthermore allows for a second meal interval of no less than 15 minutes in respect of overtime worked. Rest periods (clause 16), payment for work on Sundays (clause 17) and regulation of public holidays (clause 18) are regulated similar to the provisions in the *BCEA* (ss 15, 16 and 18).

149 Clauses 19-20. Clause 19 provides for annual leave of at least three weeks in an annual cycle. Provision are also made for sick leave in line with s 22 of the *BCEA*.

150 Clauses 24-31. Clause 24 regulates termination of employment and provides for notice periods. Clause 25 provides payment on termination and allows for payment in respect of outstanding leave of one week for every four months worked or one day for every 17 days worked. Clause 23 prohibits child labour. Clause 29 provides for a certificate of service on termination of service.

relationship.[151] This also means that if workers are dismissed they will lose their accommodation; the provision in clause 26 of the determination is not adequate in this regard.[152] The sectoral determination provides in clause 8 that an employer may not deduct more that 10% of the wages for the accommodation supplied; however, the accommodation must be reasonable and comply with certain very basic standards.[153] Human dignity is an important factor to consider in respect of the accommodation provided to these workers. This provision appears to be in line with the convention that requires decent living conditions and conditions that respect the privacy of the worker.[154] In *Daniels v Scribante*[155] the court confirmed that with reference to section 8(2) certain factors must be considered to determine whether the Bill of Rights binds a natural or juristic person. These factors include the nature of the right and the nature of the duty imposed. The court stated that the history behind the right and the purpose that the right endeavours to achieve as well as the potential invasion of that right on others must be considered.[156] The court concluded in this regard as follows:

> If, on weighing up all the relevant factors, we are led to the conclusion that private persons are not only bound but must in fact bear a positive obligation, we should not shy away from imposing it, section 8(2) does envisage that.

Decent accommodation is also directly linked to the human dignity of these workers. O'Regan, in another matter, stated:

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151 Available South African statistics do not record the number of workers that live on the premises of the employer (Budlender *The introduction of a minimum wage for domestic workers in South Africa* 11.

152 It merely provides for instances where the employer terminates the contract before the termination date, for the provision of accommodation for a period of one month or longer until the contract can be lawfully terminated.

153 These standards include that it must be weatherproof, in good condition, it must have a window, a door that can be locked and bathroom facilities (clause 8).

154 See para 3.3.6.4 above. Article 6 requires that when the workers resides at the place of employment, decent living conditions must be adhered to that also respect the privacy of the worker. Article 9 requires that the requirement that the worker resides at the place of work must be reached through agreement.

155 2017 4 SA 341 (CC) para 39.

156 Du Toit and Huysamen "Implementing domestic workers' labour rights in a framework of transformative constitutionalism" 101. See also *Daniels v Scribante* 2017 4 SA 341 (CC), where the court held that there may be circumstances where private persons may bear positive obligations in respect of the Bill of Rights – see paras 47 and 48. Ms. Daniels was a domestic worker and the head of her household. She wanted to make basic improvements to her house on a farm that was owned by Chardonne Properties CC. The respondents, including the manager of the farm, refused to grant her permission to make the improvements. Ms. Daniels argued that in terms of the *Extension of Security of Tenure Act* 62 of 1997, the right to reside also includes the right to make improvements and the court confirmed this (see ss 5, 6 and 13).

> The importance of human dignity as founding value of the new Constitution cannot be overemphasized. Recognising a right to dignity is an acknowledgement of the intrinsic worth of human beings: human beings are entitled to be treated as worthy of respect and concern. The right therefore is the foundation of many other rights that are specifically entrenched in the [Bill of Rights] ….[157]

It is submitted that the employer is also bound by the provisions in the Bill of Rights in this regard and must provide housing to the domestic worker that accords with the notion of decent work and human dignity.[158] Decent living conditions can also fall within the ambit of section 23(1). Although the right to human dignity is defined in positive terms, private persons obtain negative obligations not to impair the human dignity of others subject to the general limitation clause in section 36.[159] If a domestic worker is not provided with decent living conditions at his or her place of work this infringes on the right to human dignity. Cameron J found that socio-economic rights do not impose a positive duty on private persons, but on the state.[160]

Requiring the domestic worker to pay for her accommodation when the employer requires him or her to stay on the premises as part of a job requirement, does not appear to be in line with section 23(1) of the Constitution in respect of fair labour practices. The employee, as part of his or her duties, must stay on the premises of the employer, but must also pay for the accommodation. This provision is in line with the minimum standards of Domestic Workers Convention; however, in the South African context it is not regarded as a fair labour practice. It is submitted that fairness in this regard involves a value judgment. Although the interest of both parties must be considered, the Constitutional Court recognised the commercial interests of the employer but stated that "the constitution protects the weak, the marginalized, the socially outcast and the victims of prejudice and stereotyping".[161] Although this judgment was delivered in terms of section 9 this statement also applies to section 23 rights.[162] The employer in these instances must provide accommodation without any charge if it is a job requirement for the worker to stay on the premises. It is submitted that the convention does not provide for adequate

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157 *S v Makwanyane* 1995 3 SA 391 (CC) para 328. See also *Daniels v Scribante* 2017 4 SA 341 (CC) para 2.

158 The court stated that there can be circumstances where private persons bear positive obligations in terms of the Bill of Rights (*Daniels v Scribante* 2017 4 SA 341 (CC) para 48). The case dealt with s 25(6) of the Constitution through the *Extension of Security and Tenure Act* 62 of 1997 (*ESRA*) and the accommodation of a person on the land of another.

159 *Daniels v Scribante* 2017 4 SA 341 (CC) para 160.

160 *Daniels v Scribante* 2017 4 SA 341 (CC) para 186.

161 *Hoffmann v South African Airways* 2001 1 SA 1 (CC) para 34. See also Cooper "Labour relations" volume 4 para 53.2.

162 Cooper "Labour relations" volume 4 para 53.2.

protection in the promotion of decent work for domestic workers in this instance, as it allows for member states through national legislation and regulation to provide for remuneration to include payments in kind, for example for accommodation. The problematic nature of the mere extension of existing provisions by the sectoral determination without consideration of the socio-economic position of these workers are hereby illustrated. The notion of substantive equality is ignored and these workers are treated akin to other workers.[163] The sectoral determination thus supports only the notion of formal equality, as it "ignores economic and social disparities between individuals and groups".[164] Domestic workers in South Africa, as in many other countries, represent a previously disadvantaged group. In South Africa these women did not have access to resources, such as access to housing, land or education during the apartheid era. If an employer requires a worker to reside at the place of work it is the employer's responsibility to provide the accommodation without a charge. This approach is in line with the constitutional provision of fair labour practices and human dignity and promotes decent work for vulnerable women workers.

The extension of night work in the determination is similar to the provision in the *BCEA*; however, the determination does not provide for information about the risks of night work on a regular basis.[165] If the domestic worker resides at the workplace, the employer has easy access to the employee in respect of night work and this can be exploited. The determination also contains a provision of standby duty by the employee.[166] The domestic worker is allowed to rest, but should be available for work if necessary. This provision highlights the unique nature of domestic work, as well as the intimate nature thereof. Childcare during these hours is an example of the domestic worker being on standby. This must be agreed in writing, but considering the unequal nature of the relationship this protective provision is of minimal value or effect. The worker is remunerated for these services at overtime rates. In respect of sick leave the determination, unlike the *BCEA*, does allow for a medical certificate to be signed by a medical practitioner, a traditional healer or an authorised professional nurse.[167] Another important provision in respect of sick leave is that an employer is not allowed to withhold payment in instances where the worker resides on the premises and is unable to obtain a medical certificate, unless they

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163 See also para 1.3 above.
164 Van Niekerk *et al Law@work* 123.
165 Section 17(3).
166 Standby duty refers to the daily period between 20:00 and 06:00.
167 Clause 20(7)(a).

provide assistance in this regard.[168] These provisions indicate some level of understanding in respect of the vulnerable position of these workers and the challenges in respect of adequate healthcare in South Africa. After four months of service domestic workers are allowed five days' family responsibility leave for the same reasons as those provided in section 27 of the *BCEA*.[169] The *BCEA* only provides for three days, in this regard it is submitted that domestic workers often reside at the place of employment and not at their own home and therefore provision must be made for travelling.

Maternity protection in terms of the *BCEA* allows for four months unpaid leave and this is regulated uniformly for all women workers. The determination accords additional protection to a domestic worker in respect of notice pay and requires 4 weeks' notice where the worker has been employed for more than 6 months.[170] Written notification is not required where the domestic worker is illiterate.[171] Clause 27 provides for severance pay of one week for every year worked/completed in respect of dismissal based on operational requirements.[172] A domestic worker who unreasonably refuses to accept the employer's offer of alternative employment with that employer or any other employer is not entitled to severance pay.[173] It is submitted that this basic extension of existing provisions is problematic as it does not consider the intimate and personal nature of domestic work compared with alternative employment with another employer. When judging the reasonableness of the refusal in this regard, the courts must consider the intimate and personal nature of the employment relationship. Extensions can only be effective with due consideration of the contextual framework applicable to the extension.

In many ways the determination is a mere extension of the existing provisions of the *BCEA*, but in certain instances the determination does positively make provision for the specific characteristics of domestic work.

It is submitted that one of the most problematic issues regarding the regulation of domestic workers' rights in South Africa relates to the enforcement thereof.[174] The *BCEA*

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168 Clause 20(8).
169 Clause 21.
170 Clause 24(1). S 37 of the *BCEA* only requires 4 weeks after the employee was employed for longer than one year (s 37(1)).
171 Clause 24(3)(a).
172 See also s 41 of the *BCEA*.
173 Clause 27(3).
174 In *Majola and Moonsamy* (2004) 25 *ILJ* 153 (CCMA), the applicant during unfair dismissal proceedings indicated that she was earning R250 per month and did not receive a pay slip. These are clear contraventions with reference to Sectoral Determination 7. She was dismissed for allegedly stealing the respondent's cell phone. The commissioner found the dismissal procedurally

provides for the appointment of labour inspectors by the Minister.[175] Apart from inspection and investigation of complaints, labour inspectors must also advise employees of their rights in respect of employment laws.[176] Access at reasonable times is provided for without a warrant of notice; however, in respect of private homes, consent of the owner is required or authorisation by the Labour Court.[177] Apart from the regulation of access to private homes, no specific provisions apply to domestic workers and access to the private home is problematic, specifically in instances where the owner refuses entry. Section 68(1) provides that labour inspectors who, based on reasonable grounds, suspect that an employer does not comply with the act, may endeavour to obtain an undertaking of compliance. Subsection (2) does allow that during this investigation parties can be heard. This provision is important with reference to domestic workers and it is of paramount importance that they are also consulted in any investigative process.[178] Labour inspectors can play an important role to promote and achieve compliance, but this will require an understanding of the specific characteristics of domestic work, including the intimate nature of the workplace. This will require additional training of labour inspectors to efficiently enforce regulations in order to ensure compliance of private employers with reference to domestic workers. The South African Domestic Services and Allied Workers Union (SADSAWU) made recommendations in respect of compliance and enforcement and this included improved communication between the employers of these workers and the Unemployment Insurance Fund, the legal empowerment of all role players, and a possible rewards system for compliance.[179] It is submitted that this reward system could entail certain tax incentives for employers.

The role of a labour inspector in this regard must be expanded to include an active role that supports mediation and conciliation between the parties.[180] This role will allow parties

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and substantively unfair. The Commissioner, in line with the purpose of the *LRA* in respect of the advancement of economic development and social justice, ordered compensation at the minimum wage rate set by the determination and not the actual wages paid. In *Motaung and Issa* (2007) 28 *ILJ* 1351 (CCMA), the worker indicated that she worked 7 days per week and was not allowed any time off to visit her church on Sunday. The award for the substantially and procedurally unfair dismissal included the underpayment of wages, payment for overtime and payment for Sunday work. When these disputes are referred to the CCMA, it becomes clear that non-compliance with the Sectoral Determination is prevalent and this supports the argument that the enforcement of the determination in South Africa is problematic and ineffective.

175 Section 63.
176 Section 64.
177 Section 65.
178 Du Toit 2011 *ILJ* 11.
179 Budlender *The introduction of a minimum wage for domestic workers in South Africa* 21.
180 Du Toit 2011 *ILJ* 11.

to reach more sustainable solutions and promote equality between the parties within a constitutional framework in support of values such as human dignity.[181] It is submitted that an approach that is conducive of promoting trust and equality between the parties should be preferred.[182]

The enforcement provisions in the *BCEA*, based on a formal employment relationship and workplaces, are merely extended to include domestic workers without any comprehension of the distinctive nature of their work. No obligation is placed on the department of labour to provide specific training to its inspectors in this regard and decision makers are not sensitive to the contextual framework within which the workers work. This is out of step with ILO Convention 189, which specifically requires member states to develop an enforcement framework, including a penalty system, which recognises the unique characteristics of domestic work. This means that although domestic workers in South Africa do enjoy protection, in practice they are often unable to enforce their rights and are therefore still left without adequate labour and social protection.

This determination is an example of an extension of existing provisions to a category of workers in the informal economy. Du Toit argues as follows in this regard:

> A sectoral determination, however, is no substitute for the empowering and participatory aspects of collective bargaining.[183]

The choice of a sectoral determination as an instrument to provide vulnerable employees with basic conditions of employment is not the most suitable paradigm. Firstly, it is left to the discretion of the minister to determine when such a determination must be made and who must be covered.[184] Although this requires an investigation into the sector and categories of employees, the minister is not under obligation to consult with trade unions or workers, although written representations from the public are invited.[185] Sectoral determinations are often also not the best solution to stipulate minimum wages for vulnerable categories of workers. For example, in South Africa, the sectoral determination[186] that was introduced in 2003 in respect of the wholesale retail sector determined the minimum wage at a level lower than their existing wage at the time. In

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181 Du Toit 2011 *ILJ* 12.
182 Du Toit 2011 *ILJ* 12.
183 Du Toit and Huysamen "Implementing domestic workers' labour rights in a framework of transformative constitutionalism" 84.
184 Section 51.
185 Section 52(3).
186 Ryklief "Retail and hospitality workers in South Africa organised by trade union for formal workers to demand equal pay and benefits" 57.

certain cases the minimum wages set through sectoral determinations have also interfered with union negotiations in respect of wages, as the minimum is set at a lower rate.[187]

Empowerment of women workers is extremely important with reference to sustainable goals. In line with this approach ILO recommendation 201 requires member states to design policies and programmes to enhance the skills of domestic workers, including literacy. This is particularly important with reference to these workers who represent a previously disadvantaged group, such as black women; it supports both legal and economic empowerment and contributes to the agency of these workers.[188] Since 2008 various initiatives were established, including a programme accredited by the South African Qualifications Authority, but accessibility remains problematic.[189] By setting a low minimum wage, which is indicative of work at unskilled levels, through sectoral determination 7, a perception of unskilled and undervalued work is highlighted and entrenched.[190]

4.3.5 The Skills Development Act 97 of 1998

The *Skills Development Act* 97 of 1998 and the *Skills Development Levies Act* 9 of 1999 provide the framework for development and improvement of skills and the imposition of an applicable levy in South Africa. In 1999, a skills development project was established for domestic workers, and the project exceeded its target and trained more than 18 000 workers through its various programmes.[191] Currently the Department of Labour, together with other role players, aim to provide basic training as well as specific training such as first aid and driving to this sector. Training will also include skills to enable these workers to enter other occupations.[192] The value of specialised skills training will only be beneficial if these workers are then remunerated according to their level of specific skills.[193] The recognition of domestic work to include various levels of skill will promote the inherent

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187 Ryklief "Retail and hospitality workers in South Africa organised by trade union for formal workers to demand equal pay and benefits" 63. See also para 4.3.3.6 below.

188 Different education systems for population groups characterised the apartheid regime and education for black people was designed under the *Bantu Education Act* 43 of 1953 with specific emphasis on education for manual labour. See also Von Broembsen 2012 *LD&D* 9.

189 A programme was launched by the Department of Basic Education in 2008. A general Education and Training Certificate was established for domestic workers and accredited in 2012.

190 Du Toit and Ronnie 2014 *ILJ* 1825.

191 Budlender *The introduction of a minimum wage for domestic workers in South Africa* 28.

192 Budlender *The introduction of a minimum wage for domestic workers in South Africa* 28.

193 Budlender *The introduction of a minimum wage for domestic workers in South Africa* 28.

value of the work performed. It is submitted that societal perceptions of the value of domestic work also contributes to low compliance levels by employers.[194]

4.3.6 The Employment Equity Act 55 of 1998

The *Employment Equity Act* (*EEA*) was enacted to give effect to the provisions of sections 9(2) and (4) of the Constitution, in support of the notion of substantive equality and in compliance with South Africa's international obligations.[195] It is the primary act that regulates equality in the workplace.[196] The purpose of the *EEA* is to promote equality in the workplace through the elimination of unfair discrimination and the implementation of affirmative action measures.[197] The *EEA* applies to domestic workers as well since it applies to all employees[198] and sections 6, 7 and 8 also include applicants for employment in line with article 3(2) of Convention 189 (2011) which requires member states to "respect, promote and realise" fundamental principles such as the elimination of discrimination. Waste pickers and informal traders are excluded from the scope of the *EEA* as they do not fall within the definition of "employee" in section 1. Section 9 of the Constitution may be applicable to these workers in any dispute of unfair discrimination against the local authorities, including municipalities, as well as the provisions of the *Promotion of Equality and the Prohibition of Unfair Discrimination Act* 4 of 2000.

Section 6(1) of the *EEA* states the following:

> No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on one or more grounds, including race, gender, sex, pregnancy, marital status, family responsibilities, ethnic or social origin, colour, sexual orientation, age, disability, religion, HIV status, conscience, belief, political opinion, culture, language, birth or any other arbitrary ground.

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194 Oelz and Rani *Domestic work, wages, and gender equality* 17.

195 See for example the ILO Discrimination (Employment and Occupation) Convention 111 (1958) and the African Charter on Human and People's Rights. See also s 39(1)(b) and (c); ss 232 and 233 of the Constitution; *S v Makwanyane* 1995 3 SA 391 (CC).

196 Section 9(2) refers to legislative measures to protect and advance disadvantaged groups. S 9(4) provides that national legislation must be enacted to prevent or prohibit unfair discrimination and the preamble of the *EEA* confirms that the *EEA* must "promote the constitutional right to equality" and"eliminate unfair discrimination in the workplace".

197 Section 2. S 5 provides that employers must actively promote equal opportunities by eliminating unfair discrimination.

198 According to s 1 an employee means: "any person other than an independent contractor who works for another person or for the State and who receives, or is entitled to receive remuneration; and (b) in any manner assists in carrying on or conducting the business of an employer…".

This section prohibits unfair discrimination,[199] both direct and indirect,[200] and section 6(1) does not contain a closed list of grounds.[201] The amendments also include the reference to other arbitrary grounds. The motivation of the legislature in this regard is not clear as the phrase "including" has always been interpreted as to include unlisted grounds.[202] The approach adopted by the labour courts in respect of the test for unfair discrimination based on the *EEA* supports the test laid down by the Constitutional Court in *Harksen v Lane*.[203] It has been argued that stage 2 of the enquiry is not applicable to employment

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199 There is a distinction between differentiation and unfair discrimination. Differentiation can be divided in unfair discrimination and a residual category where the differentiation does not amount to unfair discrimination. The impact of the differentiation also plays an important role. Unfair discrimination is not defined in the Constitution or in the *EEA*; however, the Constitutional Court held that it is a differentiation that infringes on human dignity (see *President of the Republic of South Africa v Hugo* 1997 4 SA 1 (CC) para 43; *Harksen v Lane* 1998 1 SA 300 (CC) para 50); Rautenbach and Fourie 2016 *TSAR* 111-112. In *Hoffmann v South African Airways* 2001 (1) SA 1 the court held in para 27 as follows: "At the heart of the prohibition of unfair discrimination is the recognition that under our Constitution all human beings regardless of their position in society, must be accorded equal dignity. The dignity is impaired when a person is unfairly discriminated against. The determining factor regarding the unfairness of the discrimination is its impact on the person discriminated against. Relevant considerations in this regard include the position of the victim of discrimination in society, the purpose sought to be achieved by the discrimination, the extent to which the rights of the victim have been affected, and whether the discrimination has impaired the human dignity of the victim." In para 43 this is continued: "In the context of unfair discrimination, the interests of the community lie in the recognition of the inherent dignity of every human being and the elimination of all forms of discrimination."

200 Direct discrimination refers to matters where the criteria for the differentiation are themselves unfair. Indirect discrimination refers to the use of an apparent neutral criterion which however produces unequal results (Van Niekerk *et al Law@work* 130).

201 This section lists 19 grounds, and includes HIV status, family responsibilities and political opinion that are not listed in s 9(3) of the Constitution (Van Niekerk *et al Law@work* 132). Unlisted grounds have thus far included citizenship (see *Larbi-Odam v Members of the Executive Committee for Education (North-West Province)* 1998 1 SA 745 (CC); parenthood (see *Wallace v Du Toit* 2006 8 BLLR 757 (LC)); and political and cultural affiliation (*Jansen v the Minister of Correctional Services of the Republic of South Africa* 2010 31 ILJ 650 (LC)). See also Van Niekerk *et al Law@work* 137. In *Harksen v Lane* 1998 1 SA 300 (CC) in respect of discrimination on an unlisted ground, the court held as follows: "There will be discrimination on an unspecified ground if it is based on attributes or characteristics that have the potential to impair the fundamental dignity of persons as human beings, or to affect them adversely in a comparable serious manner" (para 47).

202 Rautenbach and Fourie 2016 *TSAR* 117. The explanatory memorandum referred to two reasons, namely to align the provision with s 187(1)(f) of the *LRA* (however, s 6(1) is not identical to the provision in the LRA), and to clarify that s 6(1) does not contain a closed list. This seems unnecessary as the courts both in the instance of the *LRA* and the Constitution found that unlisted grounds are included. It is submitted that "arbitrary" in the *EEA* s 6(1) and in s 187(1)(f) means the same as "unlisted" in s 9(3).

203 1998 1 SA 300 (CC). This test involves three stages of enquiry, namely (a) Does the provision differentiate between categories of people? Does the differentiation amount to unfair discrimination? This requires a two stage analysis: (b)(i) Firstly, does the differentiation amount to "discrimination"? If it is on a specified ground, then the discrimination will have been established. If it is not on a specified ground, then whether or not there is found to be discriminatory will depend upon whether, objectively, the ground is based on attributes and characteristics which have the potential to impair the fundamental human dignity of persons as human beings or to affect them adversely in a comparably serious manner (b)(ii) If the

matters, as the *EEA* must be interpreted in line with the ILO Convention 111 of 1958.[204] The second stage of the test requires an investigation into unfairness. The ILO convention defines discrimination in article 1.[205] The convention refers only to discrimination and not to a notion of unfair discrimination as provided for in the *EEA* and the Constitution, and hence does not allow for a "fairness qualification" or the notion that differentiation does exist that may not amount to unfair discrimination.[206] It is submitted that the test in the *Harksen* case is applicable to employment matters as the Constitution is the supreme law[207] and the concept of unfair discrimination in section 9 cannot be ignored in favour of the ILO Convention.[208] Even if we consider our international obligation in terms of the Constitution, section 233 refers to a "reasonable interpretation" indicating a choice if more than one interpretation exists.[209] It must also be noted that section 11 of the *EEA* refers to "unfair discrimination". Section 11 of the *EEA* clearly indicates that when the alleged unfair discrimination is not rationally linked to a legitimate purpose, the differentiation will be unconstitutional.[210] In support of the abovementioned argument the Constitutional Court in the *Mbana* [211] case confirmed that the test for unfair discrimination in the context of labour law is comparable to the Harksen test.

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differentiation amounts to "discrimination", does it amount to "unfair discrimination"? If it has been found to have been on a specified ground the unfairness will be presumed. If on an unspecified ground, unfairness will have to be established by the complainant. The test of unfairness focuses primarily on the impact of the discrimination on the complainant and others in his or her situation. If at the end of this stage of the enquiry, the differentiation is found not to be unfair, there will be no violation (c) If the discrimination is found to be unfair then a determination will have to be made as to whether the provision can be justified under the limitation clause.

204 Section 3 of the Act states that the act must be interpreted in line with this convention.

205 Article 1 states the following: "For the purpose of this Convention the term *discrimination* includes– (a) any distinction, exclusion or preference made on the basis of race, colour, sex, religion, political opinion, national extraction or social origin, which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation (b) such other distinction, exclusion or preference which has the effect of nullifying or impairing equality of opportunity or treatment in employment or occupation as may be determined by the Member concerned after consultation with the representative employers' organisations and workers' organisations, where such exist with other appropriate bodies."

206 Van Niekerk *et al Law @work* 131.

207 Section 2 of the Constitution contains the supremacy clause.

208 Rautenbach and Fourie 2016 *TSAR* 118.

209 See s 233; Rautenbach and Fourie 2016 *TSAR* 118.

210 Rautenbach and Fourie 2016 *TSAR* 125.

211 *Mbana v Shepstone & Wylie* 2015 6 BCLR 693 para 25.

Section 6(2) of the *EEA* provides for two defence grounds, namely inherent job requirements[212] and affirmative action measures.[213]

An important provision in the *EEA* in respect of domestic workers is section 6(3).[214] One of the many challenges that domestic workers face, in part due to the intimate work relationship, is harassment in the workplace. This section now expressly provides protection in instances of harassment. This section is in line with our constitutional values of human dignity and equality in a non-racial, non-sexist society.[215] In *Campbell Scientific Africa (Pty) Ltd v Simmers*[216] the court held as follows:

> By its nature such harassment creates an offensive and very intimidating work environment that undermines the dignity, privacy and integrity of the victim and creates a barrier to substantive equality in the workplace. It is for this reason that the Court has characterised it as "the most heinous misconduct that plagues a workplace".[217]

Harassment is not defined in the *EEA*, however the Code of Good Practice on the Handling of Sexual Harassment Cases in the Workplace states as follows in Item 4:

> 4. Sexual harassment is unwelcome conduct of a sexual nature that violates the rights of an employee and constitutes a barrier to equity in the workplace, taking into account the following factors:
>
> 4.1 whether the harassment is on the prohibited ground of sex and/or gender and/or sexual orientation;
>
> 4.2 whether the sexual conduct was unwelcome;
>
> 4.3 the nature and the extends of the sexual conduct; and
>
> 4.4 the impact of the sexual conduct on the employee.[218]

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212 See also article 1(2) of ILO Convention 111. In *Woolworths v Whitehead* (1999) 20 *ILJ* 2133 (LC) the Labour Court held that an inherent job requirement, in this instance continuity, is "an indispensable requirement for a particular job and this implies that the job itself must have some indispensable attribute. This indispensable attribute however must relate in an inescapable way to the performing of the job required" (see paras 25 and 26 and *Woolworths v Whitehead* 2000 21 ILJ 571 (LAC)). See also *IMATU v City of Cape Town* [2005] 11 BLLR 1084 (LC) where the court held that an individual assessment is to be preferred to a blanket ban with reference to the exclusion of persons suffering from diabetes for firefighter positions. See also *Hoffman v South African Airways* [2000] 12 BLLR 1365 (CC).

213 This defence ground is not applicable to this study.

214 This section states: "Harassment of an employee is a form of unfair discrimination and is prohibited on any one, or a combination of grounds of unfair discrimination listed in subsection (1)."

215 See also *Campbell Scientific Africa (Pty) Ltd v Simmers* 201637 ILJ 116 (LAC) para 18.

216 (2016) 37 *ILJ* 116 (LAC).

217 Para 21.

218 The amended code and the 1998 Code which has not been withdrawn are both applicable in sexual harassment cases. The ILO defines sexual harassment as: "(a) [quid pro quo] any physical, verbal

It is submitted that the notion of harassment in the *EEA* is a wider concept than just sexual harassment to include harassment on any of the listed grounds; however, sexual harassment seems to be the most frequent form of harassment targeted at women workers. The code also provides that a single incident can constitute sexual harassment.[219] The code includes physical,[220] verbal[221] and non-verbal conduct and distinguishes between victimisation, *quid pro quo* harassment and sexual favouritism.[222]

Another important amendment of the *EEA* refers to access to justice and is of particular importance for domestic workers. Section 10 now allows for unresolved disputes about unfair discrimination based on sexual harassment to be referred to the CCMA for arbitration; this also applies to cases when employees earn below the prescribed threshold, which would include most domestic workers.[223] This is an important amendment since referrals to the CCMA are free of charge and this amendment provides access for domestic workers who cannot afford referrals to the Labour Court.

Studies have indicated that risks of violence and harassment are increased when workers are economically vulnerable and in informal forms of labour.[224] Challenges exist in respect of the protection against violence and abuse of these workers at their place of employment. General criminal and civil remedies appear inadequate and awareness campaigns must prioritise the issue of harassment at work.[225] The recommendation requires an accessible complaint mechanism in respect of violence and harassment and the establishment of programmes to ensure the relocation of abused domestic workers,

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or non-verbal conduct of a sexual nature and other conduct based on sex affecting the dignity of women and men, which is unwelcome, unreasonable, and offensive to the recipient; and a person's rejection of, or submission to such conduct is used explicitly or implicitly as a basis for a decision which affects that person's job; (b) [hostile work environment]: conduct that creates an intimidating, hostile or humiliating working environment for the recipient". See ILO 2015 http://www.ilo.org/dyn/normlex/en/f?p= NORMLEXPUB:13100:0::NO::P13100_COMMENT_ID:3181090. Gender-based violence is defined as "any act of gender-based violence that results in, or is likely to result in physical, sexual, or psychological harm or suffering to women, including threats of such acts, coercion or arbitrary deprivation of liberty, whether occurring in public or private life". See also the UN Declaration on the Elimination of Violence Against Women 1993.

219 See item 5.3.3. This was confirmed by the Labour Appeal Court in *Campbell Scientific Africa (Pty) Ltd v Simmers* 2015 ZALCCT 62 (23 October 2015) para 28.

220 Item 5.3.1.1 includes behaviour from touching to sexual assault and rape.

221 Item 5.3.1.2 includes unwelcome innuendos, suggestions and sexual advances.

222 Item 5.3.1.3 includes unwelcome gestures and indecent exposure. See also item 5.3.2.

223 Section 10(6)(aA)(i) and (ii).

224 Pillinger *Violence and harassment against women and men in the world of work* xi.

225 Du Toit and Huysamen "Implementing domestic workers' labour rights in a framework of transformative constitutionalism" 110.

including certain social protection measures such as temporary accommodation and healthcare.[226]

Du Toit argues for the inclusion of these workers within the regulatory framework of the *Domestic Violence Act*.[227] The act is applicable to domestic violence within a domestic relationship. A domestic relationship includes a relationship between parties that were married,[228] or they live together, they are parents of a child or have parental responsibilities, family members, or they are in a relationship of any duration or they share the same residence.[229] Domestic workers that live on the premises of the employer could be covered under this definition as these workers share the same residence.[230] The scope of domestic violence in the Act is wide and includes, physical, sexual, emotional, verbal, economic and psychological abuse, intimidation and harassment. Harassment of a domestic worker, including sexual harassment, will fall under this definition of domestic violence.[231] This is also in line with the preamble of the Act to provide victims with maximum protection and the recognition that remedies currently available are not effective.[232] The Act allows for the South African Police Service to provide assistance, including shelter and medical treatment;[233] arrest by a peace officer without a warrant,[234] and the application of a protection order.[235] Domestic workers are vulnerable and just as entitled to protection as other members of society and the intimate nature of their employment relationship may provide the rationale for protection under this Act.

Domestic workers also enjoy protection against medical testing in terms of section 7 of the *EEA*. The Constitution does not specifically refer to medical testing, but fundamental rights such as the right to privacy,[236] the right to human dignity,[237] the right to bodily

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226 Article 7.
227 116 of 1998. Du Toit and Huysamen "Implementing domestic workers' labour rights in a framework of transformative constitutionalism" 88.
228 Marriages under any law, custom or religion are included.
229 Article 1.
230 Article 1(f).
231 Harassment in this regard includes conduct that induces fear or harm, and sexual abuse includes conduct that "abuses, humiliates, degrades or otherwise violates the sexual integrity of the complainant" (article 1).
232 The preamble also recognises South Africa's international obligations in terms of the United Nations Convention on the Elimination of all Forms of Discrimination against Women and the Rights of the Child.
233 Article 2.
234 Article 3.
235 Article 4.
236 Section 14.
237 Section 10.

integrity[238] and the right to fair labour practices are relevant in this context.[239] This section prohibits medical testing of an employee, unless it is required by legislation or justifiable with reference to factors such as employment conditions, social policy and medical facts.[240] An employer may not require medical testing of domestic workers in respect of their HIV status as this is prohibited and can only be authorised by the Labour Court.[241] Although Convention 189 does not expressly refer to HIV testing, Recommendation 201 of 2001 provides that the measures taken by member state to eliminate discrimination should include prohibitions on HIV testing and pregnancy testing of these workers.[242] The recommendation also requires measures to protect the HIV and pregnancy status of domestic workers.[243] Article 4 of the Recommendation provides that when required medical testing is considered, member states must provide the workers and the household members with public health information, in respect of primary health and other concerns, including information about voluntary testing, treatment, basic health practices and best practices with regard to testing in the work place. The *EEA* extends protection to domestic workers through the inclusion of these workers in the definition of "employee". Therefore the Act does not primarily deal with discrimination in respect of the privacy of domestic workers with reference to medical testing in the workplace. It is submitted that if the employer wants to test the worker without his or her consent, the employer must apply to the Labour Court. The Recommendation seems to prohibit HIV and pregnancy testing outright without providing any justification grounds. The Recommendation is also concerned with the empowerment of all the parties in respect of sharing of information in respect of the effects of HIV. It is therefore submitted that the general provision in the *EEA* in respect of medical testing is inadequate to provide sufficient protection for

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238 Section 12(2). This right includes not to be subjected to and medical or scientific experiments without consent.

239 Section 23.

240 Section 7(1)(a) and (b).

241 Section 7(2). The Labour Court may authorise the testing and can impose certain conditions, such as the provision of counselling, the maintenance of confidentiality and identifying the category of employees to undergo the testing (see s 50(4)). In *Joy Mining Machinery (SA) (Pty) Ltd v NUMSA* (2002) 23 *ILJ* the court provided examples of circumstances that would justify medical testing of employees. These circumstances refer to the prohibition of unfair discrimination and the need for medical testing. In respect of the need for medical testing it can include the need of an employer to evaluate the situation to provide training and awareness programmes, to be proactive, the inherent requirement of the job, social policy, and medical aid. In *Irvin and Johnson Ltd v Trawler and Line Fishing Union* 2003 4 BLLR 379 (LC) the court held that anonymous and voluntary testing does not fall within the scope of s 7(2). See also the Code of Good Practice: Key aspects of HIV/AIDS and Employment.

242 Article 3.

243 Article 3.

domestic workers as it is aimed at a more formal workplace environment. Provisions should consider the distinct working relationship and the intimate nature of domestic work.

Section 50 of the *EEA* provides for the powers of the Labour Court. In the case of discrimination this includes a just and equitable order of compensation, payment of damages and an order directing the employer to actively prevent the unfair discrimination.[244] Section 60 of the *EEA* provides for circumstances where an employer can be held liable for the conduct of the employees.[245]

In addition to the *EEA*, protection is also provided to victims of harassment by the *Protection from Harassment Act* 17 of 2011. The act extends protection to all complainants.[246] Informal traders and waste pickers will be covered under its scope as it is not limited to the formal employment relationship. Harassment includes conduct that causes harm or inspires the reasonable belief that harm may be caused to the complainant.[247] The Act allows for the complainant to apply for a protection order against harassment.[248] Where the complainant does not have legal representation, the clerk of the court must inform the complainant of the relief available.[249] This is an enabling provision for vulnerable workers without financial resources, to obtain advice from the clerk of the court. Although the scope of the *EEA* is limited, other legal instruments can provide remedies, such as the *Domestic Violence Act* and *PEPUDA*.[250]

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244 Section 50(2)(a)-(c).

245 According to s 60 the employer must be made aware of the conduct, the employer must consult with the relevant parties and must take the necessary steps to eliminate the conduct.

246 A complainant is any person who alleges that he or she is being subjected to harassment (s 1).

247 Section 1. Sexual harassment is defined as (a) unwelcome attention from a person who knows or ought reasonably to know that such attention is unwelcome; unwelcome explicit or implicit behaviour, suggestions, messages or remarks of a sexual nature that have the effect of offending, intimidating or humiliating the complainant … (c) implied or expressed promise of reward for complying with a sexually orientated request; or (d) implied or expressed threat of reprisal for refusal to comply with a sexually orientated request.

248 Section 2.

249 Section 2(a).

250 See para 5.3 below with reference to *PEPUDA* and informal traders and waste pickers.

4.3.7 Wage setting in South Africa

Wage setting in South Africa is currently governed by the *LRA*, that provides for collective bargaining for all employees, and the *BCEA* that provides for minimum terms and conditions of employment as well as the introduction of sectoral determinations.[251] South Africa is currently considering the introduction of a statutory minimum wage and it is important to consider how this will affect the specific categories of women workers in the informal economy discussed in this study.[252] The government sees the implementation of a national minimum wage as a positive intervention with reference to poverty alleviation, but recognises that it is not the answer to all labour and poverty challenges in the country and may have little effect on employment.[253] Minimum wages in many industrialised countries are introduced through statutory regulation or by legal underpinning of collective bargaining for multi-employers.[254] The ILO has listed four important factors in respect of the successful implementation of a national minimum wage, namely:

(a) the widest coverage of all workers;

(b) the minimum wage must be set at an adequate level determined through a balanced approach that considers the needs of workers and families and the risks associated with employment loss;

(c) adequate enforcement measures to ensure compliance; and

(d) social dialogue with all relevant role players to support legitimacy and compliance.[255]

Minimum wages can play an important role in respect of poverty alleviation and the promotion of equality.[256] According to Deakin they have other benefits as well:

> They can also promote industrial upgrading. In addition, they support the fiscal base and help limit the scale of government transfers aimed at ensuring that households can access a subsistence income.[257]

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251 Currently, 11 sectoral determinations have been issued, with 120 different wage levels. This is a complicated and fragmented system (Republic of South Africa *A national minimum wage for South Africa*).

252 Currently 29 733 210 people are living below the poverty line. This is more than half of the population (Republic of South Africa *A national minimum wage for South Africa*).

253 Republic of South Africa *A national minimum wage for South Africa* 9.

254 Deakin 2017 *ILJ* 7.

255 Republic of South Africa *A national minimum wage for South Africa*. See ILO date unknown http://www.ilo.org/wcmsp5/groups/public/---dgreports/---dcomm/---publ/documents/publication/wcms_570376.pdf. See also ILO Minimum Wage Fixing Convention 131 (1971) and ILO Recommendation 135 (1970).

256 Deakin 2017 *ILJ* 23.

257 Deakin 2017 *ILJ* 23.

Deakin identifies risks associated with the setting of a high minimum wage, such as increased unemployment, if not supported by measures including training and governmental support.[258] He states that when policy makers consider the introduction of a national minimum wage, various factors must be considered, including the extension of the minimum wage to vulnerable workers while avoiding potential negative aspects of such a minimum wage such as reducing employment opportunities and increasing the informal economy.[259] Webb already suggested in 1912 that instead of businesses closing down, businesses are forced to become more efficient:

> When all the employers in a trade find themselves precluded, by the existence of a Common Rule, from worsening the conditions of employment – when, for instance, they are legally prohibited from crowding more operatives into their mills or keeping them at work for longer hours, or when they find it impossible, owing to a strictly enforced price-work list, to nibble at wages – they are driven in their competitive struggle with each other, to seek advantage in other ways. We arrive, therefore, at the unexpected result that the enforcement of minimum conditions of employment as compared with a state of absolute freedom to the employer to do as he likes, positively stimulates the invention and adoption of new processes of manufacture.[260]

For workers in the informal economy without voice and representation and thus with limited or no collective bargaining opportunities, this baseline approach is more effective. For domestic workers, with limited representation, a collective bargaining framework as a safety net poses too many risks. Justification for legislative minimum wage interventions in South Africa, specifically for domestic workers, must also be seen against discriminatory labour practices under the apartheid regime, including extremely low wages.[261] Du Toit and Huysamen present the following argument with reference to the setting of a low minimum wage:

> On the other hand, setting a single across-the-board minimum wage at a low level is problematic in that it could reinforce the perception that all forms of domestic work are similar and unskilled.[262]

The National Minimum Wage Bill of 2017 has been introduced to the National Assembly.[263] The preamble recognises the inequalities of South African society, the need to eradicate

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258 Deakin 2017 *ILJ* 23.
259 Deakin 2017 *ILJ* 1.
260 Webb 1912 *JPE* 981-982.
261 Du Toit and Huysamen "Implementing domestic workers' labour rights in a framework of transformative constitutionalism" 97.
262 Du Toit and Huysamen "Implementing domestic workers' labour rights in a framework of transformative constitutionalism" 98.
263 The long title states the following: "To provide for a national minimum wage; to establish the National Wage Minimum Commission; to provide for the composition and functions of the National Wage Commission; to provide for the review and annual adjustment of the national minimum

poverty, the promotion of fair and effective competition in the labour market, labour market stability and the constitutional obligation on the state and employers with reference to the right to fair labour practices for everyone. The main objective of minimum wages across the world is to eradicate poverty among the working poor.[264] The Bill refers to "worker" as an employee as defined in article 1 of the *BCEA*.[265] The bill provides for a minimum wage of R20 per ordinary hour of work from May 2018; however, domestic workers[266] are entitled to R15 per hour from 1 May 2018.[267] The Bill is not applicable to informal traders and waste pickers as they do not fall within the scope of the definition of "employee".

The Basic Conditions of Employment Amendment Bill 2017 introduces a daily wage payment for workers who work less than 4 hours a day.[268] Domestic workers that work less than 4 hours a day will be entitled to payment for 4 hours. In terms of the Bill, labour inspectors can refer matters to the CCMA, when employers do not comply with the *National Wage Act*, 2017 (when it comes into force), the *Unemployment Insurance Act* and the *Unemployment Insurance Contributions Act.*[269] This new provision can improve compliance by employers of domestic workers as any disputes may now be referred directly to the CCMA. The proposed amendment of section 68 of the *BCEA* also provides the CCMA with jurisdiction in cases where the employer fails to comply with a written undertaking in terms of this section.

In developing countries, where institutions of collective bargaining are inadequate, a national minimum wage functions as a replacement for sectoral collective agreements

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wage; to provide for exemption from paying the national minimum wage; to provide for transitional provisions in respect of farm workers and domestic workers; and to provide for matters concerned therewith. See also ILO Minimum Wage Fixing Convention 131 (1970); and para 6.4.1.1 above with reference to the minimum wage in Brazil.

264 Deakin 2017 *ILJ* 3.

265 Section 1 of the *BCEA* contains the exact definition of *employee* as provided for in s 213.

266 The definition in the Bill is the same as in article 1 of the *BCEA*. Farm workers are entitled to R18,00 per hour (see Schedule 1 of the Bill).

267 The wage of domestic workers in 2018 in Area A for domestic workers that work more than 27 ordinary hours per week is R13,05 (a monthly rate of R 2545,22) and R11,89 in Area B (a monthly rate of R2317,75). For workers who work 27 ordinary hours or less, the hourly rate in Area A is R15,28 (monthly rate R1787,80) and in other areas not mentioned in Area A, is R14,03 (monthly rate R1641,48) (see Republic of South Africa 2017 http://www.labour.gov.za/DOL/legislation/sectoral-determinations/sectoral-determination-7-domestic-workers/). The national minimum wage of R15,00 is not a huge improvement on the current wages of domestic workers and in certain areas they will be paid R15,28.

268 The new s 9A, currently clause 3 in the Bill, provides that even where an employee works for less than 4 hours a day, the employee is entitled to a payment for 4 hours.

269 See the amendment of s 64 as provided for in clause 6 of the Bill.

whereas in more developed countries it complements the existing collective bargaining framework.[270]

In addition to the establishment of the rate of a minimum wage, South Africa will have to consider the interrelationship between the set minimum wage, existing sectoral determinations and bargaining council awards.[271] It is submitted that apart from domestic workers this will have little effect on the position of informal workers, such as informal traders and waste pickers who are excluded from the definitional scope of "employee", or where a clearly identifiable employer-employee relationship is absent. It is proposed that the existing definition of "employee" read with the presumption in section 200A is determined for purposes of the application of the national minimum wage (NMW). Proposals are already made to expand the scope to include piecework, homeworkers, part-time workers, casual workers and self-employed contractors.[272] With reference to self-employed contractors this will establish a measurement to ensure that their services are remunerated at a rate in line with the NMW. In instances where waste pickers have service agreements with local authorities, this may have some impact on the rate that their services are remunerated at. The policy proposes that this is regulated by legislation and that provision is made for appropriate enforcement mechanisms.[273] Currently the lowest sectoral wage determination for domestic workers is R2205,16 per month and the highest R2422,54.[274] In the case of domestic workers, such a minimum wage may be advantageous if it is higher than the set wages in respect of the sectoral determination, and policy considerations specifically include the recognition of domestic workers and care workers as vulnerable groups.[275] However, the Bill provides for lower national minimum wages for farm workers and domestic workers of respectively R18 and R15 per hour, where the proposed national minimum wage for other workers is R20 per hour.[276]

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270 Deakin 2017 *ILJ* 9.

271 Deakin 2017 *ILJ* 24.

272 Republic of South Africa *A national minimum wage for South Africa* 96.

273 Republic of South Africa *A national minimum wage for South Africa* 97.

274 See Republic of South Africa 2017 http://www.labour.gov.za/DOL/legislation/sectoral-determinations/sectoral-determination-7-domestic-workers/. for the domestic worker minimum increases from 1 December 2016 until30 November 2017. These rates are for domestic workers that work more that 27 ordinary hours per week.

275 Currently an initial level of R3500 is proposed. Other policy considerations include the promotion and strengthening of collective bargaining; a comprehensive social security policy, and wage inequalities (Republic of South Africa *A national minimum wage for South Africa* 9, 12, 13, 25). In Brazil, studies have indicated that the minimum wage guide, with reference to the informal economy and self-employed workers, was often seen as a yardstick to determine a price in respect of products or services.

276 See Schedule 1 to the National Minimum Wage Bill of 2017.

Adequate enforcement of the NMW is of paramount importance. The policy document recommends that the current labour inspectorate system as set out in Chapter 10 of the *BCEA* be extended to include enforcement of the NMW. This will provide an opportunity for additional training to improve the skills of the inspectors, as well as the quantity of inspectors.[277]

4.4 Social protection: a conceptual overview

Women workers in the informal economy do not enjoy adequate social protection as many of them do not have access to benefits, including maternity, retirement and health benefits. This is often the result of exclusion or limited application of social security schemes based on a narrow conceptual framework that provides benefits only to those in a formal employment paradigm and those qualifying as employees in the narrow sense of the word. [278] These women workers are therefore often denied their fundamental right to social protection and/or security.

A number of countries, such as South Africa, Malawi[279] and Zambia, have, however, taken steps to extend protection to vulnerable workers and various policies and programmes are in place.[280]

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277 Republic of South Africa *A national minimum wage for South Africa* 99.

278 See para 1.1 above for the contextual scope of social protection for purposes of this study.

279 Meerendonk *et al Towards a Malawian Social Protection Floor* 8, 25, 28. Malawi represents one of the least developed countries in the world. The majority of the workforce, a full 89%, are in informal employment, and women are more likely to be engaged in the informal economy. Nearly 82% of domestic workers are women. Malawi's Growth and Development Strategy ll 2011-2016 supports the objectives of poverty reduction, the reduction of food insecurities as well as social protection measures for the poor and vulnerable.

280 Zambia has been classified as a lower middle-income country during 2011 and the country aims to become a middle-income country, such as South Africa, by 2030. In 2014, 88,6% of the employed persons were informally employed and the majority of these workers are women. The social security system, as in most SADC countries, is based on the formal employment relationship and the employment contract. Employers are responsible for maternity benefits, in terms of the *Employment Act* of 1965. Zambia has not ratified Convention 102, but the government aims to ratify all social-protection related instruments. 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, to which the government committed itself 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 endeavours to meet the diverse characteristics of workers currently excluded. Challenges in extending social protection measures to workers in the informal economy have been identified and include the following: irregular and low income; lack of trust in the institutional framework; lack of knowledge about existing provisions, institutions and procedures; absent or weak worker's organisations, isolation and fragmentation, and current exclusions from the system. The government displays a political willingness to establish a single social protection authority to

It is submitted that for workers in the informal economy the concept of social protection being a wider concept than social security, is preferred.[281] This is also in line with the ILO Decent Work Agenda. Social protection is not linked to a specific employment relationship and it is preferable to use this notion to extend protection to workers in the informal economy as they are often not recognised as employees as they are not in traditional employment relationships as defined by legislative provisions. Olivier states the following in this respect:

> It could be argued that the term social protection also encapsulates elements and rights ancillary to social security itself. Together with social security, the presence of these elements ensures adequate social protection. From a constitutional rights perspective, it is clear that there is a close interrelationship between the concept of social security and several other related concepts which constitute the bases of specific fundamental rights, such as the right to have access to land,[282] to housing[283] and to healthcare services, and sufficient food and water.[284] The interrelations of these rights, in particular in the South African context, has been emphasized by the Constitutional Court. The court has affirmed that the realisation of a particular socio-economic right – such as the right to access to housing – would require that other elements, which do at times form the bases of other socio-economic rights – such as access to land – be in place as well. These rights are mutually supportive and have a significant impact on the dignity of people and the quality of life.[285]

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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 the fact that immediate risks are often prioritised, immediate expenditures can be realised. The labour mobility of many workers in the informal economy will ensure 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 members. 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 contributions 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 households employing domestic workers and for own-account workers and owners of small businesses. See Goursat and Pelterano *Extension of social protection to workers in the informal economy in Zambia*. 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 (Republic of Zambia *National Social Protection Policy* 28).

281 See the SADC Code on Social Security 2007 (para 3.4.2.2 above), the SADC Protocol on Gender and Development 2008 P(para 3.4.2.4 above) and the SADC Charter (para 3.4.2.1 above)..

282 Section 25(5).

283 Section 26(1).

284 Section 27.

285 Olivier "The concept of social security" 26. See also *Government of the Republic of South Africa v Grootboom* 2000 11 BCLR 1169 (CC).

The starting point of the social protection framework in South Africa must be evaluated against the Constitutional framework in section 27:[286]

(1) Everyone has the right to have access to–

(a) health care services, including reproductive health care;

(b) sufficient food and water; and

(c) social security, including, if they are unable to support themselves and their dependents, appropriate social assistance.

(2) The state must take reasonable legislative and other measures, within its available resources, to achieve the progressive realization of each of these rights.

(3) No one may be refused emergency medical treatment.

Social security in South Africa and also in developing countries in the SADC region is premised on a formal employment-based relationship, and most women workers in the informal economy are excluded.[287] Work in the informal economy is diverse and it is submitted that the nine classic social security risks as initially identified by the ILO are not well suited to these women workers taking into account the vulnerabilities and decent work deficits experienced by them.[288] Specific collective risks to which these women

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286 Countries like Malawi do not have a constitutional right to social security, but this will be encompassed under the right to development. S 30(1) of this constitution provides as follows: "All persons have a right to development and therefore to the enjoyment of economic, social, cultural, and political development and women, children and the disabled in particular shall be given consideration in the application of this right." This provision is important as particular vulnerable groups such as women are given priority in the realisation of this right. S 30(2) of the constitution obliges the state to take measures to realise the right in s 30(1). Of particular importance to women workers in the informal economy is the inclusion of equality of opportunity to basic resources, education, health services, food, shelter, employment and infrastructure. However, in respect of certain measures this does not establish direct enforceable rights. The right to education (s 50), the right to property (s 28) and the right to economic activity is specifically entrenched in the constitution (Olivier *Regional overview of social protection for non-citizens in SADC* 58. See also Kanyongolo "Social security, gender and legal plurality" 122. Access to social protection in Botswana is not rights based as the constitution does not provide for socio-economic rights as found in the South African Constitution (Van Eck and Snyman 2015 *JAL* 294-316). In Tanzania, the constitution of 1977 does provide for socio-economic rights, however they are positioned under Fundamental Objectives and Directive Principles of State Policy, and are therefore not justiciable. Article 9(f) of the Constitution does mandate state authority and other agencies to ensure that policies and programmes maintain and promote human dignity. The right to work in Article 22 is enforceable; however, no one has yet based a claim on this article to force government to adhere to this provision (Ackson 2015 *AJICL* 359-382).

287 Mozambique approved ENSSB II FOR 2016-2024, a strategy to provide non-contributory social protection. This will entail expanded coverage of the child support grant and the old age grant (Falange and Pellerano "Social protection reform in Mozambique and the new basic social security system" 1).

288 Olivier, Masabo and Kalula "Informality, employment and social protection".

workers are also exposed, such as natural disasters, crop failure and wars, are not provided for.[289] Collective risks of these workers can also be linked to the specific categories of work in the informal economy. For example, waste pickers may be exposed to specific risks associated with the work that they do as a result of the hazardous circumstances that they are exposed to. It is also submitted that due to the diverse nature of the work it is envisaged that social protection measures may even vary from category to category of work in the informal economy. Women workers in the informal economy are often marginalised, and excluded from social insurance schemes, because these schemes are linked to the traditional formal employment relationship. Even in instances where women are included, they often have to discontinue their contributions as a result of their care duties and this negatively affects their continuous contributions to schemes where continuity is essential.[290]

4.4.1 Social security in South Africa

In South Africa, the social security framework is administered by the Department of Social Development, the Department of Labour and the South African Social Security Agency (SASSA).[291] In respect of South Africa social security schemes comprise social insurance, social assistance and social relief.[292]

4.4.1.1 Safe and healthy working conditions in South Africa

In developing countries and middle-income countries workers are exposed to greater risks in respect of occupational health and safety at the place of work, often because of limited resources. Poor working conditions of women in the informal economy are exacerbated by poverty, illiteracy, gender inequality, and low socio-economic status within societies.[293] In respect of all three categories of workers in the informal economy, namely domestic workers, informal traders and waste pickers, the lack of recognition as workers by governments and policy makers often transcends into the lack of regulation in respect of occupational health and safety at the place of work.

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289 Olivier, Masabo and Kalula "Informality, employment and social protection".

290 FES *Engendering social protection* 8.

291 See also Malherbe "Implementing domestic workers' social security rights in a framework of transformative constitutionalism" 117.

292 In terms of the *Non-profit Organisation Act* 71 of 1997, social relief refers to "alleviation of need of persons by means of the temporary tendering of material assistance to them". See also Olivier "The concept of social security" 205.

293 Johnstone "Informal sectors and new industries" 68.

In terms of the common law there is a duty on employers to provide safe working conditions for their employees.[294] In respect of domestic workers this means that employers must ensure a safe working environment. Internationally applicable ILO conventions include Convention 102[295] and Convention 155.[296] In respect of statutory provisions, the *Occupational Health and Safety Act* 85 of 1993 (*OHSA*) and the *Compensation for Occupational Injuries and Diseases Act* 130 of 1993 (*COIDA*)[297] contain provisions in respect of occupational health and safety at work. The long title of *Occupational Health and Safety Act* highlights the main purpose of the Act as to provide for and promote the health and safety of persons at work. Domestic workers are covered by the *Occupational Health and Safety Act*; however, street traders and waste pickers, as own-account workers, do not enjoy any protection under the auspices of *COIDA*.[298] The Act places certain duties on the employer, such as the provision and maintenance of a safe working environment that does not pose any health risks to the employees.[299] In respect of domestic workers employed by a TES, the client will be held responsible in respect of *OHSA* as the TES are excluded from the scope of coverage as an employer.[300]

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294 See Van Niekerk *et al Law@work* 93; Smit "Employment injuries and diseases" 459. S 35 of *COIDA* provides as follows: "No action shall lie by an employee or any dependent for the recovery of damages in respect of an occupational injury or disease resulting in the disablement or death of an employee against such employee's employer, and no liability for compensation on the part of such employer shall arise save under the provision of this Act in respect of such disablement or death." In *Jooste v Score Supermarket Trading (Pty) Ltd* 1999 2 SA 1 (CC), the court found s 35 to be constitutional and highlighted the importance of the Act as social legislation and its impact on the employment relationship.

295 See para 3.3.7.1.1 above.

296 See para 3.3.7.1.3 above.

297 The Department of Labour for the administration of this act.

298 Informal economy workers are also excluded from employment injury protection in most SADC countries. In Lesotho domestic workers are excluded from the *Workmen's Compensation Act* 13 of 1997, and informal traders and waste pickers are excluded as employee status is linked to a contract of employment. Malawi is currently addressing challenges in respect of employment injury protection, including the specific regulation of workers in the informal economy. In Namibia domestic workers enjoy protection in respect of the *Employees Compensation Act* 30 of 1941, but other informal economy workers are excluded as coverage is based on a traditional employer-employee relationship. In Zimbabwe informal economy workers, including domestic workers, are expressly excluded from the *Factories and Works Act* 20 of 1948 (Mpedi and Nyenti *Employment injury protection in Eastern and Southern African countries*).

299 See s 8. The Act does provide in s 9 that self-employed persons may not expose other persons affected by his/her activities to health and safety hazards.

300 Section 1 provides as follows: An employer means, subject to the provisions of subsection (2), any person who employs or provides work for any person and remunerates that person expressly or tacitly undertakes to remunerate him, but excludes a labour broker as defined by the *LRA* (this reference is made to the *LRA* of 1956).

Domestic workers are expressly excluded from *COIDA*, but casual workers are included.[301] This means that domestic workers cannot institute a claim against the fund. In respect of any potential claims domestic workers will have to exercise their common-law remedies. This regulatory framework is inadequate as the costs involved in civil litigation is high and most domestic workers will not be able to institute action against their employers in this regard. It is submitted that this limitation to section 27 of the Constitution is not justifiable in terms of section 36 of the Constitution. The question also arises whether this exclusion is in line with section 27(2) in respect of "reasonable legislative or other measures" that the state must take.[302] Arguments in support of the exclusion, namely the intimate nature of the relationship and the problematic nature of enforcement and compliance, can no longer support this exclusion. Domestic workers constitute a particular vulnerable group of workers[303] and represent a previously disadvantaged group and this exclusion is unconstitutional and represents a discriminatory practice.[304] The arguments in support of the exclusions do not hold up in the light of their inclusion in other employment laws, including the unemployment insurance legislation.[305] This exclusion also contravenes our international obligations in terms of the conventions since domestic workers are treated less favourably in this regard compared to other workers.[306] It is submitted that government, in line with article 14(2), consult with the workers and where applicable their organisations, such as SADAWU, to provide adequate protection through appropriate measures to these vulnerable workers.

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301 The Act aims to provide compensation for disabilities caused by employment injuries and diseases during employment. S 1 excludes domestic workers from the definitional scope of employee as provided for by the Act.

302 Malherbe "Implementing domestic workers' social security rights in a framework of transformative constitutionalism" 125.

303 The ILO highlighted the health and safety risks of domestic work in its report about decent work for these workers as follows: "The work tends to involve a great deal of repetition, bending and reaching, lifting of heavy objects, extremes of heat (cooking, ironing), sharp objects (knives), handling potentially toxic cleaning products and prolonged exposure to dust" (ILO *Decent work for domestic workers* 62).

304 If the *Grootboom* test (see para 4.3.2 above) in respect of reasonable state measures, namely, whether it provides for "those whose needs are the most urgent and whose ability to enjoy all rights therefore is most in peril" is applied, the exclusion by *COIDA* is unconstitutional and cannot be described as reasonable measures by the state.

305 Malherbe "Implementing domestic workers' social security rights in a framework of transformative constitutionalism" 126.

306 Article 14.

4.4.1.2 Unemployment insurance, maternity benefits and childcare

From 2003 domestic workers were included in the scope of the *Unemployment Insurance Act*[307] (*UIA*) and the *Unemployment Insurance Contributions Act*[308] (*UICA*).[309] These acts have as their essence the economic support of employees who are unemployed as a result of not being able to work for a variety of reasons. This essence is summarily explained as the purpose of the *UIA* in the following terms:[310]

> The purpose of this Act is to establish an unemployment insurance fund to which employers and employees contribute and from which employees who become unemployed and their beneficiaries, as the case may be, are entitled to benefits and in so doing to alleviate the harmful economic and social effects of unemployment.

The *UIA* and the *UICA* contain provisions on contributions to be made to the fund by employers and employees, therefore demonstrating a most straight-forward form of social protection for workers when they become unemployed through dismissal, disease or disability. These acts ensure that they are able to receive in sum the contributions they have made to the Fund.[311] Employers and employees are mandated to make contributions.[312] 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,[313] illness benefits,[314] maternity benefits,[315] adoption benefits,[316] and dependant's benefits.[317] The Act makes specific provision for domestic workers who work

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307 63 of 2001.

308 4 of 2002. The Act supplies the following definition: "Domestic worker means an employee who performs domestic work in the home of her employer, and includes a– (a) gardener; (b) a person employed by a household as a driver of a motor vehicle; and (c) a person who takes care of any person in that home." The same definition appears in the *Unemployment Insurance Act* 63 of 2001, s 1.

309 In *H S Saddiq and the Department of Labour* EQ04/2017 para 5, the Equality Court ordered the Department of Labour to ensure that their systems allow asylum seekers who have contributed to the fund to be compensated in a fair manner (para 5).

310 Section 2.

311 Section 5. In terms of s 6 the contribution is 1% of the remuneration by the employee and 1% by the employer.

312 Section 6 in the *UICA*.

313 Section 12(1)(a). A contributor is entitled to unemployment benefits where the reason of unemployment includes the termination of a fixed contact, dismissal as defined by s 186 of the *LRA*, or the employer's insolvency (s 16 (a)).

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

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

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

317 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 (s 30).

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.[318] This provision is important as it takes specific cognisance of the nature of domestic work and the reality that these workers often work for multiple employers. Specific provision is also made for domestic workers to claim unemployment benefits in the case of the death of the employer. This specific regulation once again recognises that domestic work is unlike other work.

Benefits are calculated on a sliding scale and may vary between 60% of wages for lower-income earners and a lower rate for high-income earners.[319] In respect of maternity benefits, the benefit rate is 66% of the income of the beneficiary, subject to a maximum threshold set by the Minister in line with ILO Convention 102 (1953).[320] This provision provides additional benefits for women workers during maternity leave, but it is submitted that this is still not sustainable and many women return to work prior to the four-months period allowed due to financial restraints. Informal traders and waste pickers do not enjoy any maternity benefits in respect of this Act. A contributor is only entitled to benefits when she was employed for at least 13 weeks before the application for benefits.[321] Maternity benefits are the only category of benefits that require a minimum employment period and the provision appears to be discriminatory against women during a very vulnerable time and therefore disregards any notion of solidarity in respect of this social responsibility born by women.[322] Maternity benefits do not affect a women's entitlement to other categories of benefits, but in cases where they have claimed benefits, such as unemployment, adoption or illness benefits, this may affect a claim in respect of maternity benefits.[323] This is a discriminatory provision in respect of women (only women are treated disparately in this regard and not men) who bear this social responsibility and claiming unemployment benefits should not effect a women's claim to maternity benefits.[324]

The *Unemployment Insurance Amendment Act* 10 of 2016 aims to extend coverage,[325] to amend the accrual rate of unemployment benefits and to provide for process of

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318 Section 12(1A).
319 Section 12(3)(b).
320 Section 12(3)(c)
321 Section 24 (6).
322 Olivier and Govindjee 2015 *PER* 2747.
323 Section 13(5)(a), (b) and (c).
324 Olivier and Govindjee 2015 *PER* 2747.
325 Civil servants and learners are included.

applications for maternity benefits.[326] This amendment act endeavours to bring South Africa in line with its international and regional obligations.[327] Specifically important for women workers, and in this instance domestic workers, is the amendment of section 12 of Act 63 of 2001. This section now provides for maternity benefits to be paid at a rate of 66% of the earnings of the applicant with reference to the maximum threshold. This increase shows attempts by the government to comply with international standards. Unfortunately no provision is made for own-account workers, including waste pickers and informal traders that represent a particularly vulnerable group of women. It is also submitted that domestic workers will only qualify in instances where their employer registered them with the fund. Thus the narrow scope of definition in the *UIA*, such as the notion of "employee" and reference to remuneration does not provide for atypical workers or women in dependent work as required by ILO Convention 183 or the ICESR.[328]

The *UIA* provision in respect of maternity benefits is not in line with the ILO Maternity Protection Convention 183 (2001).[329] The convention requires that member states ensure that the majority of women within the scope of the convention are able to meet the conditions,[330] and member states must provide adequate benefits for the women that are excluded through social assistance.[331] Section 24 of the amendment act provides that in the event of a miscarriage during the last trimester, or the birth of a stillborn child, the women is entitled to *full* maternity benefits. The amendment act introduces a limitation in respect of the period of employment prior to the application and requires a minimum period of at least 13 weeks.[332] Women workers who apply for benefits and have not been in employment for a period of 13 weeks before the application will be without protection. This qualification does not ensure that a large majority of women meet the requirements for benefits as required by the convention. In terms of the convention, these women must then be provided with means-tested social assistance. Section 24(4) provides for a maximum period of benefits of 17,32 weeks, and the actual benefit amount seems to be

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326 The *Unemployment Insurance Amendment Act* 10 of 2016.

327 See ILO Social Security (Minimum Standards) Convention, ILO Maternity Protection Convention 183 of 2000, ILO Recommendation 202 of 2012 on National Floors of Social Protection, the International Covenant on Economic, Social and Cultural Rights, 1996, UN Convention on the Elimination of All Forms of Discrimination against Women. Regional instruments include the SADC Protocol on Employment and Labour (2014) and the Code on Social Security in SADC. See Chapter 3.

328 Olivier and Govindjee 2015 *PER* 2745-2746.

329 See para 3.3.7.1.2 above.

330 Article 6(5).

331 Article 6(6).

332 See s 24 as amended.

dependent on the period of contributions. The question arises whether these minimum periods provide adequate protection to these workers during maternity, and if not, whether social assistance is available to them.[333]

Adequate childcare facilities are severely lacking in South Africa and this means that women workers are extremely vulnerable, as they often have to leave their children with family members or older siblings to provide childcare for their employer.[334] In the case of domestic workers, this in turn enables the women employer of the domestic worker to re-enter the labour market though the childcare service provided by the domestic worker. Section 28 of the Constitution, an absolute right, provides children with the right to care, including family and parental and alternative care,[335] and support in respect of basic needs.[336] This constitutional right is not qualified in any way and is not dependent on available resources or progressive realisation by the state, and it can be argued that government must ensure adequate childcare services in these instances. This valuable contribution by women workers to societies must be highlighted, recognised and valued within societies, at national level and globally.

Challenges domestic workers experience in respect of unemployment insurance furthermore include compliance and enforcement measures. Although domestic workers are included under the scope of coverage, receiving benefits is dependent on registration with the fund by employers. In respect of waste pickers and informal traders it is recommended that the *UIA* provides for these own-account workers to contribute to the fund. It is submitted that the collection of contributions in this regard is challenging as their income is low and often irregular; however, measures must be introduced to accommodate these own-account workers and other workers in the informal economy that are currently excluded.[337] The exclusion increases the vulnerability of these women and contributes to their marginalisation. The consequence of being excluded from maternity benefits mean that these already vulnerable women are the ones most affected by bearing children.[338] The majority of women workers in the informal economy identified

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333 See ILO Convention 102 and the ICESCR; ILO Recommendation 202 on National Floors of Social Protection. See also paras 3.3.7, 3.3.7.1.2 and 3.2.1.2 above.

334 See para 5.7 below with reference to local authorities and the provision of childcare facilities.

335 Section 28(1)(b).

336 Section 28(1)(c). These basic needs include shelter, basic healthcare services and social services.

337 Social insurance schemes that cover self-employed or own-account workers are more prevalent in the European Union (South African Law Reform Commission *Maternity and paternity benefits for self-employed workers* 7).

338 Tanner *Social justice and equal treatment for pregnant women in the workplace*.

by this study are black women and many of these women, as own-account workers, are engaged in survival activities such as waste picking and informal trading. In addition to this, statistics also indicate that black women in South Africa have the highest birth rate.[339] Due to inequalities, stereotyping and prejudices that still exist within these communities many of these women do not have control over reproduction choices and the apartheid legacy of migrant labour strategies mean that a large number of them are single mothers. These vulnerable women require state intervention with specific reference to maternity benefits. The South African Law Reform Commission invited submissions in 2017 with reference to the inclusion of self-employed persons in respect of maternity and paternity benefits with reference to South Africa's constitutional, international and regional obligations.[340] The research proposal by the South African Law Reform Commission identifies important challenges with respect to the extension of coverage to these workers, namely the challenges in respect of contributions from low-income and irregular wage earners, as well as administrative challenges such as maintaining and updating information. In 1997 an ILO case study indicated that more informal economy workers want to contribute to social insurance schemes to cover their specific needs in this regard.[341] Van Ginneken identified essential requirements for social insurance schemes for informal economy workers, namely:

(a) an association based on mutual trust; and
(b) administrative capability to ensure the collection of contributions and modalities that provide benefits.[342]

These schemes must design structures that are affordable and that meet the specific priorities of these women.

Another fundamental requirement for women workers in the informal economy with reference to contributory social protection structures is a benefit structure that is akin to

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339 South African Law Reform Commission *Maternity and paternity benefits for self-employed workers* 14.

340 South African Law Reform Commission *Maternity and paternity benefits for self-employed workers*. International instruments include the ILO Maternity Protection Convention 183 and the Social Security Convention ratified by South Africa, the Convention on the Elimination of All Forms of Discrimination against Women, the UN Convention on the Rights of the Child and the ICESCR. See also the SADC Protocol on Gender and Development and the 2030 Agenda for Sustainable Development Goals (see para 3.2.2 and para 3.4.2 above). Chapter 2 of our Constitution promotes the values of equality, human dignity and freedom and a society based on human rights, where social security for all is supported.

341 Van Ginneken *Social security for the informal sector* 8.

342 Van Ginneken *Social security for the informal sector* 9.

their specific needs and priorities and this can include childcare facilities, or access to other resources, such as housing and access to financial resources.[343]

Women in South Africa are poorer than men, have less employment opportunities than their male counterparts and their earnings are lower.[344] Women in South Africa are also mostly responsible for childcare, care of the sick and elderly, and domestic duties.[345] Women are more exposed to domestic and sexual violence, as well as to HIV and AIDS.[346] These factors contribute to their vulnerability and their marginalised position within societies. Exclusion from formal social security measures mean that that these women must often rely on informal measures; however, it is argued that these informal measures often benefit other family members whilst the women remain disadvantaged.[347] In South Africa and other developing countries various informal social security measures exist as this is often the only social protection available to vulnerable and marginalised workers. An in-depth analysis of these schemes is beyond the scope of this study, but certain aspects must be highlighted.

These measures often consist of informal saving schemes, such as *stokvels*[348] and burial societies.[349] These schemes are characterised by family and community support displaying strong notions of solidarity and are kinship-based. The mutuality of such schemes is formed through work-based circumstances.[350] The importance of these measures is that the members do have expertise in the management of these schemes, as well as in their financial aspects and this can be used when considering the extension of more formal social protection measures to those in the informal economy. When government considers extending social protection measures, informal schemes should be strengthened as a starting point or to create a framework that can bridge the binary division between the informal and formal measures of social protection.[351] In the National Development Plan

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343 See also Van Ginneken *Social security for the informal sector* 9.
344 Goldblatt "The right to social security" 34.
345 Goldblatt "The right to social security" 35.
346 Goldblatt "The right to social security" 35.
347 Kanyongolo "Social security, gender and legal plurality" 115.
348 In 2011, it was estimated that 40% of South Africans belong to a *stokvel* (Republic of South Africa *National Development Plan 2030* 376).
349 Malherbe "Implementing domestic workers' social security rights in a framework of transformative constitutionalism" 138.
350 Dekker and Olivier "Informal social security" 559.
351 This was also recommended in the Taylor report where the following was stated: "Transformation of the present social security framework should, therefore, aim at supporting and strengthening existing informal social security with the view to enhancing solidarity" (Dekker and Olivier "Informal social security" 581).

the South African government recognises the importance of these informal measures, and stated the following:

> The government should use these existing mechanisms as a basis for establishing and developing appropriate institutional support to promote social protection for the informal sector.[352] This recognition by government is one of the first steps that Kaseke mentions when consideration is given to create an institutional framework for integration between formal and informal measures.[353]

4.4.1.3 Social assistance

There are a number of grants administered in terms of the *Social Assistance Act*[354] (hereafter SAA), namely the child support grant,[355] foster child grant,[356] care dependency grant,[357] disability grant,[358] a grant in aid,[359] a war veteran's grant[360] and the grant for

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352 Republic of South Africa *National Development Plan 2030* 375.

353 Kaseke *The challenges of extending social security to the poor*. See also Dekker and Olivier "Informal social security" 588.

354 13 of 2004. See also the *South African Social Security Agency Act* 9 of 2004. In terms of s 5 of the *Social Assistance Act*, the criteria for social assistance include that applicants meet the specific requirement of each grant and must reside in South Africa. The Minister may prescribe additional requirements in respect of means testing; age limits; disabilities; various measures of proof, and measures to prevent fraud.

355 Section 6. Requirements for the grant requires the applicant to be the primary caregiver, Persons eligible for this grant include South African citizens, permanent residents and refugees. The applicant must reside in South Africa. Clause 6 of the regulations requires the child to be the biological child of the applicant or legally adopted; if not, the applicant will only be entitled to the grant in respect of six children. The applicant must meet the means test and must not be employed in order to take care of the child. This grant is awarded to children born after 31 December 1993. Children between 7 and 18 years must attend school. The value of the grant is R380 per month. To qualify for the grant a single parent must not earn more than R45 600 per year and if married a combined income of not more that R92 200. In respect of documents required applicants without identity documents can supply an affidavit. See Regulation 6 of the regulations No R 898 2008; Regulation No R591 2009 and Regulation No R511 2016.

356 The value of this grant is R920 per month. Requirements in respect of this grant includes that the child must be under 18 years of age and applications must be supported by a court order. This grant is not means tested. See also s 8.

357 The value of this grant is R1600 per month and the grant is means tested.This grant is provided to the caregivers of children with disabilities who cannot be cared for by a state institution. A medical officer must evaluate the disability and confirm the child requires permanent care. See s 7 of the *SAA* and regulation 8.

358 The value of the grant is R1600 per month and recipients must be between 18 and 59. The person must be unable to work and a medical officer must make the determination. This grant can be of a temporary or a permanent nature. One cannot receive another grant at the same time or be cared for in a state institution. Means testing applies. See s 9 of the *SAA* and Regulation 3.

359 The value of the grant is R380 per month. The recipient must require care and attendance due to a physical or mental condition (see s 12 and regulation 5). The recipient can also receive the grant for older persons or the war veteran's grant as this grant is in addition to assist people who require a caregiver.

360 The value of the grant is R1620 per month and recipients must be over 60 or disabled.

older persons.[361] In 2016 a total number of 16 953 937 beneficiaries received social assistance.[362] Social relief is also available for persons in dire need who require temporary assistance.[363]

The majority of grant recipients are women and specifically African women. These grants are administered by the South African Social Security Agency (SASSA). Recently the South African Institute for Race Relations reported that more than 17 million people are currently dependent on social grants compared to the 15,5 million employed people.[364] Grants are aimed at vulnerable people in need of support.[365] Grants are means tested, except for the foster child grant and the grant in aid. Applicants in most instances must be South African citizens, permanent residents[366] or refugees currently residing in South Africa. Most

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361 The value of this grant is R1600 per month for persons 60 years and older. Persons older than 75 receive an additional R20 per month. The grant is means tested. See s 10 and regulation 2.

362 The child support grant was received by 11 934 065 beneficiaries, the care dependency grant by 130 572, the Foster Care Grant by 481 217, the disability grant by 3 196 258 and the grant for older persons by 3 196 258. In Brazil, the Bolsa Família, a means-tested programme, alleviates poverty and provides cash transfers and access to services such as healthcare to more than 14 million households. This integrated approach supports sustainability as it also provides for strategies to exit the scheme. The Bolsa Verde scheme is intended for persons in rural areas, and is a top-up programme in addition to the Bolsa Família (Ortiz, Schmitt and De *Social Protection Floors* 16, 19).

363 Temporary assistance includes assistance while waiting for the child care grant to be processed; the occurrence of a crisis or disaster; when one does not qualify for a grant, but still needs assistance; where a disability lasts for less than 6 months, and when the breadwinner in the family has died. Beneficiaries cannot simultaneously receive a grant and social relief. Social relief is granted for three months and may be extended for another three months if so required (see s 13 of the Act and regulation 9). For further particulars, see http://www.sassa.gov.za.

364 Raborife 2017 https://www.news24.com/SouthAfrica/News/more-people-on-grants-than-with-jobs-five-years-later-20170621.

365 Section 27(1)(c) of the Constitution provides for social assistance if people are unable to support themselves and their dependants.

366 In *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 (6) SA 505 (CC), the court had to decide whether permanent residents like the applicants in this matter were entitled to the social grants in question despite the fact that they were not South African citizens as required in the provisions of both the *SAA* and the *Welfare Laws Amendment Act* 106 of 1997. The court adopted an interpretation as part of its purposive approach to interpreting the rights, which essentially entails that the court seeks to determine "the core values that underpin the listed fundamental rights in an open and democratic society based on human dignity, equality and freedom, and then to prefer the interpretation of a provision that best supports and protects those values". The court held further that the right of access to social security, including social assistance for those unable to support themselves and their dependents is entrenched because human beings are to be valued and to have their basic needs in society met in order for such a society to be regarded as one built on the cornerstones of human dignity, freedom and equality (para 52). The court held further that permanent residents also contribute to the welfare system and taxes of the country just as much as normal citizens do, so to deny them social benefits makes them seem inferior to citizens as a result of what the legal provisions in question encompass (para 74). This creates the situation where permanent residents may have to seek assistance from friends, family and their communities who may need social assistance themselves, placing an undue burden on them and affecting the dignity of permanent residents as a result. The court held that

domestic workers will qualify for social assistance as their minimum incomes provided for by the sectoral determination complies with the means test. Informal traders and waste pickers that comply with the criteria will also be eligible for social grants. Women workers in the informal sector can qualify for the child support grant; in 2016, 98% of recipients of this grant were women.[367] More than half of poor female-headed households received this grant. The value of this grant is very low and there is a discrepancy between the value of this grant and the foster care grant that is not substantiated. This grant does have an impact on the well-being of the children, reduces income poverty, specifically for the very poor and women-headed households, but also provides the recipients with decision-making abilities within the household.[368] All three categories of workers may also qualify for the foster care grant and this grant is not means tested. In instances where these workers care for a disabled child, they may apply for the care dependency grant. In respect of these workers, care will often then be provided by a third party as the domestic worker, informal trader or waste picker is working. These cash transfers do provide relief; however, they do not automatically affect the redistribution of labour.[369] Quality public services, including healthcare, access to education, access to resources and childcare will provide these women with improved agency to participate in all aspects of productive life.[370] In many instances the domestic worker will be providing care services for the family of the employer.[371]

Domestic workers, waste pickers and informal traders are excluded from the *COIDA*. They may however benefit from the disability grant if they are no longer able to work due to a mental or physical disability.[372] This grant can also play an important role in instances

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such a denial of social assistance to permanent residents was unfair as it marginalised permanent residents in a great way (para 77). Mokgoro J stated: "I accept that the concern that non-citizens may become a financial burden on the country is a legitimate one. And I accept that there are compelling reasons why social benefits should not be made available to all who were in South Africa irrespective of their immigration status. The exclusion of all non-citizens who are destitute, however, irrespective of their immigration status fails to distinguish between those who become part of our society and have made their homes in South Africa and those who have not. It may be reasonable to exclude from the legislative scheme workers who are citizens of other countries, visitors and illegal residents, who have only a tenuous link with this country" (paras 58-59).

367 Patel *et al* "Gendered social protection and economic outcomes of social protection in South Africa". Statistics indicate that 35,7% of poor households with children were recipients of this grant (Stats SA *Poverty trends in South Africa* 37).

368 Alfers, Lund and Moussié "Informal workers and the future of social protection" 12-13.

369 Alfers, Lund and Moussié "Informal workers and the future of social protection" 13.

370 Alfers, Lund and Moussié "Informal workers and the future of social protection" 13.

371 See also Malherbe "Implementing domestic workers' social security rights in a framework of transformative constitutionalism" 131.

372 See also Malherbe "Implementing domestic workers' social security rights in a framework of transformative constitutionalism" 131.

where these women are injured at work (albeit that the costs of the accident is then transferred to the general tax payer rather than the employer).[373] The current value of this grant is R1600 per month. In terms of *COIDA* the highest percentage of previous income paid as a grant is 75%, thus a domestic worker would have to earn R2133,33 per month to receive an amount equal to the maximum amount of the grant.[374] This is also applicable to waste pickers and informal traders.

The grant for older persons is particularly important for vulnerable workers when they reach the age of 60 as South Africa does not have a national retirement funding scheme.[375] Statistics indicate that 71,9% of persons 60 years and over received the grant and 94,5% of poor females over 60 years of age received the grant in 2015.[376] Informal economy workers are vulnerable low-income earners and there is no statutory obligation on them to join and contribute to a pension or provident fund.[377] Employers of domestic workers are also not obliged to contribute to a retirement fund in respect of these workers. Many of the workers in this or a similar category will still be working as domestic workers, waste pickers and informal traders after reaching retirement age as they do not enjoy sufficient protection with reference to adequate retirement provisions as enjoyed by many workers in the formal economy. They will have to meet the criteria of the means test, but it is submitted that most of these workers will qualify as their earnings are below the single limit of R73 800 annually (monthly income of R6150) and combined income of not more than R147 600 annually (monthly income of R12 300). Women workers in all three categories have limited access to other retirement benefits and this grant for older persons plays an important role in alleviating poverty among these women. Even if these workers were to contribute to retirement funds their low and irregular wages would result in limited benefits.

In respect of informal traders the grant enables them to purchase goods to sell and to earn a living. In 2012 the Department of Labour invited submissions in respect of the

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373 See also Malherbe "Implementing domestic workers' social security rights in a framework of transformative constitutionalism" 131.

374 See also Malherbe "Implementing domestic workers' social security rights in a framework of transformative constitutionalism" 131. See also schedule 4 of *COIDA.*

375 See also Malherbe "Implementing domestic workers' social security rights in a framework of transformative constitutionalism" 132. Retirement funds in South Africa can be categorised in two ways, namely defined benefits or defined contributions. Private retirement funds are not discussed in this study as the majority of informal economy workers do not have access to these funds.

376 Stats SA *Poverty trends in South Africa* 36.

377 See also Malherbe "Implementing domestic workers' social security rights in a framework of transformative constitutionalism" 132.

establishment of a retirement fund for domestic workers and farm workers.[378] This decision was based on the recognition that these workers have unique needs and require specific provisions. Although this would provide for domestic workers and farm workers, other workers in the informal economy, such as informal traders and waste pickers, would remain excluded from any coverage, whilst public role players focus on a specific category of worker in the informal economy. This approach has both benefits and drawbacks as tailor-made solutions are not uniform or provide comprehensive coverage, and vulnerable workers in the informal economy may be excluded. On the other hand tailor-made solutions in this regard can address challenges and vulnerabilities associated with these categories of work.

The National Treasury initially issued a discussion paper on retirement reform in 2004.[379] The paper recognises the challenges in respect of workers in the informal economy without access to any retirement funding. The paper proposed a National Savings Fund (NSF)[380] for workers in the informal economy, including domestic workers and other low-income earners.[381] The focus of the 2012 approach, specifically on domestic workers and farm workers as opposed to all low-income earners, indicates a more progressive approach towards universal coverage and it is perhaps more viable to identify categories of vulnerable workers and progressively extend the protection to other vulnerable workers. The fund will address unfair discrimination and no limitations will be set in respect of gender, race, and health or employment status. The NSF payments would be in addition to the grant for older persons for people who qualify for this grant. It was envisaged that low-income earners would, in combination with the grant, receive 75% of their income of the year before retirement. Unfortunately this plan has not realised and these workers are still without adequate protection. Contributions by workers in the informal economy will be challenging as their income is low and often irregular.

4.4.1.4 Healthcare

Healthcare is an important component of social protection. Women workers in the informal economy who suffer from ill health will not be able to earn a livelihood. Section 27(1) of the Constitution provides that everyone has the right to have access to healthcare

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378 GN 736 in *GG* 33480 of 20 August 2010.
379 Republic of South Africa *Retirement fund reform* 6.
380 Characteristics of the fund would include affordable administration costs, competitive investment returns and accessibility (Republic of South Africa *Retirement fund reform* 21, 23).
381 Republic of South Africa *Retirement fund reform* 22.

services.[382] Particularly important for these women is adequate maternity healthcare. Section 28 of the Constitution provides that every child has the right to basic nutrition, shelter, basic healthcare services and social services. Unlike section 27, this right accorded to children does not have an internal limitation. Section 24(a) of the Constitution is also important for domestic workers, informal traders and waste pickers as the section provides a right to an environment that is not harmful to their health or well-being. Before 1994, South Africa's fragmented healthcare system mostly benefited the white population in the country. After 1994 attempts were made to redress the inequalities created by apartheid. Free primary healthcare was made available for pregnant women, children under six years of age and people with disabilities.[383] Health facilities were extended to rural areas through the infrastructure of clinics, and community-based services were launched in poorer areas.[384] Despite the abovementioned constitutional provisions women workers in the informal economy still experience unequal access to healthcare[385] and maternity protection and specifically informal traders and waste pickers experience limited access to water and sanitation at their places of work, and where they reside in rural areas the same conditions are prevalent. The HIV and AIDS pandemic has also had an impact on women and the world of work, and the demand for care work, both paid and unpaid, has increased.[386]

The ILO Convention Social Security (Minimum Standards) 102 (1952) lists lack of healthcare and sickness as one of the nine classic risks. Healthcare services in South Africa are divided between public and private healthcare, where a small percentage of middle- and high-income earners enjoy private health care and the poor are dependent on the public system funded by the state. The public system is extremely underresourced and provides care to more than 80% of the population.[387] This illustrates the persistent

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382 Section 27(2) obligates the state to take reasonable measures, including legislative measures, within its available resources to give effect to these rights. S 27(3) states that no one may be refused emergency medical treatment. See also *Soobramoney V Minister of Health, KwaZulu – Natal* 1998 1 SA 765 (CC). In this case the court stated: "[A] healthy life depends upon social interdependence: the quality of air, water and sanitation which the state maintains for the public good; the quality of one's caring relationships which are highly correlated to health; as well as the quality of healthcare and support furnished officially by medical institutions and provided informally by families, friends and communities (para 54). The *National Health Act* 61 of 2003 provides a framework for a uniform health system in the country in line with constitutional rights.

383 See the White Paper on National Health Insurance No 123 *GG* 39506 11 December 2015 5.

384 See the White Paper on National Health Insurance No 123 *GG* 39506 11 December 2015 5.

385 Mpedi, Smit and Klinck "Health care in South Africa" 237.

386 FES *Engendering social protection*.

387 Jobson 2015 https://www.khulumani.net/active-citizens/item/1164-the-health-system-in-south-africa-actions-to-secure-the-right-to-health-in-south-africa.html.

inequalities in South Africa along racial and gender lines. HIV infection rates are higher among women in South Africa, often as a result of gender norms; rape in South Africa is among the highest in the world and incidence of domestic violence is common.[388] Social and cultural norms within societies contribute to the fact that the health needs of women are not adequately addressed in South Africa and healthcare services are specifically lacking in respect of women workers in the informal economy. The empowerment of these women requires programmes and policies designed to address issues specific to these women.

South Africa currently envisages universal health coverage through the National Health Insurance scheme (NHI).[389] This fund aims to cover all South Africans, regardless of their income or employment status, and will contribute to the alleviation of poverty and the promotion of equality. Public and private healthcare providers will be included and the current disparities between public and private care will be eliminated to promote equality. The scheme will mostly be funded through taxes and low-income earners will not contribute directly to the scheme; however, persons earning above a threshold amount will be legally obliged to contribute. Individuals may continue to contribute to their private medical schemes, but will also have to contribute to the NHI. NHI payments will be higher for high-income earners. Employers will match the contributions of the employees and ensure that contributions are made by employees, similarly to UIF contributions. The fund will cover all South Africans, legal residents, refugees and asylum seekers with valid permits. Temporary residents and foreign nationals will not be covered. All workers in the informal economy will benefit from the scheme although low-income earners will not contribute directly to the fund, supporting a notion of solidarity. However, implementation is planned over a 14-year period and will occur in three stages. The system will abolish all direct out-of-pocket payments in the public hospitals. An important aspect of the NHI is the recognition of an integrated and interrelated public health structure that includes

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388 Jobson 2015 https://www.khulumani.net/active-citizens/item/1164-the-health-system-in-south-africa-actions-to-secure-the-right-to-health-in-south-africa.html.

389 The envisaged NHI, a non-profit public entity, will aim to provide access to comprehensive quality, affordable health services for all South Africans despite their socio-economic status. Reasons for the establishment of this fund include the inequality between private and public healthcare services, the current poor quality of care in public health facilities in public services, the high cost of healthcare in South Africa and the increase of out-of-pocket payments in the country. Cosmetic surgery, expensive dental procedures and diagnostic procedures excluded by approved guidelines will not be covered; however, the scheme aims to provide preventative, promotive, curative and rehabilitative services. Objectives include preventing disease and promoting health. See the White Paper on National Health Insurance No 123 *GG* 39506 11 December 2015; Department of Health *Understanding National Health Insurance*.

provision of electricity, access to water and sanitation. This approach will be beneficial to workers in the informal economy as they often lack access to these resources. It is submitted that this scheme will provide equal opportunities for all in respect of adequate health services in South Africa and promote the constitutional values of equality and human dignity as well as social justice, and supports section 27(1)(a) of the Constitution.

Good governance is vital for the success of the NHI, and must include monitoring and evaluation processes. Several attempts have been made in South Africa to provide for a comprehensive healthcare system for all from 1929 until 2017.[390] The goal of the National Development Plan (NDP) for 2030 is formulated as follows in this respect:

> South Africa will have a life expectancy of at least 70 years for men and women; the generation of under-20 should be largely free of HIV; the quadruple burden of disease will have been radically reduced compared to the previous decades, with an infant mortality rate of less than 20 deaths per 1000 live births, and the under-5 mortality rate of less than 30 per 1000 live births.[391]

The provision of adequate lifelong healthcare is an important component of social protection.[392] The implementation of the NHI scheme is imperative to provide equal quality healthcare services to all South Africans to ensure an equal society within a transformative constitutional framework.

Domestic workers in South Africa currently enjoy limited social security protection. They do qualify for maternity benefits, sickness benefits, unemployment benefits, invalidity benefits and survivor benefits under the scope of the UIF. They do qualify for the grant for persons through the Social Assistance Act and have access to the public care system. They are however excluded from employment injury benefits. Informal traders and waste pickers do have access to the public healthcare system and to the grant for older persons; however, they remain excluded from all other social security benefits with reference to the ILO Convention as they are excluded from the definitional scope in employment legislation.

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390 These attempts include the 1997 Social Health Insurance working group and the 2002 Committee of Inquiry into a Comprehensive Social Security System as well as the 2009-2014 Ministerial Advisory Committee on NHI. See the White Paper on National Health Insurance No 123 *GG* 39506 of 11 December 2015.

391 See the White Paper on National Health Insurance No 123 *GG* 39506 of 11 December 2015 7.

392 FES *Engendering social protection* 7.

4.4.1.5 Other measures

Other social protection measures do exist, but an analysis of their impact on informal women workers is beyond the scope of this study. It must be noted that these workers are included under the scope of the *Road Accident Fund Act* 56 of 1996 (as amended) in respect of traffic accidents. South Africa also launched an *Expanded Public Works Programme* (EPWP) in 2004. The goal of this programme was to target specific vulnerable categories, and women were identified as the largest beneficiaries.[393] The National Development Plan of 2012 aimed to provide a framework for decent work, sustainable livelihoods and to alleviate poverty and eradicate income inequality. The recommendation for women included the following:

(a) public employment must include a focus on women;
(b) women should participate in the transformation of the economy and be empowered;
(c) women must be supported a leaders in society;
(d) all barriers such as cultural and educational challenges must be adequately addressed; and
(e) quality early childhood education can relieve women of their unpaid care duties and allow them to enter the labour market.[394]

Unfortunately studies have indicated that public works programmes do not offer sustainable long-term solutions and the design often does not allow for improving workers' employability. A more integrated approach is required.[395]

4.5 Concluding remarks

When we consider social protection for women workers in the informal economy certain important factors must be considered. These factors include the feminisation of poverty,[396] the impact of poverty which affects women more adversely, the burden placed on women in respect of care and domestic work,[397] the fact that more women are prevalent in atypical work,[398] and limited access to resources.[399] It is imperative that

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393 Parenzee and Budlender *Who cares?* 11, 12, 13.
394 Parenzee and Budlender *Who cares?* 23.
395 Parenzee and Budlender *Who cares?* 30.
396 Women are also more likely to work in low skilled jobs, specifically in the informal economy.
397 Maternity is also a "life cycle contingency" that only women face (FES *Engendering social protection* 9).
398 This affects their contribution and benefits in respect of social insurance employment based schemes.
399 Many women in the informal economy represent previously disadvantaged groups and do not have access to land or other resources, including access to credit of other financial services. Access to

strategies and policies aimed at addressing the decent work deficits and vulnerabilities of women recognise the structural inequalities at all levels and aim at the empowerment of these women to ensure equality and decent work for them.[400] Fredman states the following:

> Women's ability to access socio-economic rights such as housing, education and health, is shaped by the gendered nature of social institutions, including legal, cultural, customary and traditional factors. The objectives of social protection policies must include measure to address poverty and vulnerabilities of these women.[401]

Coordination between social protection objectives and measures, gender equality and empowerment strategies are required.[402] Social protection measures for these women must promote substantive equality.[403] This will require an emphasis on protective and preventative measures as well as on promotion of transformative gender measures. Transformative gender measures must address structural inequalities and redress imbalances.

If we consider the extension of labour and social protection measures, conceptual exclusions in existing legislative provisions, policies and regulations must be addressed in the first place. Conceptual presumptions as to the notion of employee will probably not benefit informal traders or waste pickers as own-account workers. However, in instances where local authorities have concluded agreements for waste pickers to render services to these authorities, the following factors may be indicative of the work relationship, namely the economic dependency of the waste picker on the local authority,[404] whether the person only works for that local authority.[405] For instance the local authority may even direct the manner in which the services must be rendered and therefore also exercise a manner of control.[406]

Innovative and tailor-made provisions in respect of social protection measures must include specific benefit packages compatible to the need of women workers in the informal

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education is also considerable challenge that these women face, due to gender inequalities and discriminatory practices and norms (FES *Engendering social protection* 9.

400 FES *Engendering social protection* 7.

401 Barrientos and Hulme "Social protection for the poor and poorest" 3.

402 FES *Engendering social protection* 9.

403 See para 1.3 above.

404 See s 200A(e) of the *LRA*. See also para 2.5 above.

405 See s 200A(g). See also para 2.5 above.

406 See s 200A(a) and (g). In Brazil, where the local authorities even provide protective clothing for waste pickers, subsection (f) can also be indicative of an employment relationship. See para 5.6 below with reference to the regulation of waste pickers in South Africa and para 6.3.2.3 below for the regulation of waste pickers in Brazil.

economy and allow for contribution structures to accommodate their irregular and low income.[407] The importance of social protection in respect of poverty alleviation must be highlighted. International organisations have adopted social protection strategies and developing countries have established various social protection programmes in line with the sustainable development goals, briefly summarised as no poverty, no hunger, good health, quality education, gender equality, clean water and sanitation, decent work and reduced inequality.[408] Generic benefits will often be universal and support certainty, and specific regulation of identified categories may be more fragmented and pose more challenges with reference to regulation and enforcement. However, the changing nature of work and the diversity thereof may require a more categorical approach to address the specific vulnerabilities of various categories of work.

Social protection measures aimed at providing protection to women workers must address specific gender issues in order to be successful. Policies must focus on the disadvantages suffered by these women and a gender-neutral approach will be inadequate to address their specific disadvantages in line with substantive equality.

The comprehensive notion of social protection encompasses most of the sustainable development goals. Research has indicated that social protection measures are influenced by politics; however, these measures can transform politics.[409] The National Health Insurance scheme in South Africa that will provide quality healthcare to the poorest is an example of a political response to increase social protection measures through a top-down approach. This approach by the government is aimed at addressing poverty, inequality and vulnerabilities of the poor in South Africa. Innovative ideas have also influenced policies in respect of social protection measures and innovation is important in respect of the diverse nature of work in the informal economy, specifically in respect of targeting mechanisms and contribution and benefit challenges.[410]

The law has an important role to play as an instrument to bring about social change. This supports the notion of "living law", defined as the outcome of social processes, the way in which people act within and outside legal institutions.[411]

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407 Olivier, Masabo and Kalula "Informality, employment and social protection" 12.
408 Lavers and Hickey *ESID* 2015 3.
409 Lavers and Hickey *ESID* 2015 3.
410 In Chapter 6 innovative measures are considered to extend protection, with reference to Brazil and India.
411 Hepple 2012 *SALJ* 253.

It was shown that the mere extension of existing provisions to cover workers in the informal economy does not consider the intimate and unique nature of work in the informal economy nor the distinct challenges associated herewith.

This intimate and distinct nature of domestic work is characterised by the private home as a workplace. Duties such as cleaning, cooking and childcare are often performed within the boundaries of this workplace. The intimate nature of the workplace, and often also that of the duties performed, can establish a strong emotional bond between the employer and the worker, as many aspects of their lives are shared. The fact that the workplace is often also the home of the workers adds to the uniqueness of the relationship. This highly unequal relationship can also be ascribed to the above factors and renders the worker particularly vulnerable as a dismissal can also lead to workers losing their accommodation, while emotional aspects include the fact that the workers are often an integrated part of the family. If one accordingly considers the South African position it appears to provide an adequate regulatory framework in respect of the regulation of these workers; however, in practice there are various challenges, including the enforcement of the legislative provisions and a disregard for the notion of substantive equality. The unique feature of domestic work, the private dwelling as workplace, poses many challenges in respect of enforcement, including access for inspection, and often contribute to the reluctance by governments to provide a regulatory framework.[412] These provisions do not consider the socio-economic circumstances of these workers and therefore cannot provide adequate protection.

It can also be argued that domestic workers and the regulation of their work in South Africa support a notion of transition from the informal economy to the formal economy, but currently enforcement measures remain inadequate and they do not enjoy full labour and social protection. It is also submitted that the sectoral determination is inadequate as it represents a mere extension of existing legislative provisions and an innovative and tailor-made solution is needed and would be more appropriate. Currently very little is done in respect of promoting domestic work as valuable work and to recognise the value of the work on all levels, including its economic value. Policies that regulate domestic work must also promote gender equality as the majority of these workers are women and part of a previously disadvantaged group.

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[412] Du Toit and Huysamen "Implementing domestic workers' labour rights in a framework of transformative constitutionalism" 69.

I support Du Toit's argument that formalising or mainstreaming domestic work will require more than just the enforcement of existing rights to fair labour practices and collective bargaining.[413] For example, before the collective bargaining framework in the individual domestic relationship can be successfully utilised, the societal prejudices towards these workers must be addressed. These include recognition of the value of domestic work, equality (including gender equality) and voice and representation through various platforms. This will include a notion of social justice that is broader in focus than just a work relationship and which must include underlying societal issues.[414] This is true of domestic work across the world as this category is often represented by disadvantaged groups within societies and countries.

It can be argued that this legal framework of the sectoral determination only supports formal equality and not substantive equality, as these workers and their social and economic conditions must be scrutinised to ensure policies and laws are responsive to their needs.[415] This approach can be perilous for all women workers in the informal economy and their circumstances require closer scrutiny to adequately regulate their positions and to ensure equality.

Domestic workers enjoy some protection; waste pickers and informal traders, as own-account workers without a distinctive employee-employer relationship, are excluded from most labour and social protection measures and innovative and tailor-made solutions are required.[416] It is vital for these workers to mobilise and organise for better conditions despite who the bargaining partners are in any given circumstance.[417]

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413 Le Roux "Advancing domestic workers' rights in a context of transformative constitutionalism" 60.

414 Le Roux "Advancing domestic workers' rights in a context of transformative constitutionalism" 60.

415 Le Roux "Advancing domestic workers' rights in a context of transformative constitutionalism" 59; Van Niekerk *et al Law@work* 122.

416 Transformative constitutionalism is a commitment to transformation of our society. In 1998, in *Soobramoney v the Minister of Health, KwaZulu-Natal* 1998 1 SA 765 (CC) para 8 the court stated: "We live in a society in which there are great disparities in wealth. Millions of people are living in deplorable conditions and in great poverty. There is a high level of unemployment, inadequate social security, and many do not have access to clean water or adequate health services. These conditions already existed when the Constitution was adopted and a commitment to address them, and to transform our society into one in which there will be human dignity, freedom and equality, lies at the heart of our new constitutional order."

417 See Chapter 7.

CHAPTER 5
REGULATORY FRAMEWORK FOR INFORMAL TRADERS AND WASTE PICKERS IN SOUTH AFRICA

5.1 Introduction

Women informal traders and waste pickers are among the most vulnerable workers in the informal economy as they are excluded from labour laws and social protection measures, including social security schemes, in most countries.[1] Their lack of legal recognition as workers is primarily based on narrow conceptual frameworks and the lack of a distinctive employer-employee relationship. The consequence of these workers not being recognised as employees result in their exclusion from the contemporary labour law framework. However, since informal traders and waste pickers are categories of workers in the informal economy they are just as deserving of decent work which includes adequate labour and social protection. This chapter will consider the regulatory framework for these workers outside the scope of labour laws. *Ad hoc* and fragmented regulation in South Africa form the rationale for choosing studies from various different municipalities with reference to informal traders and waste pickers, to illustrate the regulation challenges and, where available, to consider best practices.

If we consider the position in the continuum of these three categories of workers within the contemporary framework, domestic workers enjoy more protection with reference to labour and social protection measures. This chapter will also illustrate that within the categories of waste pickers and informal traders, internal hierarchies exist.

Waste pickers, work in various public spaces, including streets, landfills and dumping sites. They remain unrecognised and marginalised as workers in most countries.[2] Their livelihood is based on collecting, sorting, recycling and selling of waste. Their contributions to the environment, local governments and wider society as well as to economies are undervalued.[3] As an occupation, waste picking does not require high levels of education or skill and thus allows for easy entrance. Across the world, women waste pickers generally represent previously disadvantaged groups. However in South Africa, waste

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1 For 2017 statistics on these categories of workers in South Africa see para 4.1. In October 2016 it was reported that waste pickers, numbering between 60 000 and 90 000 in South Africa, save the country more than 53 million dollars with reference to waste management (Sanchez 2016 https://www.afkinsider.com/134271/cash-from-trash-south-africas-waste-pickers-get-organized-more-formalalized/).

2 See para 1.2.1.1 above for characteristics of waste pickers.

3 Dias and Samson *Informal economy monitoring study sector report: Waste pickers* 1.

collection is highly gendered and women are mostly excluded from formal waste management systems, leaving them on the edges of informality within the waste management system.[4] Accurate statistics are not available in South Africa as these workers are not regulated or registered.[5] The compilation of statistics of workers in the informal economy is vital in respect of the extension of labour and social protection through legislation, but also for policy makers. Many challenges exist in this regard, as the various forms of work in the informal economy are often disguised and/or hidden and not registered or recorded.[6] The ILO has prioritised a revision of the classification of work as currently determined by the International Classification of Status in Employment to align the classification with the changing nature of work.[7]

According to estimates, the financial value of the waste sector in South Africa is around R15 billion and the country generates approximately 108 million tons of waste annually.[8] The regulatory framework often lacks a comprehensive and uniform framework and is dependent on discretionary policies of waste management drawn up by various local authorities. The concept of decent work is not reserved only for those in formal employment and the reduction of deficits for those workers in the informal economy is high on the ILO agenda.[9] This means that the ILO's four objectives, namely employment opportunities, workers' rights, social protection and representation are of the utmost importance to waste pickers and informal traders. This is supported by the ILO's statement that the needs of those in the informal economy are the greatest.[10] The regulatory framework with reference to informal traders and waste pickers often falls within the decision sphere of local authorities, and public role players must be encouraged to design integrative and inclusive policies and strategies to include these workers and to protect their livelihoods.

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4 Schenck *et al* 2017 *CDJ* 3.

5 See para 4.1 above; Schenk, Blaauw and Viljoen *Unrecognised waste management experts* 42. Currently available statistics in South Africa indicate that there are 534 716 street traders in South Africa and more than 61% of these are women. Statistics also indicate that 37,2% of workers in the informal economy are women (Stats SA 2017 https://www.statssa.gov.za/publications/P0211/P02111stQuarter2017.pdf 1).

6 Carré, Negrete and Vanek *Consideration for revision of the international classification of status in employment* 4, 8.

7 Carré, Negrete and Vanek *Consideration for revision of the international classification of status in employment* 1.

8 GreenCape 2016 https://www.greencape.co.za/assets/MIRs%202016/GreenCape-Waste-MIR-2016.pdf 10, 18.

9 See para 3.3.8 above.

10 See para 3.3.4 above.

Apartheid legislation impacted on informal trading. The *Group Areas Act* 41 of 1950 prohibited black South Africans from accessing viable trading areas and the *Black (Urban Areas) Consolidation Act* 25 of 1945[11] restricted economic activities in so-called "black" areas.[12] Street trading was prohibited in Johannesburg until the enactment of the *Business Act* 71 of 1991. The act endeavoured to provide for regulation and restrictions of street trading through enabling by-laws.[13] Informal traders are an important part of urban economies and they offer affordable services and goods in public spaces. The regulatory framework is fragmented and is reliant on various policies of local authorities. Currently a comprehensive regulatory framework, including comprehensive national legislation, is lacking in South Africa. Informal trading is considered a form of urban informal livelihoods.[14]

Their low and irregular income as well as their exclusion from labour law render them particularly vulnerable. Women workers are in a more precarious position and this can be ascribed to gender inequalities that impact on their entrepreneurship. These inequalities refer to access to education, cultural and patriarchal practices within societies, lack of economic empowerment and the responsibilities placed on them in respect of unpaid care and domestic work.[15] As informal traders and waste pickers they are also exposed to greater risks regarding occupational health and safety challenges at their various workplaces. These workers often stay in informal settlements without adequate basic services and this increases their vulnerability.[16]

The South African Constitution has tasked local government with the promotion of economic and social development at local level. Municipalities interpreting their constitutional mandate have adopted different approaches with reference to the informal economy. It must be realised that municipal regulations have an effect on the "workplace"

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11 Section 37 regulated trade in locations or native villages.

12 See also Skinner "Law and litigation in street trader livelihoods" 127.

13 Pieterse 2017 *PER* 5.

14 Chen, Roever and Skinner 2016 *Env&Urb* 337. The United Nations estimate that by 2050 more than 66% of all people worldwide will be urbanised.

15 Ogando, Roever and Rogan 2017 *IJSSP* 437, 438. In Zimbabwe, poverty is distinctively gendered and more than 70% of informal traders in this country are women. The majority of these women are the sole breadwinners of their respective families. Through their trading they alleviate extreme poverty within their households. Despite obligations on government to empower these workers, and an increasing dependency by Zimbabwe on the income generated by the informal economy, these workers are constantly harassed by enforcement officers. City policies are adversarial and focus on criminalising these activities, instead of adopting an integrated approach. Government should consider the precarious position of these workers and adopt policies that extend access to basic services, infrastructure and social protection measures (Nyakanyanya *News Deeply Women and Girls* 1).

16 Brown and Roever *Enhancing productivity in the urban informal economy* 8.

of informal workers. Laws, strategies, policies on informal trading as well as the regulation of waste management can be very restrictive and can destroy livelihoods of informal workers.[17] The diverse nature of informal trading and waste picking also contributes to the challenges for policy makers to effectively regulate these activities. In some instances unprecedented steps have been taken by local authorities to develop integrated policies to include these workers and in other instances the enforcement or rights, including fundamental rights, have provided protection to these workers. Brown and Roever recently described the nature and diversity of the urban informal economy as follows:

> The informal economy is the lifeblood of many cities. It provides jobs for many, in some cities the majority of urban workers, provides flexible services to many urban residents, and makes significant contributions to urban economies. The informal economy demonstrates vibrancy, flexibility and entrepreneurship, and supports local supply chains and global exchange. However, diversity makes the informal economy hard to capture in conventional urban policy processes.[18]

5.2 The Constitution

Apart from the fundamental rights, Chapter 7 of the Constitution has an impact on the livelihoods of these workers. The supremacy clause also provides that all laws and conduct must be consistent with the Constitution.[19] This implies that laws and conduct by municipalities can be tested against the Constitution. Section 152(1) of the Constitution lists the objects of local government, and a municipality must strive to achieve these objects within its financial and administrative capacity. These objects include the following:

(a) a democratic and accountable government;

(b) provision of services in a sustainable manner;

(c) the promotion of social and economic development;

(d) to promote a safe and healthy environment; and

(e) to encourage involvement of communities and community organisations in local government matters.[20]

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17 Roy states the following: "The planning and legal apparatus of the state has the power to determine … what is informal and what is not, and to determine which forms of informality will thrive and which will disappear. State power is reproduced through the capacity to construct and reconstruct categories of illegitimacy" (Roy 2005 *JAPA* 147).

18 Brown and Roever *Enhancing productivity in the urban informal economy* 1.

19 Section 2.

20 Section 152.The participation by communities is a vital element of any democracy. This process must involve communities and groups from within and should be a platform for social dialogue

Local governments can play an important role in the creation of an enabling framework to extend the necessary protection to these workers.[21] In South Africa, despite the consultative provisions of social dialogue, the regulation of informal traders still represents arbitrary enforcement and regulation.[22] Municipalities must strive to align these objectives with policies and strategies.[23] The conduct of municipalities must be in line with our Constitution and the state's obligations to fulfil the fundamental rights.[24] The actions of local authorities can be tested against the Constitution;[25] for instance, in the *South African Informal Traders Forum (SAITF) v City of Johannesburg*,[26] the Constitutional Court found the conduct of the City of Johannesburg with reference to the traders to be inconsistent

where parties can express their views and influence the decision making process (Sinxadi and Campbell 2015 *JPA* 372, 373).

21 This enabling framework must be wide in scope and should include adequate social protection measures, such as childcare facilities, access to water and sanitation.

22 SERI *The end of the street?* 50.

23 See s 2 of the Constitution.

24 Section 7(2) states the following: "The state must respect, protect, promote and fulfil the rights in the Bill of Rights." The state thus incurs a positive obligation with reference to the fundamental rights.

25 The following constitutional court case consists of four separate judgments, although it did not specifically deal with informal traders, but with the impact of actions by cities with reference to vulnerable and poor people. *Dladla v City of Johannesburg* [2017] ZACC 42 (1 December 2017) dealt with a constitutional challenge in respect of the validity of certain rules (for instance, conditions for living in a shelter provided by the city, such as a lock-out rule – residents had to leave the shelter and could only return at 17:30, and family separation rules, prohibiting men and women from living together and separating children from their care-givers) imposed by the City of Johannesburg and the Metropolitan Evangelical Services (MES), a non-profit company. The applicant in this case submitted that the rules impaired their human rights, including the right to dignity (s 10), freedom and security of the person (s 12) and privacy (s 14), and that these limitations were not justifiable on terms of s 36 (para 26). The court found the rules infringes the human rights of the applicants and are unjustifiable (para 52). Cameron J stated: "The reasonableness of public treatment of the vulnerable cannot depend only on the fact that what they are getting is better than that of others who are worse off. The question is not whether other are worse off, but whether the measures the City is taking here, now, with this vulnerable group, affords them sufficient care, respect and dignity. That question must be answered each time in concrete terms, within the framework the Bill of Rights set, including available resources" (para 88). The judgment should serve as a warning to local authorities and other organs of state with reference to the design and implementation of policies that impair the rights of vulnerable poor people as underserving. The city of Johannesburg was ordered to pay the applicants' cost in all three courts where the matter was heard. The Centre for Applied Legal Studies (first *amicus curiae*) in their arguments specifically referred to women's access to housing, the international law concerns in this regard and that states must address the issue with reference to women through tailor-made solutions. They argued that the right to adequate housing is also integral to women's overall well-being. Because women are primarily responsible for taking care of the home, they are particularly vulnerable to gender-based violence outside the home, and adequate housing is necessary for their social empowerment (para 29). Despite these gendered submissions before the court, the court did not address the specific gender dimensions presented by this case and the issue of family separation and its impact on women and their child-rearing responsibilities as sole care-givers, enforcing patriarchal gender roles. See also Hodgsonr 2017 https://www.thedailyvox.co.za/constitutional-court-encourages-change-attitude-towards-joburgs-urban-poor-tim-fish-hodgson/.

26 2014 4 SA 371 (CC).

with the Constitution. Other applicable constitutional provisions will be analysed within the regulatory framework as discussed below.

5.3 The *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 (PEPUDA)

One of the greatest challenges that women working as informal traders and waste pickers face is harassment from local authorities and enforcement officers. Protection in respect of harassment is of paramount importance to ensure decent work for these workers. Informal traders and waste pickers are excluded from coverage under the *EEA* as they do not fall within the scope thereof, as they are not defined as employees.[27]

They do however enjoy protection in respect of section 9 of the Constitution and the *Promotion of Equality and Prevention of Unfair Discrimination Act* 4 of 2000 (*PEPUDA*).[28] *PEPUDA* binds the state and all persons,[29] but the Act then expressly excludes any person to whom the *EEA* applies.[30]

The Act supports the notion of substantive equality and defines equality as follows:

> [It] includes the full and equal enjoyment of rights and freedoms as contemplated in the Constitution and includes *de jure* and *de facto* equality and also equality in terms of outcome.[31]

The Act prohibits unfair discrimination based on race, gender, and/or disability, and prohibits hate speech, harassment, and dissemination and publication of information that unfairly discriminates.[32] For women workers in the informal economy that are excluded from the *EEA*, the Act contains important provisions.

Unfair discrimination based on gender includes the following with specific reference to women:

(a) gender based violence;

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27 Section 1 defines an employee as follows: "… any person other than the independent contractor who– (a) works for another person or for the State and who receives, or is entitled to receive, any remuneration; and (b) in any manner assists in carrying on or conducting the business of an employer"; *employee* and *employment* have corresponding meanings. S 9 of the Act provides for the inclusion of an applicant for employment for purposes of ss 6, 7 and 8.

28 In terms of the long title of this Act it was enacted to give effect to s 9 of the Constitution and the preamble refers to the eradication of social and economic inequalities, especially those that are systemic in nature, which were generated in our history by colonialism, apartheid and patriarchy, and which brought pain and suffering to the great majority of our people.

29 Section 5(1).

30 Section 5(3).

31 Section 1.

32 Sections 7-12.

(b) female genital mutilation;

(c) the system of preventing women from inheriting family property;

(d) any practice, including traditional, customary or religious practice, which impairs the dignity of women and undermines equality between women and men, including the undermining of the dignity and well-being of the girl child;

(e) any policy or conduct that unfairly limits access of women to land rights, finance, and other resources;

(f) discrimination on ground of pregnancy;

(g) limiting women's access to social services or benefits, such as health, education and social security;

(h) the denial of access to opportunities, including access to services or contractual opportunities for rendering services for consideration, or failing to take steps to reasonably accommodate the needs of such persons; and

(i) systemic inequality of access to opportunities by women as a result of sexual division of labour.[33]

Subsection (g) is particularly important in respect of social protection measures. Both informal traders and waste pickers are excluded from social insurance schemes. These exclusions are also based on restrictive conceptual, contributory and benefit frameworks. Most social security laws are based on a traditional formal employment relationship with a clearly identifiable employer and do not make provision for own-account workers. These women also do not enjoy any maternity protection and during this time they have no access to an income as own-account workers.

For these workers the struggle is often not so much about higher wages, but rather a struggle about access to resources to earn a living.[34] If local authorities deny these women access to opportunities as informal traders or waste pickers this can constitute unfair discrimination in terms of the Act. With reference to women waste pickers in Johannesburg, it is submitted that they will be able to institute a claim for unfair discrimination based on section 8 of *PEPUDA* in instances where the local authorities deny them their livelihoods by awarding tenders to private companies to provide recycling services without any consultation, engagement or transparency.[35] These actions will impair the human dignity of these women and their families. Women waste pickers also represent a previously disadvantaged group as the majority of these workers are black

33 Section 8.

34 Narayan and Chikarmane "Power at the bottom of the heap" 61.

35 Section 5 provides that the Act binds the state and all persons. This confirms the vertical and horizontal application of *PEPUDA.*

women. It is submitted that a potential unfair discrimination claim can be based on section 8(e), (g), (h) and (i).[36] With reference to subsection 8(e), such an action against the local authorities could include unfair gender discrimination as a policy or conduct that unfairly limits access of these women workers to finance and resources. The abovementioned proposed action against local authorities would also be covered by subsection 8(h). This section specifically provides for unfair gender discrimination by the denial of access to opportunities.

Section 8 also provides for actions that limit women's access to social services or benefits, including health services. Denying these workers access to basic services such as sanitation and health facilities can be constituted as unfair discrimination based on gender. If the private companies chosen by the authorities to provide the recycling services to the city predominantly consist of males, section 8(i) can be applicable in respect of a claim for unfair discrimination on the ground of gender.

Any unfair discrimination claim based on *PEPUDA* is subjected to the burden of proof in section 13 of the Act.[37] When determining the fairness or unfairness of the discrimination, factors such as the impairment of discrimination on human dignity,[38] the impact of discrimination[39] and the societal position of the complainant must be considered.[40] The societal position includes an analysis of patterns of disadvantages suffered by the person or the group that they belong to. Women waste pickers and informal traders in South Africa represent a previously disadvantaged group, both as women and as black people, and therefore discrimination against these women is often multidimensional in nature, based on various grounds, including race and gender. Local authorities will have to indicate to what extent they have taken reasonable steps to address the disadvantage that results from the prohibited grounds and steps taken to accommodate diversity.[41]

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36 For 2017 statistics on these categories of workers in South Africa see para 4.1.

37 Section 13 provides the following: "If the complainant makes out a prima facie case of discrimination– (a) The respondent must prove, on the facts before the court that the discrimination did not take place as alleged; or (b) the respondent must prove that conduct is not based on one or more of the prohibited grounds. (2) If the discrimination did take place– (a) on a ground in paragraph (a) of the definition of 'prohibited grounds' then it is unfair, unless the respondent proves that the discrimination is fair; (b) on a ground in paragraph (b) of the definition of prohibited grounds then it is unfair– (i) if one or more of the conditions set out in paragraph (b) of the definition of 'prohibited grounds' is established; and (ii) unless the respondent proves that the discrimination is fair."

38 Section 14(3)(a).

39 Section 14(3)(b).

40 Section 14(3)(c).

41 Section 14(3)(i) and (ii).

Equality courts will have jurisdiction in such instances. In respect of waste pickers and informal traders it is important to note that the act allows for proceedings to be instituted by "any person acting as a member of, or any interest of, a group or class of persons".[42] This allows for organisations representing the interests of these workers to assist with the institution of proceedings in terms of the Act and promotes the legal empowerment of these women. The Act also places an obligation on the state and constitutional institutions to provide assistance to any claimant under the Act to ensure that the claimant is directed to the appropriate forum.[43] It is clear that the Act recognises the vulnerabilities of the claimants in these instances.

The equality court has wide powers, and orders specifically applicable to waste pickers and informal traders with reference to the abovementioned potential claims include the following: an interim order,[44] a declaratory order,[45] order for the payment of damages,[46] an order restraining unfair discrimination practices,[47] an order to make specific opportunities available to the complainant,[48] an order for implementation of special measures to address the unfair discrimination[49] and an order directing reasonable accommodation of a group or class.[50]

It is also submitted that women informal traders and waste pickers will enjoy protection under *PEPUDA* in respect of discriminatory practices by local authorities threatening their livelihoods. Such practices can include harassment, unlawful removal of their goods, denial of access to waste sources and unnecessary, unfair and/or cumbersome registration procedures. Discriminatory practices in policies and legislative provisions can be declared unconstitutional since the Constitutional Court can test the validity of these provisions, including the actions of local authorities, with reference to these workers.[51]

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42 See s 20 (a).
43 See s 20(9).
44 Section 21(2)(a).
45 Section 21(2)(b).
46 Section 21(2)(d). An order for damages may include consideration for the impairment of dignity.
47 Section 21(2)(f).
48 Section 21(2)(g).
49 Section 21(2)(h).
50 Section 21(2)(i).
51 Section 7(2) of the Constitution refers to the state's duties and obligations to "respect, protect and promote the rights in the Bill of Rights"; s 8 provides that the Bill of Rights is applicable to all laws and binds all organs of state. S 8(2) provides for horizontal application where applicable, depending on the nature of the right and the nature of the duty imposed.

5.4 The South African National Development Plan (NDP) and informal economy workers

South Africa's National Development Plan (NDP) aims to eliminate poverty and reduce inequalities by 2030.[52] The plan aims to create an inclusive social protection system to eradicate poverty and promote equality.[53] The population growth rate in South Africa is decreasing, the birth rate is declining and life expectancy is increasing.[54] The result of this is that our demographic profile consists of a large youth and working population, similar to other emerging economies such as Brazil and India.[55]

The NDP proposes to establish an Unemployment Assistance Fund to provide benefits *inter alia* to workers in the informal economy who have not contributed to the fund, but can prove that they worked for a specified period.[56] The Plan refers to the informal sector or informal employment instead of the preferred concept of informal economy and thus creates uncertainty with reference to the scope. However, one of the aims of the NDP is to establish clear conceptual framework in this regard.

Challenges with reference to the extension of social security measures such as occupational health and safety protection relates to the financial burden and who the responsible role players must be. The NDP recognises the challenges, and proposes that solutions are also to be found in the formal sector, as these sectors are interdependent.[57]

The following policy proposals for the extension of occupational health and safety measures to workers in the informal economy in South Africa have been made in the NDP:

(a) to redesign existing schemes, systems and regulations to extend coverage to a large number of workers in informal employment;

(b) to identify linkages and establish industry-based funds or group insurance to cover workers in the informal economy through financial support from funds from the formal economy;

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52 Republic of South Africa *National Development Plan 2030* 24.

53 The Plan recognises five important functions of social protection, namely protective measures, preventative measures, promotive measures, transformative measures and development measures (Republic of South Africa *National Development Plan 2030* 355).

54 Republic of South Africa *National Development Plan 2030* 98.

55 Republic of South Africa *National Development Plan 2030* 98.

56 Republic of South Africa *National Development Plan 2030* 371.

57 Republic of South Africa *National Development Plan 2030* 373.

(c) to improve statistical data on occupational injuries, risks and hazards in the informal economy;

(d) for local government and municipalities to play an increasing role in the management of occupational health and safety for the informal economy; this role must include the empowerment of these workers with reference to specific risks associated with specific work;[58]

(e) for municipalities to join forces with the private sector to improve working conditions and ensure that safety equipment is provided; and

(f) to establish alternative measure for implementation and enforcement of health and safety standards for those in the informal economy.

The above policy considerations are vague, but show that the NDP recognises that there is an urgent need to improve the understanding of the scope and nature of the informal economy in South Africa. It also recognises that government has an important role to play in the extension of social protection but that other role players, such as social partners and communities, are necessary in this regard.

5.5 The regulatory framework for informal traders in South Africa

The right to earn a livelihood means that workers such as informal traders must have access to resources and equal opportunities. In a wider sense it also consists of social relationships at various levels, including households and societies.[59] This right also includes limiting exposure to risks and managing these risks.[60] Evictions and relocations often have a negative impact on informal traders' right to earn a living.[61] In South Africa the regulatory framework is largely dependent on fragmented policies implemented by the various municipalities. In many instances these policies are adversarial and punitive in nature. As discussed above, workers enjoy protection under the Constitution with reference to the fundamental rights, and Chapter 7 of the Constitution is applicable with reference to the local government, as municipalities are responsible for the regulatory framework that encompasses these workers.

National legislation that has an impact on informal traders include the *Business Act* 71 of 1991, but a comprehensive and uniform legislative framework that provides for these

58 This suggests a tailor-made approach to categories of workers in the informal economy,
59 Dias 2016 *Env&Urb* 2.
60 Dias 2016 *Env&Urb* 2.
61 Roever and Skinner 2016 *Env&Urb* 4.

workers is lacking.[62] In other words, it is the economic activity that is regulated here, rather than the position of the worker.

5.5.1 The Business Act 71 of 1991

The *Business Act* 71 of 1991 is part of the national regulatory framework applicable to the livelihood of street traders. The long title of this Act states that it regulates licensing and the carrying on of businesses and matters related thereto. The act does not contain a definition for street traders, however it contains a definition of "employee" similar to that in section 213 of the *LRA*.

The act is more concerned with punitive provisions and the criminalising of activities than with creating a participatory framework, and thus is outdated in its views. It was enacted before the new constitutional dispensation and still reflects apartheid policies. It does not address the challenges experienced by the traders. The punitive approach by government in this regard affects the livelihood of these traders through the criminalising of activities that were at the time deemed illegal.[63] Section 152(1)(d) of the Constitution provides that local government must strive to promote a safe and healthy environment, and subsection (e) specifically provides for social dialogue (involvement) with communities and community organisations; however, this is not reflected in the *Business Act*. The Act does neither provide for social dialogue, nor for any involvement or consultation with the informal traders or their organisations.[64]

The *Business Act*[65] allows for the payment of a fine and even a sentence of three months imprisonment in respect of traders operating in so-called restricted areas. It further allows for the confiscations of all goods and even moveable structures used by the informal trader.[66] By focusing on a punitive framework, the contribution and value of informal

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62 In 2013 the Department of Trade and Industry released the Business Licensing Bill, 2013 to replace the *Business Act*. Although the preamble provided for an enabling framework, the harmonisation of procedures and simplifying business licensing procedures, the Minister also stated that the objective of this bill was to "deal with illegal traders and semi-illegal practices". See also Skinner C "Law and litigation in street trader livelihoods" 139. The Bill is a continuation of the punitive nature of regulation of informal traders; for instance, clause 27 provides for a penalty not exceeding ten years for contravention of clause 19 for fronting practices, and clause 25 provides for licensing contraventions of the Bill. The much criticised bill is currently being reviewed.

63 Chen, Roever and Skinner 2016 *Env&Urb* 338.

64 Participation in this regard refers to engagement processes to involve the community in all decision making that has an impact on them. This process of participation by the community then allows for redistribution of power as they are actively involved in decision making that affects their futures and this can result in social reform. This will allow informal traders to be involved in decisions that directly affect their livelihoods and promotes transparency within public administration. See also s 195(g) of the Constitution; Sinxadi and Campbell 2015 *SAJPA* 372, 373.

65 71 of 1991. See s 6A.

66 Section 6A.

traders are undermined and the exclusions in terms of labour laws exacerbate this prejudicial position of informal traders.

The *Business Act* in section 6A(1) does contain a number of enabling provisions such as the following:

> (b) A by-law made under this subsection other than a by-law contemplated by paragraph a(ii),[67] shall not
>
> (i) restrict the carrying on of the business of street vendor, pedlar or hawker to
>
> (aa) specified hours or places; or
>
> (bb) specified goods or services …
>
> (c) no by-law made under this section shall–
>
> (i) require a street vendor, peddler or hawker to hold a license, permit, authority, certificate, or approval in respect of such business
>
> (ii) prohibit the carrying on of such business–
>
> (aa) within a specified distance from any specified place or point;
>
> (bb) at any place for longer than a specified period;
>
> (cc) if the business concerned is not periodically moved from place to place …

The *Business Act* empowers local authorities to make by-laws for the supervision control, restriction and the prohibition of street trading in certain specified areas.[68] It is important to note that abovementioned by-laws are subordinate to the *Business Act* and provisions that are in conflict with the Act will be invalid.[69]

A landmark decision was obtained from the High Court (KZD) in July 2015.[70] The Legal Resource Centre assisted a 65-year-old informal trader and the sole breadwinner of eight dependents, Mr John Mpini Makwicana. His goods were confiscated by a police officer when the applicant allegedly failed to produce a trading permit. The applicant in this matter was also a member and leader of various street traders' organisations[71] and

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67 Section 6A. These by-laws can restrict and prohibit trading in certain areas, such as a church or building declared a national monument. By-laws under this section can also regulate and supervise street trading.

68 See s 6A.

69 See also Rautenbach and Malherbe *Rautenbach and Malherbe Constitutional Law* 232.

70 *Makwickana v eThekwini Municipality* 2015 3 SA 165 (KZD). Mr J Makwicana's name was incorrectly spelled as Makwickana in the judgment.

71 The applicant was the chairman of the Traders against Crime Association and the Deputy President of the Masibambasane Traders' Association (*Makwickana v eThekwini Municipality* 2015 3 SA 165 (KZD) para 1).

brought the application in his personal capacity and in terms of section 38(c) and (d) of the Constitution.[72] He also acted in the public interest. The court recognised the right of street traders as

> a group in a poverty-stricken socio-economic class to challenge the validity of laws and practices prevailing in the informal trade sector.[73]

The applicant challenged the constitutionality of section 6A(1)(d) of the *Business Act* and the eThekwini Municipality By-Law, and specifically the fact that the Act does not provide for a limit in respect of a fine.[74] The applicant also claimed compensation for an amount of R775 for the impounded goods. The applicant also challenged section 6(A)(1)(d)(ii) of the Act as it is ill-defined and does not provide for adequate procedure in respect of the removal and consequent impoundment of goods.[75] Both these sections provide authorities with unfettered powers to exercise the above rights and this unfair discretion negatively effects the ability of the informal traders to earn a livelihood.[76]

Local authorities thus have an unrestricted discretion in respect of the amount of the fine imposed and this often is not proportional to the seriousness of the infringement.[77]

The informal traders in this area are mostly indigent black Africans who are constantly harassed and intimidated by authorities.[78]

The court recognised that provisions of the *Business Act* can be remedied by subordinate legislation, such as by-laws.[79] The court had to decide whether section 35 of the current

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72 The application was brought in terms of the applicant acting as a member of, or in interest of a group or class of persons and as anyone acting in the public interest.

73 Para 2.

74 Section 6(A)(1)(d) states the following: "A by-law made under this subsection– (i) may, for any contravention thereof or failure to comply therewith, prescribe a penalty of a fine or imprisonment for a period not exceeding three months."

75 This subsection provides as follows: "A by-law made under this subsection– (ii) may provide for the removal and impoundment by an officer of any goods, receptacle, vehicle or movable structure (aa) which he reasonably suspects is being used or intended to be used or has been used in or in connection with the carrying on of the business of street vendor, pedlar or hawker; and (bb) which he finds at a place where in terms of a by-law under subsection (1)(a)(ii) or (iii), the carrying on of such business is restricted or prohibited and which, in his opinion, constitutes an infringement of such law, whether or not such goods, receptacle, vehicle or movable structure is in the possession or under the control of any person at the time of such removal or impoundment.

76 Para 35(b). The Constitutional Court has stated repeatedlly that wide discretionary powers with no expressed constraints defeat the objectives of the Constitution. See *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs, Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC) para 47, although these cases dealt with s 25 of the *Aliens Control Act* 96 of 1991.

77 Para 35(a).

78 Para 121.

79 Para 41.

by-laws,[80] which provides for the removal and impoundment of goods, meets the constitutional challenge and specifically the challenges with references to sections 9 (equality), 25 (property) and 34 (access to courts).

Section 35 of the By-law allows for the removal of the traders goods, "upon the mere suspicion, reasonably held, that the informal trader has contravened a provision in the By-law", without access to a hearing and the goods are then sold without any notification to the trader. The court stated in this regard:

> Although s 35(1) confers a power to impound only, the first respondent's officials effectively confiscate the impounded goods. The right to a refund and the return of the goods remains merely theoretical for as long as the court proceedings are not finalised before the goods are disposed of. Even though the applicant was entitled to return of his goods after the magistrates' court had directed the first respondent to release them to him and such release became impossible once the first respondent had disposed of them, the first respondent tendered no compensation for the goods to the applicant. Only as a result of access to court via this application did the applicant eventually elicit from the first respondent at the hearing a possible tender for compensation. The luxury of litigation is not an option for every street trader whose property is impounded.[81]

Access to courts is specifically problematic for traders as they do not have the necessary financial resources. In addition, every day away from their stall results in a loss of wages. The court found that section 35 of the by-law limits the constitutional right of access to courts, in respect of the impoundment as well as the subsequent disposal of the property for alleged contraventions, without the supervision of and judicial officer or any applicable tribunal or forum.[82]

In respect of section 25 of the Constitution, the court stated the following:

> To deprive street traders of their property permanently, s 35 of the By-laws has to overcome additional hurdles of fair procedure, rationality and proportionality.[83]

The court stated the following with reference to equality in para 115 of the judgment:

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80 eThekwini Municipality: Informal Trading By-Law, 2014. Section 35(1) of the By-law states the following: "An authorised official may remove and impound any goods of an informal trader which he or she reasonably suspects is being used, has been used or is intended to be used for or in connection with informal trading which is in contravention of this By-law or any other applicable law.This section authorises the removal of and impoundment of good on a mere suspicion of informal traders trading in contravention of the law. The section allows the removal and impoundment for all contraventions and does not differentiate between various degrees of contraventions. See also *Makwickana v eThekwini Municipality* 2015 3 SA 165 (KZD) para 80.

81 Para 84.

82 Para 91.

83 Para 96.

> Not only Africans and other black people are street traders. White street traders may also be discriminated on the ground of their socio-economic status. Facially the By-law is racially neutral. However, apartheid layered poverty over race. The degree of coincidence or intersectionality of race with socio-economic status results in the greatest impact being on Africans. As the population with the largest component of poor people the impact is deeper and more expansive than on any other race group … As street traders their discrimination is ostensible and direct on the grounds of their socio-economic status. However, subversively and indirectly race remains an additional ground of discrimination in appropriate instances. Recognising socio-economic status as a direct and primary ground includes everyone who is poor and a street trader, irrespective of race, gender, ethnic origin, age or any other potential ground of discrimination. Recognising race acknowledges that for black people and Africans in particular discrimination is doubly compounded.

African women are even more disadvantaged. The court stated that the infringement by the By-laws of the constitutional rights contributes to the prejudice of these poor and vulnerable traders and section 35 discriminates directly and indirectly against poor black people.[84]

The court also found that section 39 of the By-law that indemnifies the municipality against any damages or compensation for anything done *bona fide*, is unconstitutional.[85] This means that traders can now at least be compensated for lost goods. This would require that the informal traders are informed of the infringement of the law, before removal, impoundment and then disposal of the goods.[86] The By-law clearly lacks procedural fairness in the removal, impoundment and disposal of goods of these traders. Section 35 infringes on the constitutional right of access to property as the impoundment and disposal is found to be "irrational" and "arbitrary".[87] The impoundment of goods also infringes on the right of these traders to trade.[88]

The court in its judgment with reference to the *Zondi* case[89] stated:

> Street traders are similarly situated to the African owners of livestock and all other Africans whose systematic impoverishment an powerlessness are traceable to their loss of land before and after 1913.[90]

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84 Para 122 and 124. S 35 of the By-law discriminates against the traders in respect of s 9(3) of the Constitution.

85 Para 124. This provision infringes ss 9, 12, 22, 25.

86 Para 96.

87 Para 99.

88 Para 102. See also s 22 of the Constitution.

89 *Zondi v MEC for Traditional Local Government Affairs* 2008 3 SA 589 (CC). This case dealt with the impoundment of stray livestock.

90 Para 88.

The judgment illustrates that by-laws must be in line with the Constitution; if they do not, they exceed their mandates and will be declared unconstitutional.[91]

Section 33 of the Constitution provides everyone with the right to administrative action that is lawful, reasonable and procedurally fair. Just administrative action is also applicable to informal traders, in respect of decisions taken by local authorities that are not procedurally fair and adversely affect the rights of these traders. Actions by local authorities include decisions by municipalities to close trading areas without any consultation with the traders and without any reasonable justification to deny them the opportunity to earn a living.[92]

It is thus submitted that informal traders have a right to just administrative action, meaning it is lawful,[93] reasonable[94] and procedurally fair.[95] Before *Makwickana v eThekwini Municipality*[96] cases dealt mainly with the infringement of fundamental rights and the constitutionality of laws, including By-laws. The notion of just administrative action in the context of informal vendors can provide a remedy. This can be applicable where decisions have been made with reference to the issuing, suspension or revocation

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91 See also s 153(3). According to this section a by-law that is in conflict with national or provincial legislation is invalid.

92 Harvey *et al Compendium of WIEGO and SEWA case studies* 4.

93 This will include that the authority act within the scope of given powers (Kohn *Using administrative law to secure informal livelihoods* 10).

94 This will include rationality and proportionality, where rationality refers to a legitimate purpose to be achieved by the provisions. *PAJA* in s 6(f)(ii) provides that rationality is not present when "the action itself– (ii) is not rationally connected to (aa) the purpose for which it was taken; (bb) the purpose of the empowering provision; (cc) the information before the administrator; (dd) the reasons given for it by the administrator". Proportionality is not defined in the act, but what constitutes a reasonable decision was highlighted in *Batho Star Fishing (Pty) Ltd v Minister of Environmental Affairs and Tourism* 2014 4 SA 490 para 45. The court listed factors such as (a) the nature of the decision; (b) the identity and expertise of the decision maker; (c) factors relevant to the decision; (d) the nature of competing interest applicable; (e) reasons provided; and (f) the impact of the decision on the lives and well-being of those affected. Confiscating the goods of street traders adversely affects their ability to earn a livelihood and affects the well-being of all those concerned, including their dependents, specifically in instances where a fine would be an appropriate sanction. A fine may be a more proportionate sanction in instances of certain contraventions of by-laws since the confiscation and impoundment of goods will directly affect the ability of street traders to earn a living and support their dependents.

95 In s 33 administrative justice is entrenched as fundamental right. This section provides for reasons when rights are adversely affected. S 33 also provides that national legislation should give effect to the rights in s 33. The *Promotion of Administrative Justice Act* 3 of 2000 was enacted for this purpose and one of the Act's objectives is to give effect to the constitutional right. The act also aims to create a culture of accountability, openness and transparency. The Constitution seeks to prevent the injustices of the past by protecting individuals against unlawful administrative action. See also Currie and De Waal *The Bill of Rights handbook* 641-642. Procedural fairness encompass the principle that a person must be heard, and the decision maker must be impartial (Kohn *Using administrative law to secure informal livelihoods* 10).

96 2015 3 SA 165 (KZD).

of licenses;[97] the use of public spaces and the allocation of trading areas; the confiscation and impounding of goods,[98] and the imposing of fines and other penalties.[99] The *Promotion of Administrative Justice Act* (PAJA)[100] applies to administrative action[101] which "materially and adversely "affects the rights of any person and provides that it must be procedurally fair.[102] Informal traders can thus institute a claim in this regard based on PAJA. Within the framework of judicial review,[103] section 8 of the Act provides for an order that is "just and equitable". This wide discretion with reference to remedies includes directing the decision maker to provide reasons, the setting aside of the administrative action, compensation and even an order substituting or varying the administrative action. In instances where workers in the informal economy are adversely affected by decisions or/and exercise of public power which falls outside the ambit of administrative action, it can be construed as a direct constitutional challenge, as was the case in *Makwickana v eThekwini Municipality*.[104]

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97 According to Hoexter, these issues surrounding licensing can qualify as administrative action (Hoexter *Administrative law in South Africa* 184).

98 The court in *Makwickana v eThekwini Municipality* 2015 3 SA 165 (KZD) paras 68 and 75 clearly stated that the impoundment of goods of a street trader falls within the scope of administrative action.

99 In *Dawood v Minister of Home Affairs; Shalabi v Minister of Home Affairs and Thomas v Minister of Home Affairs* 2000 3 SA 936 (CC), the court in para 47 stated: "If broad discretionary powers contain no express constraints, those who are affected by the exercise of the broad discretionary powers will not know what is relevant to the exercise of those powers or in what circumstances they are entitled to seek relief from an adverse decision. In the absence of any clear statement to that effect in legislation, it would not be obvious to a potential applicant that the exercise of the discretion conferred upon the … officials … is constrained by the Bill of Rights and, in particular, what factors are relevant to the decision … If rights are to be infringed without redress, the very purposes of the constitution are defeated." See also *Democratic Alliance v eThekwini Municipality* 2012 2 SA 151 (SCA) where the court stated: "The fundamental principle, deriving from the law itself, is that the exercise of all public power, be it legislative, executive or administrative – is only legitimate when lawful." See also s 1 of PAJA that expressly excludes certain matters from the scope of the act, including the executive powers or functions of the National Executive, the Provincial Executive, the executive powers of a municipal council, legislative functions of Parliament, judicial functions with reference to s 166 of the Constitution and a decision to institute or continue prosecution.

100 3 of 2000.

101 Section 1 defines administrative action as "any decision taken, or any failure to take a decision, by– (a) an organ of state, when– (i) exercising a power in terms of the Constitution or a provincial constitution; or (ii) exercising a public power or performing a public function in terms of any legislation; or (b) a natural or juristic person, other than an organ of state, when exercising a public power or performing a public function in terms of an empowering provision, which adversely affects the rights of any person and which has a direct, external legal effect."

102 Section 3. The fairness component in this section entails the following: adequate notice, a reasonable opportunity to make representations, a clear statement of the administrative action, adequate notice of any right of review or internal appeal and adequate notice to the right to request reasons (see also s 5 with reference to reasons).

103 The procedure for judicial review is prescribed in s 7 of *PAJA*.

104 Kohn *Using administrative law to secure informal livelihoods* 21.

The court in *Makwickana v eThekwini Municipality*[105] stated that legislation must clearly state the extent and conditions of powers to enable the public to assess whether the act committed was within the scope of powers.[106] The court in *Makwickana*, with reference to the *Zondi* case, stated that the impoundment of the property of informal traders is an administrative act and a challenge of this act must follow the procedure described in section 7 of *PAJA*.[107] The right to just administrative action will also include the right to be heard before the impoundment of the property of street vendors.[108] With reference to informal vendors the following statement in *Zondi*[109] is important:

> It is a fundamental element of fairness that adverse decisions should not be made without affording the person to be affected by the decision a reasonable opportunity to make representations.

The format of such opportunity should preferably be determined by all role players and this includes the nature thereof, for instance whether a mere interaction on the street would suffice as an opportunity to make representations.[110] The court[111] found that the impounding of the goods without a hearing and authorisation was *ultra vires* as it violated section 6(2)(a)(i)[112] and section 6(2)(c)[113] of *PAJA*, as well as the concept of legality in section 1(c) of the Constitution.

Informal traders and their associations are often unaware of their remedies within an administrative framework. Empowerment programmes must be designed to inform these traders and their organisation of their legal rights under administrative law. Very few informal traders will be able to afford legal action with reference to every administrative action that affects their livelihood; however, the by-laws should provide adequate dispute resolution mechanisms in this regard.

This judgment set a precedent and can now be used by informal traders to challenge discriminatory and unconstitutional provisions by authorities. It also marks a shift from

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105 2015 3 SA 165 (KZD).

106 Para 39.

107 In *Makwickana v eThekwini Municipality* the court dispensed with the procedure because all the information relevant to the powers of the respondents were pleaded and common cause (para 68). It must also be noted that the applicant in this case did apply for a review in terms of s 7 of *PAJA*. S 7 of the Act provides for procedure for judicial review.

108 *Makwickana v eThekwini Municipality* 2015 3 SA 165 (KZD) para 71.

109 Para 112.

110 *Makwickana v eThekwini Municipality* 2015 3 SA 165 (KZD) para 72.

111 *Makwickana v eThekwini Municipality* 2015 3 SA 165 (KZD) para 74.

112 This section allows for judicial review in instances where the administrator took action for which he was not authorised by an empowering provision.

113 This provides for judicial review when the action was procedurally unfair.

criminalisation of these activities to emphasising the importance of fair and just administrative action.[114]

5.5.2 Case studies

5.5.2.1 The City of Johannesburg

Research has indicated that in Johannesburg the regulatory framework that governs street trading is restrictive, adversarial and punitive.[115] A focus on a more enabling environment is lacking and this exclusionary approach by the City of Johannesburg is not commendable. This approach also stigmatises informality, equalling it to irregular and criminal activities, instead of recognising the links with the formal economy and creating a policy framework that supports the transition from the informal economy to the formal economy.

The activities of unregistered traders are criminalised, instead of following a developmental approach that allows for easy access to registration and legal and economic empowerment programmes to obtain sustainable solutions. Inadequacies in terms of both urban and development management were highlighted.[116] The precarious position of informal workers is also intensified by clear discrepancies between informal trade policies and actual implementation.[117] Links between those trading on the streets and the formal economy are often visible as these workers source their goods from the formal economy; however, strategies to strengthen and support these links are insufficient.[118] These workers are vulnerable and lack access to resources; factors that contribute to the challenges they face in entering the formal economy. Before any transition from one economy to another can take place, the various vulnerabilities that these traders face must be analysed, as well as the motivational factors that contribute to entrance into the informal economy. Programmes that merely support the *migration* from the informal economy to the formal economy will not produce sustainable results as the root causes will not have been addressed and a superficial transition is not advisable.[119]

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114 Harvey *et al Compendium of WIEGO and SEWA case studies* 5.
115 SERI *The end of the street?* 4.
116 SERI *The end of the street?* 4.
117 SERI *The end of the street?* 4.
118 SERI *The end of the street?* 5. These goods include brand-name shoes, clothes and airtime and mobile data from networks in South Africa. Street vendors also display links with various formal institutions, such as local authorities, through payment of licensing fees and permits for trading space.
119 SERI *The end of the street?* 6.

It would also require authorities to understand the nature of informal trading and a paradigm shift from criminalising these activities and enforcing punitive frameworks to allow for more sustainable solutions and a subsequent transition from the formal economy to the informal economy. The 2009 Informal Trade Policy and the *Business Act* 71 of 1991[120] promote the facilitation of informal trade, but the conduct of the city authorities is not in line with these objectives.

The *Business Act* empowers local authorities to make by-laws for the supervision, control, restriction and prohibition of informal trading.[121] In line with section 6(A) of the *Business Act* and section 13(a) of the *Municipal Systems Act* 32 of 2000, the City of Johannesburg enacted Street-Trading By-laws in 2004. The purpose of the By-laws was to regulate informal trading in Johannesburg in line with constitutional obligations.[122]

Despite the enabling provisions in the *Business Act*, the By-law's main focal point is on environmental health and safety. Section 7 provides duties for the trader to keep his or her site clean and well maintained, to ensure safety and eliminate pollution.[123] Section 9 lists prohibited areas for trading and these include a church or other place of worship, an automated teller machine (ATM) and a building that belongs to the South African Police Services.[124] Section 10 provides for prohibited conduct and this includes a prohibition on overnight stay at trading place or the erection of structures to provide shelter. Traders may not create a nuisance through the carrying on of business or create a traffic or health risk.[125] More than 24 restrictions are listed in this section. Instead of improving the enabling framework of the regulation, the By-laws represent an even more restrictive framework. However, the By-laws are subordinate to the *Business Act* and provisions that are in conflict with the Act will be invalid as was also determined in *Makwickana v eThekwini Municipality*.[126]

Section 153 of the constitution provides for the developmental duties of municipalities. This section provides that municipalities must prioritise, the basic needs of the community through its structure, budgeting and administrative processes to promote the social and

120 This Act provides a legal framework for licensing, conducting of business and appeals.
121 See s 6A.
122 See City of Johannesburg Metropolitan Municipality Informal Trading By-laws and City of Johannesburg Metropolitan Municipality Street Trading By-laws 2004. The By-laws refer to an informal trader as a person who engages in informal trading. Informal trading includes the selling of goods and services in designated areas. See s 1.
123 See s 7(a)-(h).
124 See s 9(a)-(j).
125 See s 10(a)-(u).
126 2015 3 SA 165 (KZD).

economic development of the community.[127] Developing and appropriate regulatory framework to provide for informal traders may be viewed as giving effect to the developmental duty to promote the social and economic development for the community. This approach is again supported by the objective of the local authorities to promote social and economic development.[128]

The Informal Trading Policy of 2009 provides a more enabling framework. The Informal Trading Policy is not a national policy and compared to the Indian National Policy,[129] is very vague from the outset. The city's vision is described as follows:

> To create a well-managed informal trading sector which talks to the needs of its stakeholders and is effectively integrated into the economic, special and social development goals.
>
> In order to create opportunities for the informal sector to share in the benefits of the economic growth, the City will through a developmental approach, enable access to job and entrepreneurial opportunities within the informal trading sector as well as to facilitate the migration of informal traders into the formal sector. By providing a stable and predictable regulatory and management environment, a positive relationship with the formal sector will be nurtured so that the sectors operate effectively alongside each other in an environment that fosters sustainable economic growth.[130]

The policy does not define or identify important concepts or role players, such as stakeholders or social development goals. Unlike the Indian policy it does not create a positive enabling framework through recognition of the value of the contribution of these traders to the economy. It does however recognise section 22 of our Constitution[131] that provides for the freedom of trade, occupation or profession. The Johannesburg policy is vague, and at the outset lists important concepts such as *social justice*, human resource development, restorative justice and economic empowerment without giving content to these concepts. An informal trader is defined as someone who carries on the activity of informal trade, but criminal and illegal activities are excluded from the scope of the policy.[132]

The policy does introduce a smartcard system.[133] This serves as a verification system of licenses and permits, and only traders with a smartcard can then trade.

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127 Section 153(a).
128 Section 152(1)(c).
129 See para 6.3.1.3 below.
130 Informal Trading Policy for the City of Johannesburg.
131 See s 19 of the Indian constitution.
132 See Part B para 3 and 4.
133 Para 9.

The policy does not display a clear understanding of the nature of informal trade or the challenges that these traders face, nor does it contain clear sustainable solutions. It does not contain any provision for voice and representation of these traders and unlike in the Indian policy, recognition is not given to other workers' organisations that may be more suitable to represent these traders.[134] Instead the policy provides for a mentorship programme, through which street traders can be trained.[135]

The policy underlines a top-down approach and disregards the participation of traders in decision making.[136] Research also indicates that there are various challenges in respect of the implementation of the policy, such as challenges in respect of the verification process of traders and the roll-out process of issuing smartcards to traders.[137] These challenges and the inconsistent implementation of the policy by the City, resulted in an adversarial approach of enforcement through the Metropolitan Police. Objectives such as social and restorative justice mentioned in the policy are not integrated in the actual implementation.[138] The enforcement practices are fraught with harassment, intimidation, and destruction and confiscation of goods.[139] It is important to note that municipal policies adopted by a resolution of the relevant council is legally binding, but policies that are not approved in this manner are not.[140]

The City of Johannesburg's conduct with reference to the regulation of street traders was scrutinised in the Constitutional Court. The constitutional protection of the right to human dignity must not be underestimated and this right can ensure the protection of vulnerable workers in the informal economy against exploitation and abuse from local authorities. In *South African Informal Traders Forum v City of Johannesburg*[141] the court highlighted the importance of the ability to earn money and support oneself; that this is an important component of the right to human dignity and that without it the traders face "humiliation and degradation".

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134 See para 6.3.1.3 below.

135 Training programmes aim for example, at improving service delivery.

136 The facts of the *Makwickana v eThekwini Municipality* judgment illustrate this top-down approach and the exclusion of a participatory framework.

137 SERI *The end of the street?* 23. According to the policy, a smartcard verifies the identity of the licence holder, permits and permissions applied for and granted; in other words it verifies the legality of the trader. See para 9 of the Policy.

138 Pieterse 2017 *PER* 7.

139 Pieterse 2017 *PER* 7.

140 Regulations can often be authorised or approved by legislation or by-laws. See Local Government Action http://www.localgovermentaction.org.

141 2014 ZACC 8 at para 31.

In this case, the applicants represented 1210 informal traders trading in the City of Johannesburg. Between September and October 2013 they were removed from their trading locations and had their goods impounded by city officials. During these evictions, referred to as "the Mayoral Clean Sweep" (Operation Clean Sweep), the city did not distinguish between legal traders and those who were trading illegally. The applicants unsuccessfully sought urgent relief in the High Court, but the Constitutional Court granted leave to appeal on the grounds that it was in the interest of justice to do so and refusal would cause the traders irreparable harm.[142] The applicants showed that the traders and their families' livelihood depended on their trading in the city. After their removal from the trading areas, they had been rendered destitute and unable to provide for their families. The city's conduct impaired the dignity of the traders and their families and had a direct and ongoing adverse effect on their rights to trade, basic nutrition, shelter and basic healthcare services. The court reasoned that, if allowing the traders to continue trading during the verification process were to cause prejudice to the residents of the City, the prejudice would have been temporary. The court stated that the immediate and irreversible harm that the traders were facing rendered their application urgent and justified the interim relief which the Constitutional Court granted. Moseneke ACJ stated the following in paragraph 3:

> When women and men in government disregard the law, their conduct may very well cause much hardship, particularly for the vulnerable amongst us.

The above statement by the Acting Chief Justice of the Constitutional Court emphasises that government should strive to create an enabling framework at national and local level to support the informal economy.

The court provided as follows:

> It must be added that the eviction of traders involved constitutional issues of considerable significance. The ability of people to earn money and support themselves and their families is an important part of human dignity. Without it they faced "humiliation and degradation". Most traders, we were told, have dependants. Many of these dependants are children, who also have suffered hardship as the City denied their breadwinners' lawful entitlement to conduct their business. The City has not disputed this. The City's conduct has a direct and ongoing bearing on the rights of children, including their direct rights to basic nutrition, shelter and basic health care services. The harm the traders were facing was immediate and irreversible.[143]

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142 Section 167(6) of the Constitution provides that legislation or the rules of the constitutional court must allow for leave to appeal if it is in the interests of justice.

143 Para 31.

The above also highlights the interrelationship between the fundamental rights and the fact that they are mutually reinforcing and interdependent, including the right to human dignity, the freedom of trade and the socio-economic rights of children.[144]

The actions of the city were declared illegal and the legal traders had an undisputed right under section 4 of the by-laws to trade in their locations.[145] However, this case dealt specifically with the contraventions of the *Business Act* and the relevant by-laws. Constitutional protection for street traders under the scope of section 22 of the Constitution may be more limited.[146] The court recognised that the regulation of street traders does have a legitimate government purpose when lawful and stated:

> It is open to the City to use all *lawful* means to combat illegal trading and criminal conduct. But it has no entitlement to cause harm to lawful, if not vulnerable traders.[147]

Judgments by progressive courts throughout the world have an impact far beyond the particular parties that bring the case to court.[148] They allow us to declare that the poorest and

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144 Pieterse 2017 *PER* 7. See also *Government of the Republic of SA v Grootboom* 2001 1 SA 46 CC paras 23 and 83; *Khosa v Minister of Social Development; Mahlaule v Minister of Social Development* 2004 6 SA 505 (CC) para 40.

145 Paras 25, 28.

146 The court highlighted these limitations in a number of cases. In *Affordable Medicines Trust v Minister of Health* 2006 3 SA 247 (CC), the Constitutional Court provided that restrictions through legislation or policies for the regulation of a practice of a profession that serves a legitimate government purpose will not be an unjustified limitation of s 22. The court stated that legislative powers are subject to constitutional scrutiny and there must be a rational connection between legislation and the legitimate government purpose. This also includes the exercise of public power. Legislation will be constitutional if it relates to a legitimate government purpose and if it does not infringe a fundamental right. Thus laws regulating street trading must comply with a legitimate government purpose to meet constitutional muster. In principle local authorities do have the power to enact laws to regulate street trading (paras 73 and 74). In *Minister of Home Affairs v Watchenuka* 2004 1 All SA 21 (SCA), the court found that blanket restrictions will infringe on the right to human dignity. The court states the following in para 32: "But where employment is the only reasonable means for a person's support other considerations arise. What is then in issue is not merely a restriction upon the person's capacity for self-fulfillment, but a restriction upon his ability to live without positive humiliation and degradation." In *Union of Refugee Women v Director: Private Security Industry Regulatory Authority* 2007 4 SA 395 (CC), the court found restrictions with reference to a specific category of employment, namely security guards, with reference to refugees, a justifiable limitation. See also Pieterse 2017 *PER* 1.

147 Para 33. Emphasis added.

148 In 2014, the Supreme Court of Appeal in *Somali Association of South Africa v Limpopo Department of Economic Development Environment and Tourism* 2015 1 SA 151 (SCA) considered the vulnerable position of asylum seekers and refugees. This was with specific reference to their entitlement to apply for licenses to trade, and to earn a living as own-account workers. This application was also brought after an enforcement operation, known as "Operation Hardstick", to close businesses in Limpopo. The SAPS also confiscated goods of the traders and the foreign nationals were informed that they were not permitted to trade. The confiscation of goods by the SAPS in the case was described as follows: "During the course of the spaza shop closures, the police officers confiscated stock and equipment that collectively totalled to a value of thousands of Rands. Stock items that were seized included food items and household goods. The police

most disadvantaged among us – people living with disease and stigma, people living without shelter – have rights. They affirm human dignity and encourage people to stand up and claim their rights. They promote transparency and public accountability. As lawyers and judges engage with these rights, they affect the lives of millions.

This judgment should serve as a warning to policy makers and those responsible for the implementation thereof, as it is clear that the courts will not hesitate to intervene to ensure compliance with the Bill of Rights. State organs, including municipalities, must promote transparency and accountability in adherence to the constitution. The judgment has also created an awareness to the plights of informal traders in South Africa and that state parties cannot just disregard the law.

It is interesting to note that in a similar Supreme Court case in India where the goods of informal traders were destroyed by government officials, the court also equated the actions of the public authorities as an impairment of the constitutional provision of dignity.[149] The court also provided that earning a living as a street trader provides those affected with a life lived with dignity.

It must be noted that when courts consider the advancement of socio-economic rights and other fundamental rights, as in the above case, an integrated approach is necessary. In South Africa disadvantages suffered by these vulnerable workers include numerous causes, such as inequality with reference to social class, race, and gender, lack of opportunities for education and work, inadequate housing, limited access to water and sanitation services and lack to adequate healthcare.[150]

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officers also routinely seized fridges and freezers. Meat and other goods that required refrigeration were left to rot and perish in the traders' shops. No itemization of the confiscated stock or equipment was provided to the traders in Musina. However, in some instances the SAPS issued Admission of Guilt Fines. Notwithstanding the payment of Admission of Guilt Fines, the SAPS generally refused to return confiscated stock and equipment to the traders." This conduct clearly shows complete disregard for the law and confirms the challenges of harassment and victimisation that street traders face (para 14). The court confirmed that there is no blanket prohibition against asylum seekers and refugees with reference to seeking employment and that there is no restrictive legislation prohibiting them from obtaining licenses in this regard. The court also confirmed that in instances where persons will be left destitute and have no other means to support themselves, the right to dignity will be impaired (para 43) The court stated: "Put differently, if, because of circumstances, a refugee or asylum seekers is unable to obtain wage-earning employment and is on the brink of starvation, which brings with it humiliation and degradation, and that person can only sustain him- or herself by engaging in trade, that such a person ought to be able to rely on the constitutional right to dignity to advance a case for granting of a licence to trade …" (para 43).

149 *Maharashtra Ekta Hawkers Union Municipal Corpn. Greater Mumbai*-(2014) 1 SCC 490 para 4. See also para 6.3.1.3 below.

150 Hepple 2012 *SALJ* 253.

After the judgment the City of Johannesburg in 2014 adopted a framework for engagement with stakeholders on trading areas in line with the *Business Act* and the Constitution.[151] This implementation framework process will be done in collaboration with the informal traders' representatives and other role players. It is important to note that the City undertakes to involve the associations representing these traders in a more collaborative approach; however, associations currently feel that their involvement was merely an empty gesture and their representations were not considered.[152]

Currently the position of street traders in Johannesburg is regulated as follows:[153]

(1) Street traders must apply to trade in the City of Johannesburg. The application is processed within a 60-day period and if unsuccessful, reasons must be provided in line with PAJA.

(2) If the application is successful, the traders will be issued with a smartcard and a lease agreement with reference to a demarcated trading stall.[154] The smartcard system allows authorities to distinguish between legal and illegal traders.[155]

(3) Traders must pay a monthly rental fee for their specific place of business.[156] Certain demarcated areas, such as linear markets, offer improved infrastructure and therefor rental fees will be higher than a trading space on a sidewalk.[157] Rent is subject to annual increases, after adequate notice was given to the traders.

(4) The city's obligations entails supported infrastructure, including shelter and storage, and provision of basic services, such as access to water, sanitation and adequate waste management systems.[158]

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151 City of Johannesburg 2014 https://joburg.org.za/index.php?option=com_content&view=article&id=9059:22052014joburg-council-approves-the-informal-trading-implementation-framework&catid=217:press-releases-2013&Itemid=114.

152 Pieterse 2017 *PER* 19.

153 See SERI 2017 SERI 2017 http://www.seri-sa.org/images/Traders_resource_guide_FINAL_FOR_WEB__Spreads.pdf 1-39.

154 Various factors must be considered in the allocation of stalls, such as the preferred business allocation, the current place of trading, the type of goods, projected income, previous displacements and services and lastly the availability of demarcated areas. The consideration of the various factors include a more holistic approach. See also para 8 of the Informal Trading Policy of the City of Johannesburg.

155 See para 9 of the Informal Trading Policy of the City of Johannesburg. The smartcard is used as a verification process to ensure compliance with the legal requirements.

156 See para 11 the Informal Trading Policy of the City of Johannesburg.

157 See para 10 of the Informal Trading Policy of the City of Johannesburg.

158 See para 7 of the Informal Trading Policy of the City of Johannesburg.

(5) In line with the Informal Trade Policy of the City, training and mentoring programmes must be introduced.[159] These programs highlight issues such as the applicable legal framework, life-skills, entrepreneurial and other business practices. It is submitted that specific programmes with a distinctive gender focus must be introduced to empower women traders and to develop leadership. Mentorship programmes will consist of access to advice, including improved methods of service provision, and will endeavour to promote sustainability and profitability.

(6) In terms of the Informal Trade Policy, an Informal Trade Chamber must be established as a platform for dispute resolution between the city and the traders. A very important feature of this is the representative nature of the forum, and representatives must include informal traders' organisations, representatives of Market Committees and all other interested parties.[160]

(7) Currently, the office of an ombudsman has been established in Johannesburg to resolve disputes between traders and the City that remain unresolved. His or her duties include the conciliation and mediation of disputes, as well as an investigation with reference to corruption and unfair administrative action. The ombudsman must also ensure that the rights of the traders are not infringed on.[161]

(8) In terms of the By-law, traders also incur obligations and responsibilities and these include the following: overnight stay at the place of business is prohibited; traders may not erect structures without the approval of the Council, they may not through their activities endanger property or persons and they may not attach their property to any public property or public roads.

5.5.2.2 The City of Cape Town

The City of Cape Town adopted a new Informal Trading Policy in 2013. This policy defines an informal trader as a "person engaging in informal trade, whether employer or employee".

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159 See para 14 of the Informal Trading Policy of the City of Johannesburg.

160 Part F, para 17 the Informal Trading Policy of the City of Johannesburg.

161 See SERI 2017 http://www.seri-sa.org/images/Traders_resource_guide_FINAL_FOR_WEB__Spreads.pdf.

However, the City of Cape Town: Informal Trading By-Law of 2009[162] still defines an informal trader as a person or enterprise that is not registered in terms of corporate laws. The focal point of the By-laws are on aspects of non-compliance.[163]

The definition of "formal" trade thus reflects registration and tax compliance. The definition is outdated and focuses on the avoidance of tax by workers in the informal economy rather than the lack of labour and social protection of these workers. Legal and regulatory frameworks seldom provide for informal workers and often focus on criminalising informal work.[164] The policy must be aligned with the definition as set out in ILO Recommendation 204 that highlights the lack of labour and social protection as a key characteristic of workers in the informal economy as opposed to notions of illegality or lack of registration. The City of Cape Town's Informal trading By-Law was amended in 2013 and also links the definition of informal trader to a person or enterprise that is not registered in terms of corporate laws.[165]

The policy describes a "historically disadvantaged person" as a "South African citizen, who is a black person, is a women and/or has a disability." The policy aims to promote economic growth and the development of the informal economy.[166] An important factor is the recognition and acknowledgement of the legitimate role of the informal economy in terms of employment and economic growth and also the value of a social component.[167] At times of high unemployment the informal economy provides employment opportunities to many, and in this instance with reference to informal trading, entry into this category of work in the informal economy is often also a survivalist strategy.

The policy supports flexible infrastructure,[168] spatial planning[169] and an integrated approach towards development of the informal economy.[170] A key principle of the policy is the multifaceted approach adopted by the City in respect of trading areas, recognising the diverse characteristics of the informal trading areas and the various desired

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162 As amended by the City of Cape Town; Informal Trading Amendment By-law of 2013.

163 Section 2.13 states the following: "… informal trader means a person, or an enterprise which is not registered or incorporated in terms of corporate laws of South Africa and which engages in informal trading. Informal trading includes street trading, trading at markets, public open spaces and in pedestrian malls." See s 3.

164 Brown and Roever *Enhancing productivity in the urban informal economy* 23.

165 See s 2.13

166 City of Cape Town Informal Trading Policy 2013 7 para 3.3.

167 City of Cape Town Informal Trading Policy 2013 10 para 5.1.2.

168 City of Cape Town Informal Trading Policy 2013 10 para 5.1.8.

169 City of Cape Town Informal Trading Policy 2013 10 para 5.1.7.

170 City of Cape Town Informal Trading Policy 2013 10 para 5.1.5.

outcomes.[171] With reference to social dialogue, the policy provides for the establishment of multi-stakeholder forums at various levels.[172] The policy recognises representative organisations other than trade unions, and aims to provide support and assistance to them.[173] This recognition is important as number of associations represent informal traders in Cape Town.[174] With reference to women workers the policy supports a gendered approach with reference to training and development. It is submitted that this subsequently promotes the access of women to financing and other resources and provides opportunities to women in line with what is envisaged by section 8 of PEPUDA, to oppose unfair discrimination against women and to promote gender equality.[175]

The City of Cape Town: Informal Trading By-Law of 2009 was amended in 2013. A wide number of activities are included under informal trading, namely: street trading; trading in pedestrian malls, trading in public open spaces and at markets.[176] The amended by-law requires permit holders to be South African citizens or valid work permit holders. Preference is given to historically disadvantaged individuals and unemployed persons.[177] The By-law also provides for public participation with reference to the adoption of a trading plan.[178] This provision encourages social dialogue and a consultative process with affected role players in line with the municipality's constitutional obligation to encourage the involvement of the community in matters of local government. The new by-law is more aligned with the policy document and provides for appeal procedures with reference to decisions made in terms of the by-law.[179]

5.5.2.3 The City of Durban

In central Durban a large number of informal traders operate from a market known as Warwick Junction and the majority of these traders are women.[180] This area formed part of an urban renewal project and the aim was to improve the trading areas within the junction and also the urban environment. The project focused on safety, security, and supported economic opportunities for the poor in that area.[181] The project is often used

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171 City of Cape Town Informal Trading Policy 2013 10 para 9.7.1
172 City of Cape Town Informal Trading Policy 2013 10 para 5.3.3.
173 City of Cape Town Informal Trading Policy 2013 10 para 5.3.3.
174 These associations include: The Mitchell's Plain Progressive Traders' Association and the Town Hawkers' Association (Bamu and Theron "Nothing about us without us" 25).
175 City of Cape Town Informal Trading Policy 2013 10 para 7.4.
176 See s 3.
177 See s 8.
178 Section 6.
179 Section 17.
180 Between 5000 and 8000 traders operate at this market. Harvey *et al Compendium of WIEGO and SEWA case studies* 3.
181 Brown and Roever *Enhancing productivity in the urban informal economy* 19.

as a global example of urban planning and design, and illustrates how to enhance productivity for the urban informal economy.

Successful strategies included improved accessibility of local government officials, empowerment of informal trader organisations, recognition of these organisations as independent associations, continuous collaboration with relevant role players, and improved infrastructure.[182] The improved infrastructure included adequate shelter, access to water and storage facilities.

This project addressed the specific challenges faced by the informal traders in that area and illustrates the advantages of a tailor-made response to regulation of vulnerable workers.[183] Through collaboration with the various associations and local authorities, distinctive challenges were addressed. The contribution of the traders to the urban economy and the importance of their social role within urban cities were recognised by local authorities. Such recognition subsequently leads to innovative design and urban planning within cities to accommodate the interests of traders within specific designated areas such as Warwick Junction. This project illustrates the important role of local governments in promoting the livelihoods of workers in the informal economy through social dialogue. A key component of this is "meaningful participation" by all role players to ensure sustainable solutions.[184]

Although the project has had a positive impact on the livelihoods of the traders, the legal framework that regulates the activities of these traders includes various adversarial and criminalising provisions.[185] An important non-profit organisation, namely Asiye Etafuleni, assists traders in this area through advocacy campaigns, strengthening the bargaining power of the traders, promoting integrated urban policies and empowerment programmes including training of the traders.[186] Legal empowerment forms an essential part of their support. Through associations with organisations[187] dedicated to the promotion of social justice, they host street law programmes to familiarise the traders with their constitutional rights, the legislative framework applicable to street trading and the various dispute

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182 Brown and Roever *Enhancing productivity in the urban informal economy* 19.
Brown and Roever *Enhancing productivity in the urban informal economy* 19, 20.

184 In this area the Self-Employed Women's Union has been actively campaigning for the rights of these traders. See Harvey *et al Compendium of WIEGO and SEWA case Studies* 3; Brown and Roever *enhancing productivity in the urban informal economy* 45.

185 The *Business Act* and the eThekwini Municipality 2014 Informal Trading By-law are also applicable. The *Business Act* allows local authorities to enact by-laws to regulate informal traders within their jurisdiction. See s 6(A)(1) of the *Business Act.*

186 Harvey J *et al Compendium of WIEGO and SEWA case studies* 3.

187 Such as Students for law and social justice, and the Legal Resource Centre.

resolution options.[188] This flagship project's collaborative approach and flexible design allowed for its success as it enabled all stakeholders to partake in consultative processes that led to joint decisions in a participatory regulatory framework.[189] The recognition by state parties that informal traders in this area are an intrinsic part of the city, with reference to their contribution to the economy and their social role, contributed to its collaborative approach.[190]

Apart from the success of Warwick Junction, other informal traders in Durban, and specifically women traders, are still constantly harassed and intimidated by local authorities in this area.[191] Local authorities also often fail to account for the impounded goods.[192] In terms of section 156 of the Constitution, the eThekwini Municipality promulgated a Nuisances and Behaviour in Public Places By-law, effective from 11 March 2016.[193] This By-law contributes to a very restrictive regulatory environment and this negatively impacts on the livelihoods of informal traders. Restrictive provisions include the following: a prohibition on the unpacking of goods and a prohibition on leaving goods in a public place.[194] The prohibition of causing a nuisance is widely defined and subject to the discretion of authorities, and thus can include nearly any conduct by traders.[195] Sanitation facilities are lacking in most trading areas and instead of providing for better sanitation facilities the By-law restricts activities. The municipality has the authority to designate areas for informal trade and the issue of permits in terms of the By-law.[196] The By-law makes no provision for consultation with the traders or their representatives in any matter that affects their livelihoods. This promotes an adversarial environment that negatively impacts on the livelihoods of the traders. Provisions are however made for an appeal procedure against any municipal decision.[197]

The above case studies indicate the prominent role that local governments play in the livelihoods of informal traders and the importance of integrated policies, the recognition

188 Harvey J *et al Compendium of WIEGO and SEWA case studies* 4.
189 Brown and Roever *Enhancing productivity in the urban informal economy* 20.
190 Brown and Roever *Enhancing productivity in the urban informal economy* 20.
191 In an unreported judgment in *Veeron Rambali v eThekweni Municipality* 11162/09, the applicant also obtained an interdict against this municipality to stop the harassment and the impounding of goods without a court order.
192 *Makwickana v eThekwini Municipality* 2015 3 SA 165 (KZD) para 17.
193 This By-law endeavours to regulate activities and conduct in public places.
194 See s 5(2)(n) of the By-law.
195 Section 1 and 5(v).
196 Section 17.
197 Section 23

of informal traders as workers, and the need for a consultative and participatory approach to a regulatory framework.[198]

5.5.2.4 Conclusions

The position of informal traders thus differs from one municipality to another and regulations in this regard are fragmented throughout the country. Through the regulatory framework it appears that it is the economic activity of informal trading that is regulated and it is recommended that provisions must rather focus on regulating the person engaged in the activity. Regulating informal trading in South Africa requires national and comprehensive provisions that are tailor-made for the specific situation and can address the specific challenges and vulnerabilities of these workers, and not just a mere extension of legislative provisions through the *Business Act*. This Act was enacted before the adoption of our Constitution and is outdated. For instance, it does not provide for any recognition of the value of informal trading within urban spaces in cities. Tailor-made provisions must incorporate the empowerment of these workers, strengthening their livelihoods, urban development and management, and focus on access to resources and simplified business registration processes. National legislation will prevent that regulation occurs erratically with fragmented responsibilities[199] and will ensure uniform regulation of informal traders throughout the various municipal areas in South Africa. This will eliminate discretional policies and regulation by local authorities.

In the absence of national legislation, regulation of street traders remain fragmented as by-laws and policies are adopted on an ad hoc basis as illustrated above. The biggest challenge remains the implementation of the By-law to create a more enabling participatory environment through this integrated approach. It must also be determined whose primary responsibility this is and how to ensure effective implementation of by-laws. Proper regulation will require political will, and without any doubt also requires the political will from state parties.

5.6 The regulatory framework for waste pickers in South Africa

For many workers in the informal economy, including for many women, waste picking constitutes a vital survival strategy in developing countries and also in South Africa.[200]

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198 In Lima, Peru there are more than 300 000 informal traders. The city passed a law (Ordinance 1787) in 2014, which recognised the traders as workers. The ordinance simplified all administrative and registration procedures and in these procedures applications from women are prioritised. To ensure collaboration and promote participatory regulation a tripartite commission was established to facilitate social dialogue between stakeholders.

199 Brown and Mackie "Urban informality and 'rebel streets'" 2, 3.

200 See para 5.6 with reference to national statistics on waste pickers in South Africa.

Waste picking is prevalent in most developing countries and these workers face unique challenges, including poverty, marginalisation and the lack of adequate labour and social protection measures.[201] Accurate statistical data on waste pickers are particularly scarce and only in countries where they have been recognised as workers and integrated into solid waste management structures, as in Brazil, are official data available.[202] The limited statistics that are available do not indicate a clear gender dimension but this also seems to vary from one country to another.[203]

The plight of women workers in waste picking cannot be ignored as they represent one of the most vulnerable groups within the informal economy. Waste picking is the most diverse and the least understood category of work in the informal framework.[204]

Regulation of waste pickers in South Africa is fragmented through provinces and local authorities.[205] Inclusion in waste management systems by local authorities was achieved through organisation by associations representing the interests of waste pickers. Waste pickers in South Africa, just like informal traders, are also dependent on regulation by local authorities. Distinct deficits exist and comprehensive national legislation is absent. Waste pickers enjoy the least protection of all categories of informal work in South Africa. Globally, an increasing recognition exists for the valuable contribution of these workers to the economy, public health and safety, the alleviation of household poverty and the promotion of a sustainable environment. However, they remain marginalised, excluded from labour and social protection and without adequate support from governments at national or local levels.[206]

Waste pickers in South Africa collect waste at various locations, such as streets and dumping and landfill sites.[207] According to Schenck, Blaauw and Viljoen, a waste cycle in South Africa can include the waste picker, a buyer or a buy-back centre, and recycling

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201 Schenck, Blaauw and Viljoen *Unrecognised waste management experts* 34. See also Viljoen, Blaauw and Schenck 2016 *SAJEMS* 186.

202 WIEGO date unknown http://www.wiego.org/informal-economy/occupational-groups/waste-pickers.

203 Ogando, Roever and Rogan 2017 *IJSSP* 436. In South Africa, the prevalence of women varies from site to site. For example, in the Free State, at two landfill sites, namely Deneysville and Oranjeville, the majority of the workers were women (Schenk, Blaauw and Viljoen *Unrecognised waste management experts* 16).

204 Ogando, Roever and Rogan 2017 *IJSSP* 436.

205 See para 5.2 above for the constitutional framework and para 5.3 above for a discussion of *PEPUDA*.

206 WIEGO date unknown http://www.wiego.org/informal-economy/occupational-groups/waste-pickers.

207 Schenck, Blaauw and Viljoen *Unrecognised waste management experts* 17.

companies.[208] There is also a discernible value chain present with recycling activities. According to Schenck, Blaauw and Viljoen the value chain links (i) the production of post-consumer waste (ii) to its collection, sorting and transport and (iii) to its processing before becoming an input in production processes.[209] Role players in this value chain can involve the waste pickers, buy-back centres; and manufacturers that use the recycled materials for production.[210]

As has already been mentioned above, waste pickers face unique challenges[211] Specific challenges associated with this occupation include: physical challenges, [212] health challenges,[213] safety and security challenges,[214] harassment[215] and exposure to various climate challenges.[216] Waste picking allows for easy entrance into the occupation as low skills and educational levels are required. The flexible nature of the work also attract women workers as they can balance this with their domestic and care responsibilities. Across the world these workers thus represent the poorest in societies in what are often survivalist activities, and social stigmatisation is one of their biggest challenges.[217] These survivalist activities become extremely important for vulnerable people during times of high unemployment such as those currently prevalent in South Africa. Studies have also indicated that women in this occupational category are more disadvantaged and earn less than men.[218] These women face a number of challenges that can be ascribed to gender equality and social and patriarchal practices. Challenges include low educational and skills levels, barriers with reference to economic empowerment, including access to resources and financial products, unequal distribution of unpaid care and domestic work. These women are also exposed to specific occupational health and safety challenges, according

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208 Schenck, Blaauw and Viljoen *Unrecognised waste management experts* 18.

209 Schenck, Blaauw and Viljoen *Unrecognised waste management experts* 2.

210 Schenck, Blaauw and Viljoen *Unrecognised waste management experts* 2.

211 Schenck, Blaauw and Viljoen *Unrecognised waste management experts* 34. See also Viljoen, Blaauw and Schenck 2016 *SAJEMS* 2016 186.

212 This includes the transportation of heavy waste materials.

213 Waste pickers work at dump sites and landfills that pose many occupational hazards and they are at times exposed to contaminated waste. Access to sanitation is problematic, specifically for women workers (Ogando, Roever and Rogan 2017 *IJSSP* 445).

214 The dumpsites and landfills are unsafe and waste pickers often have to sleep on the streets and are exposed to various criminal elements. See also Schenck, Blaauw and Viljoen *Unrecognised waste management experts* 29,30.

215 In Durban waste pickers reported verbal and physical harassment by enforcement officers (Ogando, Roever and Rogan 2017 *IJSSP* 443).

216 Weather conditions play a very important role as in bad weather conditions they are unable to earn a living (Schenck, Blaauw and Viljoen *Unrecognised waste management experts* 29-30).

217 WIEGO date unknown http://www.wiego.org/informal-economy/occupational-groups/waste-pickers.

218 WIEGO date unknown http://www.wiego.org/informal-economy/occupational-groups/waste-pickers.

to their physical and biological needs.[219] Inequalities also exist within the waste picking hierarchy that excludes women workers from certain higher paid activities. These women are often prohibited from access to sites with valuable collection materials, and are then exposed to higher risk areas to collect recyclables.[220] Studies have also indicated that very few women are in leadership positions within this waste picking hierarchy, thus mirroring society's prejudices and inequalities.[221] Gender-based inequalities appear to manifest itself within the labour division of this occupation.[222] Studies in Brazil, have indicated that more men work as formal waste pickers under a contract; however, more than half of waste pickers that are organised in cooperatives and other workers' organisations are women.[223]

5.6.1 The National Environmental Waste Act 59 of 2008

National legislation that regulates waste management is embodied in the *National Environmental Management Waste Act*.[224] The preamble provides that effective waste management practices require uniform norms and strategies to ensure best practices. Municipalities must comply with national and provincial norms and standards with reference to waste management.[225]

5.6.2 National Waste Management Strategy of 2011

The National Waste Management Strategy (NWMS) aims to give effect to the objectives of the Act.[226] The policy recognises various challenges in waste management, such as a

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219 Ogando, Roever and Rogan 2017 *IJSSP* 436.

220 Ogando, Roever and Rogan 2017 *IJSSP* 437.

221 Ogando, Roever and Rogan 2017 *IJSSP* 438.

222 See para 5.3 above for applicable provisions in *PEPUDA*.

223 Dias 2011 http://www.wiego.org/sites/default/files/publications/files/Dias_WIEGO_SB2.pdf 2. Women waste pickers are more likely to operate in cooperatives and other associations than men. In a cooperative, waste pickers are often categorised. These categories then include street waste pickers, motorised waste pickers, sorters, operational and workshop categories.

224 59 of 2008. The aim is to reform the law that regulates waste management with reference to the protection of health and the environment (see also s 24 of the Constitution). The Act recognises that waste management practices can adversely impact on the environment. Other laws that can have an impact on waste management includes the *Municipal Finance Management Act* 56 of 2003 and the *Municipal Systems Act* 32 of 2000. With reference to s 24 of the Constitution, the legislative framework is established by the *National Environmental Management Act* 107 of 1998. South Africa has also incurred international obligations with reference to waste management. These obligations derive from the Rotterdam Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and Pesticides in International Trade (acceded to in 2002); the Basel Convention on the Control of Transboundary Movements of Hazardous Wastes and their Disposal (acceded to in 1994); the Stockholm Convention on Persistent Pollutants (signatory in 2002) and the Montreal Protocol on Substances that Deplete the Ozone Layer (signatory in 1990).

225 Section 9(3)(b).

226 The policy provides that in the implementation of the Act, government must draft legislation, regulations, standards and Waste Management Plans (NWMS 8).

growing population and increased volumes of waste; a historical backlog of waste services and an inadequate waste management system.[227] A new infrastructure must transform disposal sites to waste management sites, recovery facilities and buy-back centres. One of the goals of this strategy is to increase the number of cooperatives and small- and medium-sized enterprises (SMEs) in the recycling process of waste management.[228] Municipalities should not engage large private enterprises for these services, but in line with their constitutional objective, encourage the involvement of communities and community organisations.[229] According to the NWMS, government must establish a national recycling infrastructure and collaborate with the private sector and civil society.[230] Civil society is directly tasked with the separation of waste at the first stage, at household level, the participation in awareness campaigns, the participation in initiatives and civil society must assist with compliance.[231] Government commits to a "co-regulatory and consensual approach" that allows participation from all stakeholders[232] in the waste management process.[233]

The NWMS aligns itself with the Green Economy Accord.[234] The accord symbolises a key partnership between the government, business, community organisations, trade unions and constituents of Nedlac.[235] This objective includes measures to strengthen the waste economy and generate and sustain jobs in waste management.[236] As part of these aims, existing jobs within the recycling value chain, from collection to the manufacturing of recyclables, will be formalised.[237] Access to financial assistance will be made available to cooperatives and small business in the wage management system.[238] The policy and accord certainly aim at an integrated and participatory approach for stakeholders; however, implementation by the various spheres of government remains challenging.

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227 NWMS 15.
228 See goal 3 of the NWMS.
229 Section 152(1)(e).
230 See NWMS 8.
231 See NWMS 9.
232 These stakeholders include households, businesses, community organisations and the three spheres of government (MWMS 19).
233 See NWMS 19.
234 Republic of SA 2011 Dept of Economic Development http://www.sagreenfund.org.za/wordpress/wp-content/uploads/2015/04/Green-Economy-Accord.pdf.
235 Within the constituents of NEDLAC, cooperatives and women organisations are represented.
236 See goal 3 of the NWMS.
237 See goal 3 of the NWMS.
238 NWMS 6,27. Targets included 69 000 jobs and 2600 SMEs and cooperatives in the waste management system.

It must also be noted that in terms of Ministerial Determination 4: Expanded Public Works Programme, a public works programme can include working on waste.[239] This creates a platform for the development of decent work within waste management and recycling systems. South Africa currently has a three-year Waste Integration Programme,[240] which runs concurrently with policy development by the Department of Environmental Affairs, in respect of the integration of waste pickers into their waste management systems, as have been done in Brazil, Colombia and India. The policy will also focus on empowerment programmes, including information training on city policies with reference to waste management and negotiation skills to enable waste pickers to negotiate with local authorities on an integrated and inclusive system.[241] In India, the inclusion of waste pickers in waste management systems was a High Court order and in Colombia it reflected

239 See para 1.2 of the Determination. The Determination was issued in terms of s 50 of the *BCEA*.

240 This programme is funded by the Commonwealth Foundation and aims to promote the integration of waste pickers into the waste management of municipalities, to strengthen the mobilisation and organisations of these workers and to support and promote the South African Waste Pickers Association (SAWPA) (WIEGO 2017 http://www.wiego.org/sites/default/files/resources/files/WIEGO-MBO-Newsletter-June-2017-English.pdf).

241 WIEGO 2017 wiego.org http://www.wiego.org/sites/default/files/resources/files/WIEGO-MBO-Newsletter-June-2017-English.pdf.

an order by their Constitutional Court.[242] It is also submitted that in countries such as Brazil and Colombia these workers are well organised.[243]

5.6.3 Case studies

5.6.3.1 Waste pickers in the City of Johannesburg

The lack of consultation by local authorities in South Africa, specifically local authorities in Johannesburg, have threatened the livelihood of waste pickers in these cities. The City of Johannesburg decided to appoint private service providers to assist with the separation and recycling of waste.[244] This decision was made without any consultation involving these reclaimers (waste pickers), as they are known in the area. This decision denied these workers the ability to earn a livelihood and thus impaired their human dignity. This exclusion is not in line with national policies or strategies. Waste pickers campaigned

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242 In Bogotá, Colombia, waste pickers are among the poorest of people. Initially these workers were banned from waste sites; however, through numerous protests and advocacy campaigns they have obtained recognition and waste picking is seen as an economic activity (Abizaid *ARB: Fighting for an inclusive model for recycling in Bogotá* 3). In a Constitutional Court case (Sentence No T291/09 of 2009) waste pickers, through an organisation named ARB, brought an application in respect of their right to a decent life and their right to work (para I). They specifically stated that their fundamental right to work (article 25), their right to life (article 11), right to health (article 49); and their right to social security (article 48) had been infringed by the closure of a waste dump where they collected waste. They stated that this also negatively impacted on the right of their families to a decent life. The court ordered local authorities to consider waste pickers in the processes of awarding contracts. The court found that a process that excludes waste pickers from public tenders was unconstitutional and infringed on their fundamental rights to work. Colombia's Constitution of 1991 provides in article 26 that everyone has the freedom to choose an occupation and article 21 also provides for the right to dignity. The court recognised their vulnerable status and declared them deserving of special protection that included remuneration, and the promotion of their social potential and organisational abilities. The court clearly recognised the importance of a participatory framework and social dialogue for workers in the informal economy and ordered the establishment of a committee that consists of all role players, including the applicable waste pickers' associations. The committee was tasked with the design of an inclusive framework for waste pickers (para 9.2.7 of the judgment as translated by WIEGO). As in South Africa, the Constitutional Court is supreme, and their judgment led to legislative amendments. Through the court waste pickers obtained an inclusive framework in respect of waste management and a remuneration scheme for the services rendered by the waste pickers. Enforcement of court orders are often problematic as public authorities do not adhere to these orders and in 2011 ARB filed a claim in respect of contempt of court since authorities did not comply with the court's order. The court dealt with the contempt by ordering the public authorities to submit an inclusive plan within certain time frames imposed and the court legitimised ARB's statutory role in the process by ordering them to make proposals in respect of the plan and the remuneration of their members for their services. The Colombian waste picker experience also illustrates the transition from the informal economy to integrate these vulnerable workers into the lower end of the formal economy. The constitutional court passed an order in 2011 (275/2011) to ensure the integration of waste management, and highlighted the importance of recycling. This court order also ensured that waste pickers are paid the same as other providers and ensured basic banking services for them (Abizaid *ARB: Fighting for an inclusive model for recycling in Bogotá* 7, 8, 9).

243 Ogando, Roever and Rogan 2017 *IJSSP* 440.

244 WIEGO 2017 http://www.wiego.org/wiego/johannesburg%E2%80%99s-new-waste-programme-threatens-reclaimers%E2%80%99-work.

against this decision through media appearances and various protests.[245] As a result of these efforts, the City of Johannesburg halted all further negotiations with the private contractors and have scheduled workshops to start a process of engagement with stakeholders, including the reclaimers.[246] This is a progressive achievement in a process of recognition of these workers. These workers have tabled their demands in line with their right to work and moreover their right to decent work.

These demands include the following:[247]

(a) The registration of waste pickers on a database. This will promote their status as workers and will legitimise the work they do and promote their public appearance, as they are often seen as criminals and a nuisance by authorities and the public.

(b) Safety and security is one of the biggest challenges that these workers face. Apart from personal safety, specifically for women workers, they also require a secure storage space for their materials. These workers also need access to basic sanitation services and water, thus a decent infrastructure is needed to provide these services. Sanitation and water are basic needs that support a healthy work environment and promote decent work.

(c) These workers require authorities to treat them with dignity and respect and to recognise their contribution in the recycling process. Human dignity is both a right and a value protected in our Constitution and it is of the utmost importance that the human dignity of the reclaimers is not impaired.

(d) Good governance, including transparency, is required by local authorities in respect of waste programmes. Social dialogue and engagement programmes must include all role players. This will require local authorities to also recognise the various organisations, such as WIEGO, that represent the interest of these workers.

These demands consist of basic conditions and are supported by the fundamental rights in our Constitution and our international commitment to decent work. Adherence to these demands will also improve the current decent work deficits that these workers experience. The demands also reflect the global challenges that these workers face. It is submitted

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245 WIEGO 2017 http://www.wiego.org/wiego/johannesburg%E2%80%99s-new-waste-programme-threatens-reclaimers%E2%80%99-work.

246 WIEGO 2017 http://www.wiego.org/wiego/johannesburg%E2%80%99s-new-waste-programme-threatens-reclaimers%E2%80%99-work.

247 WIEGO 2017 http://www.wiego.org/wiego/johannesburg%E2%80%99s-new-waste-programme-threatens-reclaimers%E2%80%99-work.

that the abovementioned action by the local authorities in Johannesburg to deny these workers their livelihoods by awarding recycling contracts to private companies without consultation or engagement, amounts to unfair discrimination. In respect of women waste pickers a claim for unfair discrimination can be based on section 8 of PEPUDA. This section makes specific reference to unfair discrimination based on gender when women are denied access to opportunities. This denial includes access "to services or contractual opportunities for rendering services for consideration". By awarding contracts to private recycling companies, they threaten the livelihoods of these women reclaimers in Johannesburg.

It is submitted that the listed demands must form the basis for policy design with reference to waste pickers in South Africa. Furthermore it is submitted that policies must also promote gender equality in line with our Constitution and legislative obligations within any integrated waste management system.

5.6.3.2 Waste pickers in the Eastern Cape

In the Eastern Cape a group of women waste pickers earn a livelihood through the collection of waste such as scrap metal to re-sell.[248] This is an area where unemployment is high and severe weather conditions impact on agricultural activities. The low skill levels required with reference to the collection of waste allows for easier entry into this occupation.[249] The women in this region have limited educational levels and therefore finding work in the formal sector is problematic.[250]

These women workers highlighted the following challenges in respect of the sustainability of collecting scrap metal within a livelihood framework. Challenges include the effect of a global reduction in the price of steel on their livelihood, thus increasing their vulnerability, the long distances that they must travel to sell their goods, exposure to harsh weather conditions, exposure to toxins from the metal, and injuries from collecting sharp materials. These women indicated that their motivation for waste collection was to support their families and to alleviate their extreme poverty.[251] The majority of the women indicated that they receive assistance from SASSA, either in the form of a child support grant or the

248 Schenk *et al* 2017 *CDJ* 1.
249 Schenk *et al* 2017 *CDJ* 3.
250 Schenk *et al* 2017 *CDJ* 7. Their lack of education was ascribed to poverty experienced within their community and societal norms with reference to gender inequalities and access to education.
251 Schenk *et al* 2017 *CDJ* 7.

grant for older persons.[252] In these instances the social assistance that they receive support their activities in the informal economy.

Work in the informal economy can change the lives of vulnerable women. One of the women in the Eastern Cape stated the following:

> … we are self-employed and independent, we have cleaned the [village] and we are not the poorest of the poor anymore.[253]

Part of the success of these women as waste pickers could be ascribed to notions of solidarity among them. Although they are own-account workers, they use their collective resources for the transport of their recyclable materials, and they assist each other with loans and food during other hardships.[254]

With reference to the above study among women recyclers in the Eastern Cape, it was found that waste picking can function as an example of sustainable livelihood.[255] However, it must be supported by integrated gender-sensitive public policies and an institutional framework to support the regulatory framework.[256] The above also illustrates the potential of job creation within the informal economy, specifically for women, where lower educational levels due to being previously disadvantaged create a barrier to employment in the formal economy. These women workers, through their work in waste management, contribute to their households, communities and they provide valuable services to municipalities with reference to waste management.[257] Work in the informal economy provided these workers with the ability to alleviate poverty, contributed to the environment and overall promoted human dignity among these workers.[258]

In another project in the Eastern Cape in the Amathole District Municipality, the Municipality built a Materials Recovery Facility (MRF), operated by a cooperative, namely

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252 Schenk *et al* 2017 *CDJ* 8.
253 Schenk *et al* 2017 *CDJ* 7.
254 Schenk *et al* 2017 *CDJ* 1.
255 Schenck *et al* measured the viability of these waste pickers as a livelihood in South Africa against a sustainable livelihood framework. According to this framework, a livelihood is sustainable if it comprises the capabilities, assets (stores, resources, claims and access) and activities required for a means of living;when it can cope with and recover from stress and shocks, maintain or enhance its capabilities and assets and provide sustainable livelihood opportunities for the next generation; and contributes net benefits to other livelihoods at the local and global levels in the short and the long term (Schenk *et al* 2017 *CDJ* 3, 4). See also Chambers and Conway *Sustainable rural livelihoods* 6.
256 Schenk *et al* 2017 *CDJ* 15.
257 Schenk *et al* 2017 *CDJ* 15.
258 Schenk *et al* 2017 *CDJ* 15.

the Vusanani Environmental Project Primary Cooperative.[259] Members of this cooperative are also registered with the Department of Public Works and they receive a daily wage.[260] This MRF is the first of its kind in South Africa and includes various machinery to assist with the recycling as well as a platform scale and trolleys.[261] This is an example of what can be achieved through social dialogue, a clear political will and a consultative process between local authorities and in this case a cooperative of waste pickers.

5.6.3.3 Waste pickers in KwaZulu-Natal

The following two examples illustrate the importance of cooperation and participatory processes by local authorities in KwaZulu-Natal[262] to ensure a sustainable livelihood of waste pickers.

5.6.3.3.1 The Mooi River Recycling Cooperative

In this region the Mooi River Recycling Cooperative operates at the Mooi River waste dump.[263] The majority of workers are women. The cooperative is supported by government departments, including the local municipality, and the members received training from various departments.[264] The efficient recycling activities of this cooperative resulted in the Mpofana Local Municipality receiving the award for being the greenest in the province.[265] Through the cooperative, sustainable jobs are created for these women workers.

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259 groundWork date unknown http://www.groundwork.org.za/Documents/waste/SAWPA%20pilot%20projects.pdf.

260 groundWork date unknown http://www.groundwork.org.za/Documents/waste/SAWPA%20pilot%20projects.pdf.

261 groundWork date unknown http://www.groundwork.org.za/Documents/waste/SAWPA%20pilot%20projects.pdf .

262 In Durban waste pickers, collect mostly from pavements, street or landfills and sell to buy-back centres. They are not formally recognised or integrated in the municipality's waste management system and currently there is a lack of organisation among the waste pickers. Waste pickers have also reported frequent harassment by police The municipality has never provided these workers with any infrastructure (Dias and Samson *Informal economy monitoring study sector report: Waste pickers* 9, 12, 15, 38).

263 groundWork date unknown http://www.groundwork.org.za/Documents/waste/SAWPA%20pilot%projects.pdf.

264 groundWork date unknown http://www.groundwork.org.za/Documents/waste/SAWPA%20pilot%projects.pdf.

265 groundWork date unknown http://www.groundwork.org.za/Documents/waste/SAWPA%20pilot%projects.pdf.

5.6.3.3.2 The Hlanganani Ma-Africa Cooperative

In the Umgungundlovu District Municipality waste pickers were often denied access to the waste dump.[266] A cooperative, Hlanganani Ma-Africa, was established. Funding was received to build a MRF; however, as a result of disputes between local and district municipalities the project was placed on hold, despite the fact that the cooperative is registered and the members are ready to work.[267] This illustrates how actions of public role players can affect the livelihoods of vulnerable workers.

The above example of cooperatives in the region also illustrates the fragmented approach followed by municipalities with reference to waste management and that cooperation can provide sustainable employment for waste pickers.

5.6.3.4 Conclusions

Local authorities in South Africa should consider the examples of Brazil and India to protect the livelihood of these workers and consider integrated policies to provide a comprehensive regulatory framework.[268] In 2017, the South African Waste Pickers Association[269] hosted and international exchange programme with leaders from Brazil and India, to exchange shared experiences and knowledge in the three countries.[270]

South Africa must consider the integration of these marginalised workers into the formal waste management system and the establishment of a comprehensive uniform regulatory framework.[271] This is of paramount importance in a country such as South Africa, where

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266 groundWork date unknown http://www.groundwork.org.za/Documents/waste/SAWPA%20pilot%projects.pdf.

267 groundWork date unknown http://www.groundwork.org.za/Documents/waste/SAWPA%20pilot%projects.pdf.

268 Molaba *Roodepoort Record*. See Chapter 6 for the comparative framework with reference to waste pickers.

269 This association was formed in 2009 and currently has 6000 members. Its objectives include the following: (i) the improvement of the livelihoods of waste pickers; (ii) recognition; (iii) the promotion of rights and national comprehensive legislation for waste pickers; and (iv) organisation and mobilisation of these workers (South African Waste Pickers Association (SAWPA); see Global Alliance of Waste Pickers date unknown http://globalrec.org/organization/south-african-waste-pickers-association-sawpa/).

270 Various role players were involved, including state actors, and examples of more integrated waste management systems in Brazil and India were provided, to offer solutions with reference to waste management in South Africa. See Chapter 6 for best practices of waste management in India and Brazil (GlobalRec 2017 http://globalrec.org/2017/09/20/waste-pickers-from-3-continents-exchange-experiences-and-knowledge-in-south-africa/).

271 The following examples illustrate the fragmented attempts to regulation of waste pickers by the various municipalities in different provinces. In Magaliesburg a government initiative, namely the Phakisa Waste Minimization Plan, was established to promote economic opportunities within waste management (GlobalRec 2017 http://globalrec.org/2017/09/20/waste-pickers-from-3-continents-exchange-experiences-and-knowledge-in-south-africa/). Onderstepoort, a landfill site within the Tshwane Municipality, has five registered cooperatives, but only one, namely the Rekopane

unemployment is currently at 27% and occupations in the informal economy, like waste picking and informal trading, provide much needed job opportunities. This will also promote decent work and combat poverty. If we consider a transition from the informal economy to the formal economy for waste pickers, it will require a formalisation of their relationship with municipalities through contractual provisions that includes payment for their services, social protection measures, policies that promote gender quality and provisions for social dialogue with all relevant parties.[272]

Important lessons can be learnt from the Brazil experience in respect of waste pickers.[273] Studies have indicated that more men work as waste pickers with a formal contract; however, more than half of waste pickers that are organised in cooperatives and other organisations are women.[274] In a cooperative waste pickers are often categorised. Categories include street waste pickers,[275] motorised waste pickers,[276] waste sorters,[277] operational[278] and workshop categories.[279] Cooperatives in Brazil are specifically advantageous to women workers because of flexibility in respect of working hours, regular wages, and childcare facilities.[280] South Africa must consider a more inclusive approach in waste management that recognises waste pickers as workers and value their contribution to a better environment and an increase in recycling measures.

Recycling Cooperative, has benefited from an incentive scheme established by the Department of Trade and Industry. A landfill site in Kwaggasrand was closed and waste pickers were merely advised to seek other landfill sites. In Dobsonville in Soweto, a landfill site managed by Pikitup, shifts were established for waste pickers at the site. According to these shifts, South African citizens can operate at the site in the mornings and non-citizens in the afternoons. In the Free State, the Fezile Dabi District Municipality has initiated consultations with existing cooperatives. The Vaal Park Recycling Centre is also involved in consultations with cooperatives and has launched awareness campaigns to highlight the environmental and community benefits of recycling. In KwaZulu-Natal, the New England Landfill Site is badly managed and the Mayor has in the past ordered that waste pickers that operate on the site must be shot. At the Mooi Rivier landfill site, the Mooi Rivier Recycling Cooperative operate a recycling facility. See groundWork date unknown http://www.groundwork.org.za/Documents/waste/SAWPA%20pilot%20projects.pdf.

272 Dias and Fernandes "Cooperation among workers in the informal economy" 16.

273 See para 6.3.2.3 below.

274 Dias 2011 http://www.wiego.org/sites/default/files/publications/files/Dias_WIEGO_SB2.pdf

275 This category of workers collects waste from the streets; it is the lowest category in the work hierarchy and is also the most gruelling (Dias and Silva "Waste pickers in Brazil" 183).

276 Larger amounts of waste are collected from businesses using vehicles and in cooperation with municipalities (Dias and Silva "Waste pickers in Brazil" 183).

277 These waste pickers are responsible for the sorting of the collected waste (Dias and Silva "Waste pickers in Brazil" 183).

278 Members of the cooperative that are responsible for further processes such as weighing and sorting of waste (Dias and Silva "Waste pickers in Brazil" 183).

279 These workers are responsible for the empowerment of their members through educational and training programmes (Dias and Silva "Waste pickers in Brazil" 183).

280 Dias and Silva "Waste pickers in Brazil" 184.

Policies and strategies in South Africa must strive to include informal waste picker in the integrated waste management system. Municipalities must consider a registration process for these workers, including a smartcard system, similar to that of informal traders who have obtained a license to trade. This is an initial step within a recognition framework and will enhance the visibility of these workers.[281] Municipalities will also be able to control and adequately regulate the waste management system as they are obligated to do. In Brazil, the workers who are integrated into the system of local authorities also receive protective clothing.[282] It is submitted that in South Africa this will certainly enhance their occupational health and safety, but will also contribute to their visibility and recognition as workers. Municipalities should provide access to basic healthcare for these workers as part of their integration into the waste management system. This could include a tailor-made focus on their specific occupational health needs within the sector, through providing mobile clinics at dumping sites and landfills.[283] Infrastructure for sorting and storage is a vital component of waste management and municipalities should consider measures to provide infrastructure to enable integrated waste management systems.[284]

5.7 Local authorities and the provision of childcare facilities

One of the biggest challenges that women workers in the informal economy face is the lack of proper childcare facilities. In countries like, India, where a number of trade unions, such as SEWA, represents these women, various provisions for care facilities have been established. In South Africa this is still a major challenge. The workplace of waste pickers and informal traders poses many health and safety hazards for children; however, if these women do not work, they are not able to earn a livelihood and cannot provide for their households.

It is submitted that the provision of childcare facilities is a function of local authorities. Section 155(6) of the Constitution provides for provincial government to "promote the development of local government capacity to enable municipalities to perform their functions …". Section 155(7) refers to these functions of municipalities as listed in Schedule 4. Schedule 4 to the Constitution provides for local government functions including childcare facilities and municipal health services. Currently the focus by local

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281 Schenk, Blaauw and Viljoen 2016 *SocW* 46.

282 This is can also be indicative of an employment relationship as waste pickers are provided with tools and/or work equipment. See also s 200A of the *LRA* and s 83A of the *BCEA*.

283 Schenk, Blaauw and Viljoen 2016 *SocW* 46.

284 In April 2017, the Department of Environmental Affairs in Mooi Rivier provided a number of waste pickers with trolleys to transport collected waste material (Republic of South Africa Dept of Environmental Affairs 2017 https://www.environment.gov.za/mediarelease/thomson handsover15trolleys).

authorities is on early-childhood development rather that the provision of childcare facilities. Organisations representing informal traders and waste pickers must consult and negotiate with local authorities with reference to their function in Schedule 4 to provide childcare facilities.[285]

5.8 Occupational health and safety of informal traders and waste pickers

Challenges in respect of the health and safety of workers in the informal economy in South Africa can also be ascribed to the fact that occupational health and safety is regulated at national level and the diverse nature of work in the informal economy would often require policies at municipal or local level to address the specific challenges adequately.[286] Certain forms of work in the informal economy pose high occupational health and safety risks, for instance waste picking and informal trading.[287] These workers are often self-employed and there is no employee-employer relationship, which then raises questions in respect of who is responsible for the health and safety of these workers. Their workplace is commonly a public space such as a street or a waste dump. The regulation of occupational health and safety at national level, via various departments, including the Department of Labour, can be seen as a "bureaucratic disjuncture".[288] Limited focus is placed on the urban environment as a workplace and local policies to regulate these workplaces are lacking.[289]

In South Africa the provision and funding of occupational health and safety is to a large extent the responsibility of employers, and state resources may be limited. This is particularly challenging with reference to own-account workers such as informal traders and waste pickers.[290] Women workers also face more challenges than men because they

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285 In Ghana, the Ministry of Gender, Children and Social Protection plans to build childcare facilities at markets to allow women traders to earn a livelihood. Childcare is problematic for these women; they take their children with them to the markets as schools are long distances away from their workplace (Peacefmonline 2017 http://peacefmonline.com/pages/local/education/201710/331001.php).

286 Alfers *et al* 2016 *NewSol* 285.

287 Chen 2016 *NewSol* 161.

288 Alfers *et al* 2016 *NewSol* 283.

289 Alfers *et al* 2016 *NewSol* 283.

290 In Durban a pilot project named the Phephanathi Project was launched among informal traders in Warwick. The project was developed with the assistance of NGOs at national and international level. The project operated in two parts. The first level endeavoured to improve the working conditions through a tailor-made system designed for traders in public spaces. These working conditions are often associated with challenges such as lack of access to basic services such as water and sanitation. The second part related to a more sustainable conceptual framework. This entailed the engagement of various role players, including government officials and occupational health professionals, to consider these urban spaces as a workplace for these workers. A health committee was then established, representative of traders from the various markers to collaborate

are often responsible for categories of work such as unpaid family work and according to statistics they are less likely to be employers.[291]

Occupational health and safety of workers in the informal economy will often require innovative solutions in respect of coverage, as a mere extension of existing legislative provisions will not suffice due to the heterogeneous nature of work in the informal economy. It is often necessary to consider alternatives from the traditional occupational health and safety framework as well as to involve other role players.[292] Informal work often poses many health risks and the main asset workers provide is their labour; however, they do not enjoy adequate protection in this regard, thereby increasing their vulnerability.[293] For informal traders and waste pickers protection must include the strengthening of policies at local levels. If we consider specific regulation of the occupational health and safety of these workers it will require a paradigm shift from policies only designed to provide for those in formal employment to encompass also own-account and other workers in the informal economy. This shift will also require strengthening of worker organisations that represent these workers and a distinctive political will. Studies have indicated that for nearly 66% of these vendors their work in the informal economy is the principal source of their income and their position becomes extremely precarious when they cannot earn a living as a result of specific health issues.[294]

5.9 The role of public and private institutions

The importance of the role of public and private institutions in creating an enabling environment to extend labour protection to workers in the informal economy can be described as follows in the words of former President Nelson Mandela:

> Even the most benevolent of governments are made up of people with all the propensities of human failings. The rule of law as we understand it consists in the set of conventions and arrangements that ensure that it is not left to the whims of individual rulers to decide on what is good for the populace. The administrative conduct of government and authorities are subject to the scrutiny of independent

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with the stakeholders to improve the health and safety conditions at the markets. See para 7.9.4 below.

291 Chen 2016 *NewSol* 161. Women have to combine their paid work with unpaid care work in the home and therefore work longer hours to integrate their work and household responsibilities and thus often disregarding their own needs in terms of their health. Training programmes to improve knowledge with reference to various risks at the markets were also conducted. The above project indicates that through innovative and tailor-made mechanisms protection can be extended to these workers (Alfers *et al* 2016 *NewSol* 282).

292 These role players can include medical practitioners, nurses and other role players who show an interest to work with workers in the informal economy (Alfers *et al* 2016 *NewSol* 283).

293 Lund and Naidoo 2016 *NewSol* 146.

294 Roever *Informal economy monitoring study sector reports: Street vendors* 10.

> organs. This is an essential element of good governance that we have sought to have built into our new constitutional order.[295]

The responsibility placed on unions in respect of the informal economy does not relieve the state from providing labour protection or the employer from providing work with conditions that will meet acceptable (inter)national standards. Governments should strive to create an enabling environment for organisation and representation.[296] They should also provide an enabling framework at national and local level to support the informal economy and ensure basic rights, such as a healthy and safe workplace.[297] Policies and programmes should focus on bringing these marginalised workers into the economic and social mainstream. Although certain regulatory policies seek to balance competing interests, these policies may impact on the livelihoods of informal economy workers, for example citizens have a right to free movement, including access to pavements, and this right competes with the rights of informal traders as the pavement is their workplace. Regulations need to be carefully chosen to accommodate these competing interests.

The South African Constitution has tasked local government with the promotion of economic development at local level, and municipalities interpreting this constitutional mandate have adopted different approaches in respect of the informal economy.[298]

It must be realised that municipal regulations have an effect on the workplace of informal workers. Government can fulfil a major role in creating a more secure working environment and promoting opportunities for informal workers as it is generally mandated by the Constitution to do so.[299]

Current labour legislation often provides structures and processes for collective bargaining based on the traditional employment relationship; however, informal economy workers often face different bargaining counterparts, such as municipalities, government officials and other policymaking bodies that have a direct impact on their livelihood.[300] Labour

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295 Mandela Address at *Balancing the exercise of governmental power and its accountability*.

296 See also Chapter 7.

297 Social protection measures to workers in the informal economy can be extended if governments subsidise both contributory and non-contributory schemes. Within this framework, it is only the worker and the state that contributes and not the employer. This is of particular relevance to waste pickers or informal traders where an employee-employer relationship is absent (Alfers, Lund and Moussié 2017 *ISSR* 72).

298 Section 152(1) of the Constitution.

299 The City of Johannesburg's Informal Trading Policy of 2006 was based on the following principles: the proactive absorption of the poor; balanced and shared growth; facilitated social security and mobility; settlement restructuring; sustainable and environmental justice, and innovative governance solutions. In this policy, government highlights the importance of the informal economy's contribution towards job creation and poverty alleviation.

300 Sankaran and Madhav *Legal and policy tools to meet informal workers' demands*.

legislation could be extended to provide structures to accommodate the need of these workers as well as a dispute resolution process to cater for their specific needs.

When considering the labour protection of these workers one must take into account that apart from labour laws other regulatory laws can impact on certain occupational groups of informal economy workers. Role players should consider policies that provide for lower costs to establish and operate a business and the simplification of licensing procedures and other applicable rules and regulations.[301] However, providing for fundamental rights is not enough: government should engage with these organisations and provide innovative measures to accommodate their specific needs. Governments should, for example, provide for simple, less expensive and speedy registration procedures of these organisations. Existing unions can strive to provide and accommodate workers in the rising informal economy, but independent unions formed by these workers will concentrate on issues most relevant to these individuals. Good governance, which excludes the practices of harassment,[302] 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.

5.10 Conclusion

Regulation of waste pickers and street vendors in South Africa is fragmented, and comprehensive and uniform legislation is absent.[303] A consultative and participatory approach in line with the constitutional objectives of local authorities is lacking. A regulatory policy framework for these workers must promote inclusiveness, social dialogue and gender equality, rather than constitute a punitive framework. Comprehensive policies and strategies will also require statistical date on the size and contribution of these workers to the economy.

Apart from being the responsible actor in the regulatory framework, the state must endeavour to support the various forms of work of these workers. This must include

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301 ILO Resolution on Decent Work and the Informal Economy 2002 Conclusion 27.

302 In Uganda 49% of workers reported harassment by officials (Banik *The legal empowerment agenda* 163).

303 See paras 6.3.1.2 and 6.3.1.3 below. In India the *Street Vendors (Protection of Livelihood and Regulation of Street Vending) Act* of 2014 provides for the protection of urban street vendors and the regulation of their activities. This is a national act and only two states, namely Jammu and Kashmir, are excluded from the scope (see s 1(2)). Enacting specific legislation, thereby recognising the contribution of vendors, also highlights their value an importance to the country. A very important innovative aspect of this Act is the provision for education and training programmes to increase knowledge and understanding of the role and value of the informal sector and advise the street vendors of their rights (see s 32(b)). The Act is an excellent example of an innovative measure to provide protection to those in the informal economy.

access to both legal and economic resources and adequate social protection measures, including maternity protection and access to childcare facilities. It is of the utmost importance that these women workers are integrated into a consultative process with local authorities for the design and implementation of all regulatory measures that have an impact on their livelihoods. The involvement of these workers in these processes, both in design and implementation, represent a bottom-up or "regulation from below" option.[304] Governments must recognise the important role of any regulatory framework with reference to public spaces, and the impact of such a framework on the livelihoods of these workers.

One of the most important challenges that these workers face is that they are not recognised as workers. This concept of recognition encompasses recognition with reference to their status as workers through policies, legislative measures and strategies; however, this must also include the recognition of their collective voice and the strengthening of this voice.[305] Recognition as workers is indeed the first step in any endeavour to extend labour and social protection measures. This recognition must be combined with tailor-made legislative measures to reduce the vulnerability of these workers.[306] A rights-based approach can also provide a progressive and normative framework that promotes integration and inclusion and minimises decent work deficits.

These categories of workers in the informal economy face diverse challenges, but an overarching common challenge is the lack of a comprehensive national legal framework to provide adequate labour and social protection to these workers.

Meaningful inclusion of the workers is necessary; however, this will require a paradigm shift in respect of urban policies.[307] It is clear that these workers in the informal economy contribute to the economy within cities and assist in the alleviation of poverty.[308] The South African government must ensure that local authorities realise the potential of the informal economy and thereby contribute to their developmental goals.[309] A regulatory

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304 Bamu and Theron *"Nothing about us without us"* 5. See also the success of the Warwick Junction Programme. This programme supported a consultative and participatory approach involving all stakeholders in urban planning processes.

305 Schenk, Blaauw and Viljoen 2016 *Social Work* 43.

306 Brown and Roever *Enhancing productivity in the urban informal economy* 47. See the *Street Vendors (Protection of Livelihood and Regulation of Street Vending) Act* of 2014 of India. The integration of waste pickers in Brazil was initiated by the recognition of waste picking as an occupation. See also para 6.4.1.2 below.

307 Brown and Roever *Enhancing productivity in the urban informal economy* 44.

308 Brown and Roever *Enhancing productivity in the urban informal economy* 44.

309 Brown and Roever *Enhancing productivity in the urban informal economy* 8.

framework that can transform the lives of these workers and can positively contribute to urban governance is of paramount importance.[310]

[310] Brown and Roever *Enhancing productivity in the urban informal economy* 44.

CHAPTER 6
LABOUR AND SOCIAL PROTECTION FOR WOMEN WORKERS IN THE INFORMAL ECONOMY: THE BRAZIL AND INDIAN EXPERIENCE

6.1 Introduction

Work which is regarded as atypical work or non-standard work has increased across the globe, and informal economy work is continuously increasing and has taken on new forms.[1] In addition to this the ILO estimates that global unemployment will increase by 3,3 million in 2017 – prompted by a decline in labour conditions in emerging countries.[2] Approximately 1,4 billion people are engaged in vulnerable or precarious employment[3] across the world.[4] In developing countries, four out of five workers are in a form of vulnerable employment.[5] Globally there is a realisation that the informal economy is a reality and that it is increasing in most developing countries. A new awareness exists, namely that the informal economy provides job opportunities to unemployed persons and in many developing countries it contributes to the national economy and alleviates poverty within households. Other than in many developed countries, the informal economy in developing countries is in general not regarded as illegal, but rather encompasses a way of life.

In sub-Saharan Africa, 66% of workers are in informal employment excluding agriculture,[6] compared to 82% in South Asia[7] and 51% in Latin America.[8] Globally 586 million women are own-account or contributing family workers.[9]

The extension of labour and social protection to workers in forms of vulnerable employment, such as workers in the informal economy, is vital and necessary if one

1 Vanek *et al Statistics on the informal economy* 3.
2 ILO *World employment and social outlook: Trends 2017* 1.
3 Vulnerable employment is described by the ILO Report as work associated with limited access to social protection (ILO *World employment and social outlook: Trends 2017* 2).
4 ILO *World employment and social outlook: Trends 2017* 2.
5 ILO *World employment and social outlook: Trends 2017* 2.
6 Women represent 74% of informal employment as a percentage of non-agricultural employment. See also Vanek *et al Statistics on the informal economy* 8.
7 Women represent 83% of informal employment as a percentage of non-agricultural employment. See also Vanek *et al Statistics on the informal economy* 8.
8 Chen 2017 https://oecd-development-matters.org/2017/04/04/the-informal-economy-in-african-cities-key-to-inclusive-and-sustainable-urban-development/. See also Vanek *et al Statistics on the informal economy* 7, 8. Women in this region represent 74% of informal employment as a percentage of non-agricultural employment.
9 According to ILO *Women at Work: Trends 2016* xii.

considers the future and function of labour law and if one is mindful that globally the number of workers in these forms of employment will grow by 11 million per annum. South Asia and sub-Saharan Africa will be the worst affected regions.[10] In Chapter 1, I indicated that in developing countries these workers often live in conditions of extreme poverty as their wages are irregular and low.[11] These workers also face various legal barriers and high risks, such as exclusion from legislative protection, lack of voice and representation and deficits in respect of economic resources, productive resources and decent work:[12]

> The decent work deficits are the most pronounced in the informal economy. From the perspective of unprotected workers, the negative aspect of work in the informal economy far outweigh its positive aspects. Workers in the informal economy are not recognized, registered, regulated or protected under labour legislation and social protection … Since they are normally not organised, they have very little collective representation vis-à-vis employers of public authorities. Work in the informal economy is characterized by low levels of skills and productivity, low or irregular incomes, unsafe and unhealthy working conditions, long working hours and a lack of information, markets, finance, training and technology. Workers in the informal economy are characterized by various degrees of dependency and vulnerability.[13]

The lack of adequate social protection measures characterises women workers in the informal economy and includes inadequate or no coverage by compulsory schemes and exclusions form benefit regimes such as maternity benefits.[14]

Studies also indicate links between work in the informal economy, poverty and gender.[15] The poor are overrepresented in the informal economy, especially poor women, while earnings are often irregular, lower than in the formal economy and below prescribed minimum wages.[16] Similar to the situation in the formal economy, women in the informal economy also earn less than men.[17] Poverty among women can also be ascribed to the gender inequalities in access to economic resources, as in developing countries many women do not have access to property and other assets due to societal gender

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10 The number of unemployed was expected to increase to 201 million at the end of 2017 (ILO 2017 http://embargo.ilo.org/global/about-the-ilo/newsroom/news/WCMS_541128/lang--en/index.htm).

11 ILO *World employment and social outlook: Trends 2017* 2.

12 Bonner and Spooner *The only school we have* 7.

13 Resolution concerning decent work and the informal economy (ILO 2002 http://www.ilo.org/public/english/standards/relm/ilc/ilc90/pdf/pr-25res.pdf Conclusion 9).

14 ILO *Women at work: Trends 2016* 30.

15 Hill *Women identity, agency and economic development* 27.

16 Chen, Vanek and Carr *Mainstreaming informal employment and gender in poverty reduction* 30.

17 Chen, Vanek and Carr *Mainstreaming informal employment and gender in poverty reduction* 30. The ILO estimates that the persistent wage gap between men and women will take another 70 years to close (ILO *Women at work: Trends 2016* xvi).

disparities.[18] Women are also found in jobs in the informal economy that are particularly precarious, such as domestic work.[19] In South Asia, sub-Saharan Africa, Latin America and South Asia, the majority of workers in the informal economy are women.[20]

Oelz and Rani[21] provide an overview of the situation as follows: Female labour force participation rates are lower than that of males in South Africa, India and Brazil and this includes both rural and urban areas. In South Africa and Brazil the proportion of women workers employed as formal waged workers is higher; however, statistics have indicated that even these women in South Africa are often hired on a temporary basis without adequate social protection measures. Domestic workers in South Africa, India and Brazil earn substantially less than women in other low-skilled services and in manufacturing. This renders domestic workers extremely vulnerable. Domestic workers also often represent a previously disadvantaged group, for example black women in South Africa; in India they are often representative of disadvantaged castes or tribes. In Brazil, more than 60% of these workers are black. [22] Moreover, poverty rates among previously disadvantaged communities are often high. The low level of education among domestic workers contributes to the fact that domestic work is undervalued and seen as work that is innate and which does not make any economic contribution.[23]

The focus of this chapter and this study is specifically on categories of women workers in the informal economy without adequate labour and social protection – it focuses on domestic workers that currently, in many countries are recognised and represent a group of workers that enjoy some protection *de jure*; however, *de facto,* they are still without adequate protection. The chapter also considers two other distinctive vulnerable groups of women workers in the informal economy, namely waste pickers and informal traders. They are also mostly unrecognised and undervalued as workers in most countries. Waste pickers represent one of the most precarious worker occupations in the informal economy, although they make important contributions to the global economy and contribute to public health and a safer environment. Their work reduces municipal costs with reference to solid waste.[24] In most countries they are not covered by a legal framework as most

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18 United Nations Statistics Division 2015 https://unstats.un.org/unsd/gender/worldswomen.html xiv.

19 United Nations Statistics Division 2015 https://unstats.un.org/unsd/gender/worldswomen.html 103.

20 Vanek *et al Statistics on the informal economy* 8 See also Chen 2016 http://www.un.org/esa/socdev/egms/docs/2016/PPTbyMarthaChen.pdf.

21 Oelz and Rani *Domestic work, wages, and gender equality* 2-8.

22 Oelz and Rani *Domestic work, wages, and gender equality* 7.

23 Oelz and Rani *Domestic work, wages, and gender equality* 7, 8.

24 Dias and Samson *Informal economy monitoring study sector report: Waste pickers* 4.

labour law paradigms only extend protection to categories of employees and not own-account workers. Moreover social protection contributions are often only based on a formal contract of employment and a distinctive employee-employer relationship, which is absent for many of these workers.

In Chapter 5 the position of waste pickers and informal traders in South Africa was discussed. In this chapter various case studies from two other jurisdictions, namely India and Brazil, will be considered to identify and consider measures that improved the position of these specific categories of women workers through the extension of existing legislative measures and innovative and tailor-made measures of protection. In India and Brazil, extension of existing measures as well as innovative and tailor-made solutions are evident and these will be analysed in order to evaluate whether they can offer guidance to South Africa. These countries were chosen as, on one hand, they have introduced pronounced and unprecedented measures to extend both labour and social protection measures to these informal economy workers and, on the other hand, innovative policy developments are evident which provide these workers with protection. These countries were also chosen with reference to the significant number of workers in the informal economy and local conditions as compared to South Africa, as will be illustrated in the discussions below. Within the South African constitutional paradigm, section 39(2) provides as follows:

> When interpreting the Bill of Rights, a court, tribunal or forum-
>
> (c) may consider foreign law.[25]

With further reference to the need and impact for a comparative perspective, Javillier states the following:

> The definition of employer and worker, and of enterprise and employment, are at the heart of evolution or revolution in the field of not only labour law, and industrial relations, but also of social security. From a geopolitical, as well as from a legal point of view, there is no longer any such thing as a "closed world". More than ever we need to learn from each other taking into account not only the European and the (North) American experience, but also the African, Arabic and Asian and Central and South Americas … As always a comparative and critical view is vital and can help one face new challenges in an increasing globalized economy.[26]

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25 In *S v Makwanyane* 1995 3 SA 291 para 39, the court stated that we can derive assistance from public international law and foreign case law and that our Constitution must be construed with due regard for our legal system, our history and circumstances, structure and language of the Constitution. The comparison of foreign jurisdictions provides assistance to address the challenges with due regard to these workers in South Africa and ensures a critical perspective to existing challenges.

26 Javillier "The employer and the worker" 355-356.

The majority of workers in India, approximately 92%, work in informal jobs without adequate labour and social protection.[27] In India reference is made to this as the "unorganised" sector.[28] Even the formal economy in India is characterised by informality as a result of the increasing use of contract labour and outsourcing of production.[29] India has established a number of important measures to address the vulnerabilities of workers in the informal economy, both through legislative and other measures that extend labour and social protection. When compared to South Africa, India has higher poverty levels but lower inequality levels.[30] Brazil is one of the largest countries in the world with one of the largest populations and there are about 31 million informal workers.[31] In 1994 inequality in Brazil strongly resembled that of South Africa's society; however, since then inequality has decreased and school enrolment has increased, the informal economy has shown a decrease and the economy displays strong growth.[32] South Africa, Brazil[33] and India[34] all have constitutional provisions that ensure a dignified life to all; however, these constitutional guarantees remain an illusion to many workers in the informal economy.

Protection of human rights is regarded as important in these countries as they endeavour to align domestic laws with international instruments. All three countries are members of the International Labour Organization.[35] These countries experience common problems with reference to women workers in the informal economy and poverty and inequality, but India and Brazil have adopted various measures to successfully address a number of these challenges. These developments and innovative measures often challenge the traditional boundaries of labour law and restricted social security notions and objectives. It is submitted that a number of these measures can provide solutions to the challenges faced by a similar category of women workers in South Africa. Despite comparative similarities, categories of workers in the informal economy in different jurisdictions face different contextual, societal and economical challenges in respect of labour and social

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27 This includes unorganised sector workers and informal workers in the organised sector. Informal workers in the organised sector are categorised as workers without access to social security (ILO 2016http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-new_delhi/documents/publication/wcms_496510.pdf).

28 Hill *Women identity, agency and economic development* 49.

29 Srivastava *Structural change and non-standard forms of employment in India*.

30 Bhorat *Mail and Guardian* 2.

31 Dias and Silva "Waste pickers in Brazil" 179. There has been a decline in the rate of informality. In 2007, there were 37,4 million informal workers and this declined to 35,5 million in 2013. See also Cardoso 2016 *Soc&Antr* 330.

32 Bhorat *Mail and Guardian* 1; UNU WIDER 2015 https://www.wider.unu.edu/publication/inequality-south-africa-interview-murray-leibbrandt.

33 See para 6.3.2 below with reference to the Constitution of Brazil of 1998.

34 See para 6.3.1 below for the Indian constitution.

35 Brazil is a founding member of the ILO and the first country in the region to establish an ILO field office.

protection. It is imperative for South Africa to develop policies and legislative frameworks to protect these vulnerable workers and it is submitted that these developments can be enhanced by considering corresponding conditions, similarities, challenges and responses in countries such as Brazil and India.

6.2 Definitional framework

The International Classification of Status in Employment (2003) categorises informal employment within the informal economy and the formal economy.[36] Informal employment in the informal economy includes own-account workers; employers in informal enterprises, their employees and contributing family workers in these enterprises, as well as members of informal producers' cooperatives.[37] Informal wage employment then encompasses employees employed by formal enterprises without social protection and those employed by informal enterprises or households, such as domestic workers.[38]

As mentioned in Chapter 1 above, the International Conference on Labour Statisticians adopted an international statistical expanded definition of "informal employment" to widen the scope to include the various forms of informal employment for purpose of more accurate data collection.[39] This widened concept of informal employment includes informal self-employment[40] and informal wage employment.[41] This classification is based on two notions, namely, the degree of risk (the precariousness associated with the work in terms of loss of work and or earnings) and of authority.[42] This widened concept illustrates a shift from the enterprise notion to also cover employment relationships that are not regulated by law.[43] Three distinct concepts thus exists: the narrow notion of *informal sector* that refers to production and employment in unincorporated small or unregistered enterprises, the statistical notion of *informal employment* as described above and lastly the informal economy.[44]

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36 See para 1.2.1 above for characteristics of the categories of workers.

37 See also Von Broembsen and Chen *Eliminating legal barriers from the perspective of the informal economy* 2, 3.

38 Von Broembsen and Chen *Eliminating legal barriers from the perspective of the informal economy* 2, 3.

39 Chen 2016 *NewSol* 158.

40 Included are employers in informal enterprise; own-account workers in informal enterprises and contributing family workers (formal and informal enterprises are covered); and members of informal producers' cooperatives (Chen 2016 *NewSol* 159).

41 This concept includes employees of informal enterprises; casual or day labourers; temporary or part-time workers; paid domestic workers (unpaid domestic work is not included); contract workers, Unregistered or undeclared workers, and industrial outworkers (Chen 2016 *NewSol* 159).

42 Chen 2016 *NewSol* 159.

43 Chen 2016 *NewSol* 159.

44 Chen 2016 *NewSol* 159.

When considering the labour and social protection of the informal economy, it is important to analyse its composition, the various steering elements and the linkages that exist with the formal economy.[45]

An overview of the last available statistics according to regions is provided in paragraph 1.1 above. The heterogeneous nature of the informal economy increases the challenges in extending labour and social protection to these workers. The diversity of the work in the informal economy is accurately described by Chen as follows:

> Street vendors in Mexico; push cart vendors in New York City; rickshaw pullers in Calcutta; jitney drivers in Manila; garbage collectors in Bogotá; and roadside barbers in Durban. Those who work on the streets or open air are the most visible forms of informal workers. Other informal workers are engaged in small shops and workshops that repair bicycles and motorcycles, recycle scrap metal; make furniture and metal parts; tan leather and stitch shoes, weave, dye and print cloth; polish diamonds and other gems; make and embroider garments, sort and sell cloth, paper and metal waste, and more. The least visible informal workers, the majority of them women, work from their homes. Home-based workers are found around the world. They include garment workers in Toronto; embroiderers on the island of Madeira; and assemblers of electronic parts in Leeds.[46]

This quotation clearly illustrates the very diverse nature of work in the informal economy across the world. All these workers are vulnerable as a result of the work they perform and are without the necessary labour and social protection.

Although a certain number of workers in the informal economy are there by choice, the informal economy also increases during economic crises or decline, forcing workers into the informal economy. The informalisation of formal jobs can also contribute to an increase in the informal economy.[47] In developing countries most of the workers in the informal economy have never worked in the formal economy and are engaged in informal work as "traditional or survivalist activities".[48] Many workers also enter the informal economy during periods of high unemployment, underemployment and poverty.[49] The informal economy does have "great job and income potential" as entry is easy and the demand for certain skills or education is low.[50] However, the work created in the informal economy does not comply with the notion of decent work.

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45 Chen 2016 *NewSol* 158.
46 Chen *The informal economy: Definitions, theories and policies* 4.
47 Chen *The informal economy: Definitions, theories and policies* 11.
48 Chen 2016 *NewSol* 158.
49 ILO Resolution concerning Decent Work and the Informal Economy, Conclusion 6.
50 ILO Resolution concerning Decent Work and the Informal Economy, Conclusion 6.

Studies have indicated that women workers in the informal economy also suffer from cultural and social injustices at various levels, such as macro- or societal level,[51] meso- or enterprise level[52] and micro- or interpersonal level.[53] Women's work, including domestic work and care work, is often seen as an "extension of their gender specific responsibilities".[54] Such women are vulnerable and face discrimination on multiple grounds and levels and this can be linked to the position or location of the women worker in the informal economy (sectoral location), their status as worker according to class or caste and finally their status as women in societies, communities or households according to gender.[55] They thus face various inequalities and discrimination on various grounds and the culmination of this reflects in the inequalities of access to resources and power.[56] Discrimination, bias and stereotyping within societies and households often create both structural and cultural barriers in respect of access to markets for these women.[57] Men in the informal economy are more often the employers with higher incomes and lower poverty risks, whilst women are predominantly engaged as industrial outworkers, homeworkers or contributing family workers. These workers also display various degrees of vulnerabilities.[58] Feminisation of poverty and gender discrimination is a common feature of women workers in the informal economy.[59] Poverty is multidimensional and these women are often denied access to education, appropriate training and access to resources which compounds their precarious position in the informal economy.[60]

Shared challenges by women workers in the informal economy include the following:

(a) lack of labour and social protection or inadequate labour and social protection;

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51 These workers are excluded from labour and social protection and are often nor recognised as workers and their work is not valued. They also suffer from cultural injustices as they are marginalised and excluded from a social and political life (Hill *Women identity, agency and economic development* 59).

52 Economic empowerment or the lack thereof plays an important role at this level, as these workers do not have access or have limited access to resources, such as markets, credit and industry information (Hill *Women identity, agency and economic development* 60).

53 Hill *Women identity, agency and economic development* 59. In 2015, the UN determined that globally 58 million primary school children are not receiving education and more than 31 million of these are girls (UN Statistics Division 2015 https://unstats.un.org/unsd/gender/worlds women.html xi).

54 Pande "Organising for life and livelihoods in the mountains of Uttarakhand" 100.

55 Hill *Women identity, agency and economic development* 59.

56 Pande "Organising for life and livelihoods in the mountains of Uttarakhand: The experience of Uttarakhand Mahila Parishad" 101.

57 Chen, Vanek and Carr *Mainstreaming informal employment and gender in poverty reduction* 71.

58 Resolution concerning Decent Work and the Informal Economy 2002, Conclusion 9. Workers in the informal economy are particularly vulnerable without adequate labour and social protection.

59 ILO Resolution on Decent Work and the Informal Economy 2002, Conclusion 20.

60 ILO Resolution on Decent Work and the Informal Economy 2002, Conclusion 20. See also UN Statistics Division 2015 https://unstats.un.org/unsd/gender/worldswomen.html.

(b) various levels of poverty;
(c) representing previously disadvantaged groups, based on race, gender and caste;
(d) a lack of skills and lower educational levels due to being previously disadvantaged as well as to gender inequalities;
(e) a lack of empowerment, including legal and economic empowerment;
(f) low or irregular wages;
(g) poor working conditions; and
(h) a lack of representation and collective bargaining at various levels.

Solutions must include legislative interventions, as well as tailor-made, innovative solutions in accordance with the diverse needs of these workers.[61]

Another important factor to consider when extending labour and social protection is the link that exist between the formal and informal economy. Informal ventures or undertakings often have some link with formal enterprises.[62] These linkages can be divided into, for example, individual transactions,[63] subsectors[64] and value chains.[65] The regulatory framework that exists for the formal economy is often not appropriate for the informal economy, as rigid regulation can create more obstacles for those in the informal economy such as expensive registration procedures.[66]

6.3 Comparative perspectives

6.3.1 India

India has a hybrid legal system that stems from civil, common and customary law. The country consists of 29 states and 7 union territories and has a population of 1,3 billion people. India has one of the largest informal economies in the world; the majority of its people work in the informal economy and women are also more likely to be working in the informal economy than men.[67]

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61 Fourie and Smit "Precarious work, gender and non-discrimination in the informal economy".

62 These undertakings often source materials form formal enterprises and deliver completed products to these enterprises (Chen 2016 *NewSol* 162).

63 This category includes the exchange of products or services in an "open market exchange" (see Chen 2016 *NewSol* 162). The formal enterprise is normally the dominant party and in control.

64 This includes networks of self-standing units engaged in the production and distribution of certain products (normally a number of transactions), for example items of clothing (Chen 2016 *NewSol* 162).

65 In these instances the formal dominant enterprise will dictate the terms and conditions for the informal enterprise or firm (Chen 2016 *NewSol* 162).

66 Chen 2016 *NewSol* 164.

67 ILO 2017 http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-new_delhi/documents/publication/wcms_568701.pdf

The preamble of its constitution refers to India as a democratic republic that provides justice, liberty, equality and fraternity to all its citizens.[68] The constitution of India contains fundamental rights in part III. These rights include the right to equality[69] and prohibition of unfair discrimination,[70] protection of freedom of speech, the right to form associations and to practise any profession, or to carry on any occupation trade or business,[71] the right to education,[72] and the prohibition of forced labour[73] and employment of children.[74]

In India, 54% of women are not part of the labour market due to unpaid care and household work.[75] The following table illustrates the most recent statistics (2012) available with reference to informal employment, as a percentage of non-agricultural employment in India.[76]

Table 6.1 Informal employment as a percentage of non-agricultural employment in India

Description	**Men**	**Women**	**Total**
Informal employment	84	86	85
Self-employment as % of total employment	51	56	52
Informal employment as total % of employment	92	95	91

Source: WIEGO 2012 http://www.wiego.org/dashboard/statistics/south-asia/india

68 Fraternity is linked to the human dignity of individuals. The constitution was adopted by the Constituent Assembly in 1949 and came into force in January 1950 (National Portal of India 2017 https://www.india.gov.in/my-government/constitution-india).

69 Article 14.

70 Article 15. The grounds are a closed list, and include race, caste, sex and place of birth;. see article 15(1). Specific vulnerable categories are mentioned, such as women, children and "backward classes of citizens" and the state can specifically provide for these vulnerable people (article 15(3) and (4)).

71 Article 19. All citizens have the right to form associations, unions or cooperative societies (article 19(c)).

72 Article 21.

73 Article 23.

74 Article 24.

75 UN India 2014 http://in.one.un.org/page/rights-for-domestic-workers/.

76 WIEGO Dashboard statistics distinguishes between self-employment and wage employment, employment within the informal sector (i.e, unincorporated, unregistered or smaller enterprises) (WIEGO 2012 http://www.wiego.org/dashboard/statistics/south-asia/india).

In June 2017, India ratified the Worst Forms of Child Labour Convention 182 (1992) and the Minimum Age Convention 138 (1973), however, these conventions will only be effective in 2018.[77] India has ratified six out of the eight fundamental conventions.[78]

In India, domestic workers, street traders, and waste pickers all have the right to life and to earn a livelihood in terms of the constitution. A regulatory framework in respect of waste pickers includes only environmental regulations, at national as well as at municipal levels.[79]

6.3.1.1 Domestic workers in India

In India, as in South Africa, the majority of domestic workers are women and represent disadvantaged groups in society, often marginalised because of caste, race and class.[80] More women than men have never received any schooling.[81] Accurate statistics are not available, but estimates indicate there are more than 4 million domestic workers in India. In recent years there has been an increase in domestic work in India due to more women entering the labour market[82] and a decline in extended families.[83] Many domestic workers migrate from disadvantaged rural communities to the city in search for a better life.[84] Domestic workers face many challenges including violence and harassment within the place of employment, often the employer's private home.[85]

In India, as in many other countries, these workers are often excluded from the scope of labour and social protection measures due to narrow definitions of notions such as worker, employee and employer. In addition in India placement agencies also fall outside legislative scope due the narrow definitional scope.[86] These workers are excluded from the *Minimum Wages Act* of 1948 as their work is not listed as scheduled employment, the

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77 ILO 2017 http://www.ilo.org.dyn/normlex/en/f?p=NORMLEXPUB:1:0::NO:::.

78 These conventions include the Forced Labour Convention 29 (1930), the Equal Remuneration Convention 100 (1951), the Abolition of Forced Labour Convention 105 (1957) and the Discrimination (Employment and Occupation) Convention 111 (1958).

79 Sankaran and Madhav "Legal and policy tools to meet informal workers' demands" 11.

80 Sankaran, Sinha and Madhav *Domestic workers: Background document.* Child labour in this sector is a common occurrence, despite the government prohibition of children under 18 working (SEWA *Domestic workers' laws and legal issues in India*).

81 Jain *Health financing and delivery in India* 5.

82 India still has one of the lowest female participation rates in the world and many women are involved in unpaid care work within their own households and because of these responsibilities are unable to enter the labour market (UN India 2014 http://in.one.un.org/page/rights-for-domestic-workers/).

83 Sankaran, Sinha and Madhav *Domestic workers: Background document.*

84 Dasgupta 2016 http://sanhati.com/excerpted/18181/.

85 In 2012 alone 3564 cases of violence against domestic workers were reported across India (UN India 2014 http://in.one.un.org/page/rights-for-domestic-workers/). In many instances domestic workers do not report harassments or violence because they are afraid they will lose their jobs.

86 SEWA *Domestic workers' laws and legal issues in India* 2.

Payment Wages Act of 1936, the *Contract Labour Act* (*Regulation and Abolition*), 1970, the *Maternity Benefit Act* 53 of 1961,[87] the *Equal Remuneration Act* of 1976, the *Employees' State Insurance Act* of 1948, *Employees' Provident Fund Act* of 1952, *Payment of Gratuity Act* of 1972; and the *Workmen Compensations Act* of1923.[88] The extension of equal protection to domestic workers will require these acts to be amended to extend coverage to these marginalised workers and where a mere extension is not appropriate, tailor-made provisions must be considered to provide for these workers of whom the majority are women, specifically for the inclusion of placement agencies.[89]

Minimum wages can be determined by the various states, but are not determined at national level. The undervalued nature of domestic work also means that even in states with minimum wages, the wages set for domestic work are lower than those for other low-skilled work.[90] This indicates how important it is to recognise the value and contribution of domestic work to societies and countries and to address the systemic challenges associated herewith. In order to provide labour and social protection to domestic workers, national and uniform policies and legislation must be provided.[91]

Legislative provisions that extend coverage to these workers in India include the *Unorganized Workers' Social Security Act* of 2008, the *Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act* of 2013 and the Minimum Wage Schedules.[92]

One of the many challenges that domestic workers face is harassment at the workplace. Specific national legislation was enacted in India to protect workers against sexual harassment in the workplace.[93] The *Sexual Harassment of Women at Workplace*

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87 The Act does not provide for a private household as an establishment within the application of the Act (see s 2(a) and (b)). The notion of "woman" in the act is defined widely as "a woman employed, whether directly or through any agency, for wages in any establishment" (s 3(o)).

88 Dasgupta 2016 http://sanhati.com/excerpted/18181/. Domestic workers in South Africa are also excluded from workmen's compensation, but they do enjoy maternity benefits, maternity leave and job protection. The *Shops and Establishments Act* of 1954 of Delhi provides for obligations and rights to employees and employers in the unorganised sector of employment in these workplaces.

89 SEWA 2014 *Domestic workers' laws and legal issues in India* 2.

90 Dasgupta 2016 http://sanhati.com/excerpted/18181/.

91 SEWA 2014 *Domestic workers' laws and legal issues in India* 5.

92 Currently seven states, including Andhra Pradesh, Bihar, Jharkhand, Kerala, Odisha and Rajasthan, have introduced minimum wages for domestic workers. Two states, namely Maharashtra and Tami Nadu, have also introduced a Welfare Board for domestic workers to register for benefits. However, a large number of workers are still without protection as national legislation coverage for all domestic workers is clearly absent (Rights for domestic workers UN India http://in.one.un.org/page/rights-for-domestic-workers/).

93 In India, national statistics of 2012 indicated that 3564 cases of violence against domestic workers were reported. Due to the intimate nature of the relationship many workers are reluctant to report

(Prevention, Prohibition and Redressal) Act[94] provides for the protection of women against sexual harassment specifically in the workplace, and recognises that harassment is an infringement of fundamental rights, such as the right to equality[95] and the right to life and dignity.[96] The act recognises the international protection of equality, a right to a safe environment free from sexual harassment and the right to work with dignity.[97] The Indian constitution provides in section 15(3) that government can make special provisions for women and children in respect of equality and prohibition of discrimination. The *Sexual Harassment Act* extends coverage to domestic workers. The act specifically provides that domestic workers are included, it also includes all workers placed through any agency, whether temporary, part-time or full-time workers.[98] This is thus an example of extending the scope of legislation to include workers in the informal economy.

It is not clear whether women waste pickers and street vendors who are self-employed and where there is no direct employer will enjoy protection under this act, but the scope of the definition of employee includes employees employed through an agent, including a contractor, as well as employees employed om terms of employment that are implied. Section 2(g) defines the unorganised sector with reference to a workplace as an enterprise owned by individuals or self-employed workers engaged in the production or sale of goods or providing a service of any kind.

Waste pickers and street vendors will be included under the scope of the definition of unorganised sector and under section 3 that states no woman shall be subjected to sexual harassment at any workplace.[99] However, these women workers are often harassed by local authorities. The act also distinguishes between an employee and a domestic worker and the definition of domestic work specifically refers to the household as the place of work.[100]

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cases of violence (http://in.one.un.org/page/rights-for-domestic-workers/). In South Africa sexual harassment in the workplace is regulated by the *EEA*. Street traders and waste pickers are covered by *PEPUDA* in this regard.

94 Of 2013. It is interesting to note that the Act specifically provides for protection for women and not men. Certain critics have called for gender-neutral legislation in this regard (Mitta *Indian Times* 1). The *Criminal Law (Amendment) Act* of 2013 prescribes penalties for the perpetrator of sexual harassment and this ranges from a fine to imprisonment.

95 Section 14 and 15 of the Constitution of India. The constitution has been amended 101 times and is one of the longest constitutions in the world.

96 Section 21.

97 India ratified the convention on Elimination of all Forms of Discrimination against Women in 1993 and this act endeavours to give effect to its obligations under the convention.

98 Section 2(e).

99 "Workplace" in this regard will refer to the definition of the unorganised sector in relation to workplace in s 2(p).

100 Section 2(f). This includes a person employed at a workplace for any work.

Sexual harassment is defined in the act and includes the following acts:

(a) physical contact or advances; or
(b) a demand or request for sexual favours; or
(c) making sexually coloured remarks; or
(d) showing pornography; or
(e) any other unwelcome physical, verbal or non-verbal conduct of a sexual nature.[101]

Section 4 of the Act obliges employers of a workplace[102] to establish an internal complaints committee and section 5 provides for a local complaints committee within districts. The Act also provides that every employer must provide a safe working environment.[103] In the case of domestic workers working in the private home of the employer, a complaint for harassment will be lodged at the local committee.[104] The section provides reasonable assistance to women who are illiterate to be members of the committee.[105] However, criticism against the Act includes that the procedures are long and cumbersome, specifically for vulnerable women from disadvantaged backgrounds.[106] Depending on the circumstances, one of the committees will investigate the complaint against the employer; however, in the case of domestic workers a criminal case will be opened by the police.[107] This is an innovative provision as it recognises the problematic nature of the employment relationship in the case of domestic work, where the workplace is the private home of the employer. It takes into account the fact that the employer might refuse to assist a committee in any investigation, and providing the police with the complaint strengthens the position in respect of investigation and enforcement against the employer of a domestic worker. During the investigation, the complainant can be transferred to another workplace, or be granted additional leave for a period up to three months or relief as may be prescribed.[108] In the case of domestic workers, a transfer to another workplace will not be appropriate relief; however, leave for a period up to three months will be, specifically if one also considers the intimate nature of the employment relationship in this

101 Section 2(n).
102 A house is included in the definition of workplace to extend coverage to domestic workers (see 2(vi).
103 Section 19(a). Other duties include workshops and programmes to sensitise employees and the provision of assistance to the complainant as required (s 19(c) and (g)).
104 Section 9.
105 Section 9(1).
106 Dasgupta 2016 http://sanhati.com/excerpted/18181/.
107 Section 11.
108 Section 12.

instance. Compensation can be awarded and the relevant committee must consider the following:

(a) the mental trauma, pain, suffering and emotional stress caused to the aggrieved woman;
(b) the loss in career opportunity due to the incident of sexual harassment;
(c) medical expenses incurred by the victim for physical or psychiatric treatment;
(d) the income and financial status of the respondent;[109] and
(e) feasibility of such payment in lump or in instalments.[110]

Appeal procedures are available to the aggrieved party.[111] Although this Act covers all women workers, specific provisions provide for the atypical relationship of domestic workers and this is innovative legislative drafting, recognising that this employment relationship is distinctive and requires responsive regulation.

Several commissions and other associations have attempted to draft policies and legislative provisions in endeavours to provide a legal framework for domestic workers.[112] However, comprehensive, uniform and national legislation is still lacking. State governments have been tasked to include domestic workers under the *Minimum Wage Act* of 1948 that enforces minimum wages for categories of workers.[113] This requires the state to include domestic work as scheduled employment.[114]

India ratified two fundamental ILO conventions, namely the Minimum Age Convention 138 (1973) and the Worst Forms of Child Labour Convention 187 (1999) in June 2017. The *Child Labour (Prohibition and Regulation) Act* of 1986[115] only prohibited employment of children of 14 years and younger in certain employments, including as domestic

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109 This provision endeavours to accommodate small or individual employers; however, for many domestic workers this will mean a limited amount of compensation, whereas an aggrieved employee employed by a more affluent employer may be entitled to a larger amount of compensation due to the financial status of her employer. Compensation will certainly be the appropriate remedy for domestic workers due to the intimate nature of the employment relationship and the fact that as a result of the harassment the continuous relationship will be intolerable.

110 Section 15.

111 Section 18.

112 The National Commission for Women drafted a *Domestic Workers Welfare and Social Security Act* and the Minister of Labour and Employment drafted a policy document for Domestic Workers. Other unsuccessful attempts at legislative coverage include *the Domestic Workers (Conditions of Employment) Bill* of 1959, and a *Private Members Bill* (SEWA *Domestic workers' laws and legal issues in India* 5).

113 WIEGO date unknown http://www.wiego.org/informal_economy_law/domestic-workers-india.

114 WIEGO date unknown http://www.wiego.org/informal_economy_law/domestic-workers-india.

115 The act defines a child: "as a person who has not completed his fourteenth year". See s 2 (ii).

workers or servants.[116] However, a 2016 amendment to the Act[117] amended the long title of the act to read:

> An Act to prohibit the engagement of children in all occupations and to prohibit the engagement of adolescents in hazardous occupations and processes.[118]

This means that any employment of children younger than 14 years is prohibited and the employment of an adolescent is prohibited in unsafe occupations.[119] In line with this ratification several other measures have been adopted to prevent child labour, including the Child Labour (Prohibition and Regulation) Central Rules and a National Child Labour project that promotes education and vocational training.[120]

Domestic workers in India are vulnerable and often from disadvantaged communities. Their work is undervalued and unrecognised and the majority of legislation enacted benefits only formal workers. Currently the legal framework, including the conceptual framework, in India is unable to adequately address the distinctive challenges that these workers face. Legal coverage is often left to the various states since uniform national regulation is absent. Apart from the *Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act,* the *Unorganised Workers' Social Security Act* of 2008 (discussed below), measures introduced through the Rashtriya Swasthya Bima Yojana (RSBY – the National Health Insurance Programme), and the introduction of minimum wages by certain states, regulation is too a large extent absent.

Specific regulation for a specific categories of vulnerable workers in India does exist, namely the *Beedi and Cigar Workers (Conditions of Employment) Act* of 1966.[121]

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116 List of Occupations (Non Industrial Activity) Item 14 Part A of the Schedule in the *Child Labour (Prohibition and Regulation) Act*, 1986. Domestic work has been prohibited since 2006. In Schedule B List of Processes (Industrial Activity), item 56, rag picking and scavenging is prohibited.

117 The *Child Labour (Prohibition and Regulation) Amendment Act* 35 of 2016.

118 Section 2. An adolescent is a person between 14 and 18 years. See s 4.

119 Section 2.

120 ILO 2017 ilo.org http://www.ilo.org/wcmsp5/groups/public/---asia/---ro-bangkok/---sro-new_delhi/documents/publication/wcms_557089.pdf.

121 It is submitted that the position of this category of workers is not specifically addressed in this study; however, important principles can be extracted from this example with reference to the extension of protection to other women workers in the informal economy. This act is an example of innovative and tailor-made legislation for a specific category of workers, namely *beedi* and cigar workers in. It is important to note that this is an example of a national statute and only two states are excluded, namely the states of Jammu and Kashmir (s 1(2)). The Act provides for a wide definition of employer and this includes a person who has control over an establishment (included is a place that is connected with any manufacturing process of *beedi* and cigar work), or advanced money, supplied goods, has a substantial interest in the control, or the business of the establishment is entrusted to him. A managing agent, manager, superintendent or supervisor by any other name are also included (s 2(g)(b)). The scope of the definitions in s 2 of the Act endeavours to extend wide coverage and thus include words such as "any" to achieve this. In the instance of *beedi* and cigar workers, a narrow definition of employer and employee will result in

Comprehensive, tailor-made legislation similar to this Act is also required in respect of domestic workers and should contain provisions applicable to women workers in respect of their empowerment, their conditions of work and social protection, including maternity benefits, childcare facilities, housing and health. The ILO convention on decent work provides a framework for specific regulation for domestic workers.[122] Currently the National Platform for Domestic Workers, consisting of unions and MBOs, are actively campaigning for comprehensive legislation for these workers.[123]

Labour protection for domestic workers in India lacks comprehensive, uniform, national legislation that ensures decent work and equality, including gender equality. The challenges in regard to organising domestic workers also prevents legislative change.[124] Domestic workers in India have commonalities with domestic workers across the world as these workers

> … are largely drawn from social sections that have been socially devalued/debased and that are voiceless, especially in a context of growing inequalities, and are not easily able to demand societal and legal recognition for their work and working conditions.[125]

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exclusion of this sector from labour and social protection due to the unique nature of their work. This is an example of innovative conceptualisation to include a large number vulnerable workers in a category. Enforcement of the Act is monitored through inspectors (ss 6 and 7). In respect of occupational health and safety the act provides for cleanliness of the workplace or premises (ss 8 and 15), proper ventilation and measures to prevent harm in respect of inhalation of hazardous fumes (s 9), overcrowding (s 10), access to drinking water (s 11) and adequate sanitation (ss 12 and 13). These provisions are important as they consider the specific health and safety issues of these workers and then provide specifically for the safety of *beedi* and cigar workers through tailor-made provisions. A mere extension of existing legislative provisions would not have provided for the specific risks associated with *beedi* and cigar work. An innovative feature of the Act is that it provides specifically for childcare facilities in respect of employers that employ more than 50 employees at an industrial premise and requires women caregivers in such facilities that are trained in childcare (s 14). This is an innovative and tailor-made provision to provide specifically for women workers. It ensures social justice and promotes gender equality, and is an example of what can be achieved through tailor-made legislative provisions for women workers in the informal economy. The Act also provides for the *Maternity Benefit Act* of 1961 to apply to establishments as defined in the *Beedi and Cigar Workers (Conditions of Employment)* Act (s 36(3)). The *Beedi and Cigar Workers (Conditions of Employment)* Act of 1966 thus widens the scope of the definition of establishment in the *Maternity Act* to include *beedi* and cigar workers.

122 Certain attempts to legislate domestic workers have been made such as the *Domestic Workers (Conditions of Service) Bill* of 2009, the *House Workers (Conditions of Service) Bill* in 1989; however, these bills have lapsed and a *lacuna* exists as there is still no national parliamentary act to regulate these workers (SEWA *Domestic workers' laws and legal issues in India* 6).

123 SEWA 2014 *Domestic workers' laws and legal issues in India* 7. See also their proposal for a Domestic Workers Welfare and Social Security Act.

124 Courts in India have also declared that workers engaged in personal service are not "workmen" for purposes of the Trade Unions Act of 1926 (see article 2 (g)). See *Ramagaswami v Registrar of Trade Unions* A.I.R 1926 Mad (India) (para 17), the court declared that their services are of a personal nature and they do not fall within the ambit of the act and are unable to register a trade union (Neetha and Palriwala 2011 *CJWL* 100).

125 Neetha and Palriwala 2011 *CJWL* 100.

6.3.1.2 Waste pickers in India

Waste picking in India is also ranked low on the hierarchy of occupations in the informal economy, and specific vulnerable people are engaged in these activities, such as women, children, migrants and unskilled and illiterate people.[126] They represent the poorest of the poor and these workers often face discrimination based on caste.

Waste pickers in India are often own-account workers or members of cooperatives. An employee-employer relationship is absent and their bargaining partners often include local authorities such as municipalities, but a formal legal relationship is absent. Accurate statistics are not available, but a limited number of estimates have been recorded in four cities. In Delhi it is estimated that there are a 100 000 waste pickers, in Pune 6 000 (of whom 72% are women), in Gujarat, more than a 100 000 and in Ahmedabad 30 000.[127] They face numerous challenges such as occupational health issues, lack of social protection measures and harassment from local authorities and enforcement officers. It is submitted that the profile of waste pickers is presently changing due to a new realisation that recyclable materials do have value.[128]

In India, solid waste management is a state matter and the responsibility of the municipalities as provided for by the constitution and the *Environment Protection Act* of 1985. National legislation provides specific provisions in this regard.[129] India has a large number of municipal authorities that are responsible for solid waste management under various state laws.

In 2000, the Municipal Solid Waste (Management and Handling) Rules were issued, which only became effective in 2004. The Supreme Court in the landmark decision of *Almitra H P Patel vs Union of India*[130] ordered a comprehensive policy with regards to all waste management issues. The rules require authorities to introduce measures for the collection

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126 Waste pickers in India (date unknown) WIEGO http://www.wiego.org/informal_economy_law/waste-pickers-india.

127 WIEGO date unknown http://www.wiego.org/informal_economy_law/waste-pickers-india.

128 WIEGO date unknown http://www.wiego.org/informal_economy_law/waste-pickers-india.

129 See the *Constitution 74th Amendment Act* of1992, article 243, 12th Schedule. This article provides for the state to empower municipalities to perform certain functions, such as public healthcare, solid waste management, protection of the environment, poverty alleviation and safeguarding the interests of weaker members of the society (see the 12th Schedule of the Constitution). The *Environment (Protection) Act* provides for the protection and improvement of the environment and allows central government to take required measures to ensure this (s 3). The Municipal Solid Waste (Management and Handling) Rules were issued in 2000 (Sankaran, Sinha and Madhav *Waste pickers: Background document*).

130 15/02/2002. The court reprimanded the City of Delhi, the capital, as it had not been able to provide a clean and healthy environment for its people since garbage is visible all over the city. The court directed authorities on how to discharge their statutory duties in this regard.

of solid wastes, through door-to-door collection on regular informed times through the use of a bell-ringing musical vehicle, as well as collection from slums and squatter areas, markets and slaughter houses.[131] It also contains a provision that requires awareness programmes for citizens of segregation of waste and the promotion of recycling.[132] The rules do not specifically provide for waste pickers, but municipalities have a wide discretion in the adoption of waste collecting measures, depending on their specific conditions.[133] Unfortunately many municipalities contract these functions out to private enterprises for reasons of assumed efficiency and reduced costs, thereby displacing waste pickers.[134]

An attempt to integrate these workers into the system was made by the National Environment Policy of 2006 that stated the following as part of an action plan:

> Give legal recognition to, and strengthen the informal sector systems of collection and recycling of various methods. In particular enhance their access to institutional finance and relevant technology.[135]

This is an important empowerment provision, but it does not have the force of a binding legislative provision and is thus merely a guideline. A number of rules also exist for waste management according to specific classifications.[136]

Municipalities must allow for household collection of waste and this compelled certain municipalities to negotiate with waste pickers in respect of the collection and segregation of waste.[137] These waste pickers are then paid a "user fee" and municipalities are responsible for the acquisition of equipment such as protective clothing and carts and also contribute towards health insurance.[138] This provision of "tools" of trade and work equipment can be indicative of an employment relationship.[139] The municipalities also empower these waste pickers through training programmes.[140] Where municipalities choose to use waste pickers instead of private contractors, this inclusive framework allows

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131 See Schedule –II (1).
132 See Schedule –II (2).
133 See Schedule –II (2).
134 Waste pickers in India (date unknown) WIEGO http://www.wiego.org/informal_economy_law/waste-pickers-india.
135 See Action Plan E part (iii), s 5.2.6 of the National Environment Policy of 2006.
136 See Recycled Plastic Manufacture and Usage Rules of 1999 as well as Batteries (Management and Handling) Rules of 2002.
137 Dias 2016 *Env&Urb* 7. Municipalities in the Province of Bombay, including Pune municipality, are covered by the *Bombay Provincial Municipal Corporations Act* of 1949 and this Act places the responsibility of cleaning the cities and the removal of refuse within the competencies of local authorities (see articles 291-293; Chikarmane *Integrating waste pickers into municipal solid waste in Pune, India*).
138 Dias 2016 *Env&Urb* 7.
139 See s 200A(f) of the *LRA*.
140 Dias 2016 *Env&Urb* 7.

for recognition as workers and social recognition at various levels, improves the livelihood of these workers and their households and provides for improved working conditions.[141]

There is no minimum wage regulation for waste pickers, and a perception exists that this can only be done by the Department of Labour and not the various municipalities.[142] Waste pickers are paid certain "rates" by authorities, but the setting of a national minimum wage is to be preferred with reference to income security and the promotion of equality.

In Pune, one of the largest cities in India, waste pickers through mobilisation and the establishment of unions[143] and cooperatives[144] have been included in the municipal solid waste management framework and their working conditions have improved.[145] These waste pickers are extremely vulnerable as 90% of them are illiterate women who do not have any other occupational alternatives.[146] Hierarchies exist within the tasks performed by waste pickers and women are at the lowest end, collecting waste at bins and landfill sites which also means that their income is lower than that of their male counterparts who are more predominant as waste traders.[147] Waste pickers are all poor and vulnerable and there is a clear caste and class segmentation; however, men are still in a more favourable position than women.[148] If one considers the debate about the future of labour law and the crisis experienced and debated by labour lawyers around the world, about the inability of current labour laws to protect the large number of workers in the informal economy, one must realise that the starting point of any debate must include the recognition of waste pickers in India as workers deserving of protection.

Various policies and guidelines[149] published by the Minister of Urban Development in India provide important guidelines in respect of solid waste management. These guidelines recognise the environmental risks in respect of solid waste and the challenges in respect

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141 Dias 2016 *Env&Urb* 8.

142 WIEGO date unknown http://www.wiego.org/informal_economy_law/waste-pickers-india.

143 Waste pickers established a union for the self-employed, named Kagad Kach Patra Kashtakari Panchayat (KKPKP) and this union started the battle for recognition of these waste pickers as workers (Chikarmane *Integrating waste pickers into municipal solid waste in Pune, India* 1). See para 7.9.5. below.

144 The union KKPKP established a cooperative, SWaCH, for the waste pickers (Chikarmane *Integrating waste pickers into municipal solid waste in Pune, India*). See para 7.9.5 below.

145 Chikarmane *Integrating waste pickers into municipal solid waste in Pune, India.*

146 Chikarmane *Integrating waste pickers into municipal solid waste in Pune, India*.

147 Narayan and Chikarmane "Power at the bottom of the heap" 207.

148 Women work at landfill and bin sites and at these sites the valuable waste has already been removed. Many of the men also remove valuable recycling waste during the night when women are responsible for the household and care duties (Narayan and Chikarmane "Power at the bottom of the heap" 224).

149 Government of India Urban Development Department *Guidelines 2010: Advisory on Improvement of Solid Waste Management Services* of 2013.

of an inclusive framework that mitigates the adverse effects on the quality of life of all.[150] The guidelines also recognise the social exclusion of waste pickers, the health risks involved in their work and the importance of effective waste management systems in the country.[151] Moreover, an important aspect of these guidelines is the recognition of organisations representing waste pickers, and local authorities are requested to cooperate with these organisations to mobilise these workers.[152] Local authorities are required to consider financial support and the provision of equipment and tools to these organisations to improve the work conditions of these workers.[153]

In April 2017, the High Court in Gujarat also ordered that the local municipality must include waste pickers into its solid waste management and design an appropriate policy within a limited time frame, thereby ordering an inclusive framework and providing a livelihood for these workers, transforming their lives and promoting social justice, human dignity and decent work for all.[154] The SEWA and Om Sai Ventures challenged the tender issued by the municipality, as it required applicants to have 25% ownership of vehicles for door-to-door collection and a cash deposit. These requirements created a barrier for waste pickers to apply and favoured larger private enterprises; therefore it can be regarded as an indirect discriminatory requirement that excludes waste pickers.

The Directive Principles of State Policy, Part IV, in article 38 provide the following:

> (1) The State shall strive to promote the welfare of people by securing and protecting as effectively as it may a social order in which justice, social, economic and political, shall inform all the institutions of the national life.
>
> (2) The State shall in particular, strive to minimise the inequalities in income, and endeavour to eliminate inequalities in status, facilities and opportunities, not only amongst individuals but also amongst groups of people residing in different areas or engaged in different vocations.

Subsection 2 can be interpreted to the effect that the state must consider to eliminate the inequalities experienced by waste pickers within the solid waste management system.

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150 Government of India Urban Development Department *Guidelines 2010: Advisory on Improvement of Solid Waste Management Services* of 2013 para 3.

151 Government of India Urban Development Department *Guidelines 2010: Advisory on Improvement of Solid Waste Management Services* of 2013 para 4.

152 Government of India Urban Development Department *Guidelines 2010: Advisory on Improvement of Solid Waste Management Services* of 2013 para 6.4.

153 Government of India Urban Development Department *Guidelines 2010: Advisory on Improvement of Solid Waste Management Services* of 2013 para 6.4.

154 Times of India 2017 https://timesofindia.indiatimes.com/city/ahmedabad/hc-tells-amc-to-include-waste-pickers-in-managing-waste/articleshow/58230274.cms. See Special Application No. 1994 of 2017: *Centre for Development Communication v Ahmedabad Municipal Corporation* No. 4748 of 2017 SCC Online GU 360.

Article 39 of the Directive provides that the state must ensure that its policy contains principles of equality, a right to adequate means of livelihood, equal pay for men and women and that the health and strength of workers are protected. Article 41 allows the state to design provisions for securing the right to work within its economic capacity and article 43 provides for a living wage and decent conditions of work through legislative or other measures to all workers. These principles are not enforceable and are merely directive principles that design a code of conduct. The reason that they are not enforceable relates to the limitations on available resources of the state. However, all policies should be influenced by these directives. This means that policies by local authorities with reference to solid waste management and the livelihoods of waste pickers must consider these principles based on equality and decent work for all.

The *Maharashtra Mathadi, Hamal and other Manual Workers (Regulation of Employment and Welfare) Act* of 1969 regulates unprotected manual workers employed in certain categories as provided for in a Schedule. The Act currently applies mostly to head-loaders and loaders in industries such as grocery markets, railway yards and various markets.[155] The act provides that unprotected workers are manual workers according to the Schedule.[156] The act provides for registration of all parties with a Statutory Scheme.[157] Such Schemes must regulate the employment conditions and welfare of these workers, including hours of work, maternity benefits, health and safety measures, and the rate of wages.[158] The Act provides for the establishment of a board and for tripartite representation, with equal numbers of employers and workers.[159] This Act can be extended to include waste pickers and provide for a representative structure that allows for representation by these workers, their associations and local authorities. However, to provide comprehensive protection, this Act should then apply to all waste pickers in the country.

In certain countries waste pickers have been able to change their circumstances through the courts.[160] In many instances this took place through judicial activism where the courts were prepared to issue orders instead of deferring to the legislature. In certain instances

155 See the Schedule to the Act.
156 Article 2(12).
157 Article 3.
158 Article 3(2)(d) and 3(2)(i).
159 Article 6.
160 Times of India 2017 https://timesofindia.indiatimes.com/city/ahmedabad/hc-tells-amc-to-include-waste-pickers-in-managing-waste/articleshow/58230274.cms. See Special Application No. 1994 of 2017: *Centre for Development Communication v Ahmedabad Municipal Corporation* No. 4748 of 2017 SCC Online GU 360.

the enforcement of such orders can be timeous and problematic; therefore enactment or amendment of legislation and policies perhaps offers a more sustainable solution.[161] Waste pickers in India, as in many other countries, are reliant on the policies of local authorities for regulation since uniform and comprehensive national legislation and policies are absent. India lacks comprehensive legislation and policies to protect the rights of these workers and their livelihoods. The approach needed must be holistic and include an integrated waste management system.

6.3.1.3 Informal traders (street vendors) in India

Informal traders are categorised as street vendors in India. There are 12 million street vendors in India and 3 million of them are women traders.[162] This occupation has dual benefits as it provides an income for the street vendors while at the same time providing access for the poor to cheaper services and goods.[163] It provides easy access for many poor workers, as it does not require high skills levels or substantial financial resources. The Supreme Court of India specifically referred to street trading as an "age old vocation adopted by human beings to earn a living".[164] In *Maharashtra Ekta Hawkers Union Municipal Corpn., Greater Mumbai*[165] the court defined a street trader as a person who offers goods for sale to the public without a permanent structure as a workplace.

However, street trading is characterised by a conflict of balancing interests that exists between the right to use public spaces and the right of these traders to earn a livelihood.[166] These vendors offer goods and services to the public often from temporary structures. They are often seen as a burden to urban renewal policies and development

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161 Times of India 2017 https://timesofindia.indiatimes.com/city/ahmedabad/hc-tells-amc-to-include-waste-pickers-in-managing-waste/articleshow/58230274.cms. See Special Application No. 1994 of 2017: *Centre for Development Communication v Ahmedabad Municipal Corporation* No. 4748 of 2017 SCC Online GU 360.

162 Harvey J *et al Compendium of WIEGO and SEWA case studies* 1.

163 Harvey *et al Compendium of WIEGO and SEWA case studies* 1. In *Sodan Singh v New Delhi Municipal Committee* (1989) SCR (3) 1038, Kuldip Sing J in para 33 stated the following: "In India there are large numbers of people who are engaged in the business of 'street trading'. There is hardly a household where hawkers do not reach."

164 *Sodan Singh v New Delhi Municipal Committee* (1989) SCR (3) 1038 para 5.

165 (2014) 1 SCC 490 D.

166 In *Sodan Singh v New Delhi Municipal Committee* (1989) SCR (3) 1038 5, para 17, the court stated: "If hawkers were to be conceded the right claimed by them, they could hold the society ransom by squatting on the busy thoroughfares, thereby paralyzing all civic life. This is one side of the picture. On the other hand, if properly regulated according to the exigency of the circumstances, the small traders on the sidewalks can considerable add to the convenience of general public, by making available ordinary articles of everyday use for a comparative lesser price … If the circumstances are appropriate and a small trader can do some business for personal gain on the pavement to the advantage of the general public and without any discomfort or annoyance to others, we do not see any objection to his carrying on the business."

plans and are harassed by local authorities and enforcement officers. As in South Africa and Brazil, street vendors in India face many challenges, including irregular income, lack of adequate social protection measures, regular displacement and evictions by authorities, lack of infrastructure, lack of basic services, and occupational health and safety risks. Women street vendors in India also earn less than men.[167] They face many inequalities and various barriers in respect of access to resources such as credit facilities.[168] In all countries street traders face challenges, including lack of an adequate infrastructure in the cities where they operate; such as access to running water; proper waste disposal systems; sanitation, shelter and access to storage facilities.[169]

Legislative regulation varies according to the different municipalities. These workers require licenses to trade in most areas.

In respect of the organisation of specifically street vendors SEWA has always played a major role.[170] Advocacy campaigns lobbied by SEWA and the National Association of Street Vendors of India (NASVI) produced a National Policy on Street Vending in 2004 and a revised policy in 2009. Their advocacy campaigns led to the enactment of the *Street Vendors (Protection on Livelihood and Regulation of Street Vending) Act* of 2014.[171]

Important lessons can be learnt from both the policy document and the Act. The policy is a national document that ensures equal treatment for all, unlike South Africa, where various municipalities have their own policies and hence no consistent framework exists. Although the Indian policy is a national document it does allow for variations within states according to geographical locations.[172] Both these documents highlight the value and contribution of vendors in the cities, and hence underline the importance of protecting their livelihoods.[173] The overarching objective of the policy is to provide a supportive framework for these vendors without undue restrictions.[174] Specific objectives include: the provision of legal status for street vendors; clearly marked vendor zones; transparent regulation; the promotion of organisation of vendors;[175] promotion of social dialogue at

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167 Harvey *et al Compendium of WIEGO and SEWA case studies* 1.
168 Harvey et al *Compendium of WIEGO and SEWA case studies* 1.
169 SERI 2015 *The end of the street?* 32.
170 See paras 7.9.1 and 7.9.2 below for their role in organising these workers.
171 Roever 2016 *Env&Urb* 12.
172 Para 3.2 of the National Policy on Urban Street Vendors 2009.
173 Roever 2016 *Env&Urb* 12.
174 See para 3 of the National Policy on Urban Street Vendors 2009.
175 This provision is of paramount importance as it recognises various forms of organisation including unions, cooperatives and civil society, and supports their role as collective empowerment agents (see para 3.2(d)).

various forums;[176] self-regulation and economic empowerment.[177] The policy document also recognises that a large number of street vendors are women, and the constitutional provision for equal rights for women and men to an adequate means of livelihood.[178] It is of paramount importance to recognise these vendors in respect of the economy and society at the outset and thus promoting their dignity. This provides for a positive framework that focuses on an enabling environment rather than a punitive, criminalising environment.

The *Street Vendors (Protection on Livelihood and Regulation of Street Vending) Act* of 2014 aims to protect the rights of urban street traders and to establish a regulatory framework.[179] It is important to note that the Act applies to the whole of India, therefor establishing uniform and comprehensive national regulation for these workers.[180] The Act distinguishes between mobile vendors and stationary vendors that operate regularly from the same location.[181] The act contains a general, broad definition of a street vendor:

> … "street vendor" means a person engaged in vending of articles, goods, wares, food items or merchandise of everyday use or offering of services to the general public, in a street, lane, side walk, footpath, pavement, public park or any other public place or private area, from a temporary built-up structure or by moving from place to place and includes hawker, peddler, squatter and all other synonymous terms which may be local or region specific; and the words "street vending" with their grammatical variations and cognate expressions, shall be construed accordingly.[182]

This definition is particularly wide in scope and endeavours to cover all activities of these workers and to extend its scope to all the regions. This definition recognises the diverse activities within the category of street trading. Town Vending Committees are obliged to conduct regular surveys of vendors within their jurisdiction and traders may not be evicted until such a survey has been done.[183] Street traders must provide the Committee with an undertaking that they have no other means of earning a livelihood, that they will

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176 This provision for participatory processes are exemplary as social dialogue includes all role players, such as local authorities, planning authorities, the police, organisations and associations representing the vendors, welfare associations, civil society and NGOs, representatives of trade and commerce, and banks. See para 3.2(e).

177 See para 7.8 below. Economic empowerment includes access to services such as credit facilities, housing and social security.

178 National Policy for Urban Street Traders 1. See also article 39 of the Indian constitution.

179 Despite this act, restrictive by-laws do still exist; these include various municipal acts such as the *Bombay Provincial Municipal Corporation Act* and the *Bombay Police Act* of 1951 which provides for eviction of vendors in terms of ss 67 and 102. The impact of the *Street Vendors Act* as a national regulatory framework will still have to be determined (Mahadevia and Vyas "Ahmedabad: Judicial activism in claiming spaces" 115).

180 The only states that are excluded are Jammu and Kashmir. See article 1(2).

181 Article 2(d) and (k).

182 Article 2(l).

183 Article 3.

personally conduct the business, or through a family member, and that the certificate for trading shall not be transferred.[184] In the event of the death of the trader, the spouse or dependent children may continue.[185]

These workers are responsible for the maintenance of cleanliness and hygiene of the trading space.[186] The Act allows for a 30-day notification period before eviction.[187] A dispute resolution framework is established for the resolution of grievances of these traders.[188] An important provision of the Act is the prevention of harassment of traders by the police and other authorities.[189]

The Act contains directives for a plan for street vending for local authorities to be submitted for approval by the government.[190] The plan must provide for the following:

- the accommodation of all existing street traders;
- the right of the public to usage of the urban spaces, including the roads;
- earmarking the spaces for vending; and
- existing markets may not be declared no-vending zones.

This Act constitutes an example of an innovative and tailor-made modality to provide for a specific category of workers in the informal economy, namely street traders. The benefit of this approach is that the Act can address the specific challenges that these workers face, such as harassment by authorities, displacements and evictions.

In a number of Supreme Court cases in India, the court recognised that street trading is a fundamental right in line with section 19(1) of the Indian constitution and highlighted the importance of a regulatory framework to provide for street traders. The court found that court orders do not provide sustainable solutions and it is not possible for the court to monitor the implementation of instructions contained in judgments.[191] The fundamental right is not unlimited and the state can provide reasonable restrictions in respect of trading

184 Article 5(1).
185 Article 5(2).
186 Article 15.
187 Article 18(3).
188 Article 20.
189 Article 27.
190 See also article 21.
191 See *Gainda Rum v M.C. D.* (2010) 10 SCC 715 and *Maharashtra Ekta Hawkers v Union Municipal Corpn., Greater Mumbai* (2014) 1 SCC 490. In *Sodan Singh vs New Delhi Municipal Committee* (1989) 4 SCC 155, para 17, the court stated: "The right to carry on trade or business mentioned in article 19(1)(g) of the Constitution, on street pavements, if properly regulated cannot be denied on the grounds that the streets are meant exclusively for passing or re-passing and for no other use. Proper regulation is, however a necessary condition."

such as registration and compliance with area restrictions for safety reasons.[192] Legislative intervention is required to address the challenges that these traders face.[193] The court also emphasised the importance of the state in protecting and providing for all its citizens, including street traders.[194]

Street trading in India is regulated through specific national legislation and policies that provide for a comprehensive legal framework, unlike the regulation of waste pickers through various municipal policies. It is submitted that a tailor-made design modality also be implemented through specific national legislation in India to regulate the precarious position of waste pickers in the country.

6.3.1.4 Innovative and tailor-made design modalities in India to extend social protection to the all workers in the informal economy

6.3.1.4.1 The *Unorganized Workers' Social Security Act*

In 2008 India enacted the *Unorganized Workers' Social Security Act*[195]and the long title provides as follows:

> An act to provide for social security and welfare of unorganized workers and for other matters connected therewith or incidental thereto.

This Act is an example of national legislation specifically drafted to cover workers in the informal economy and provides an exemplary inclusive framework for other jurisdictions with reference to coverage of informal economy workers.

The act defines the "unorganized worker" as

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192 *Maharashtra Ekta Hawkers Union Municipal Corpn., Greater Mumbai* (2014) 1 SCC 490 para 9. This case was decided before the enactment of *Street Vendors (Protection on Livelihood and Regulation of Street Vending) Act* of 2014.

193 See *Gainda Rum vs M.C. D.* (2010) 10 SCC 715 and *Maharashtra Ekta Hawkers Union Municipal Corpn., Greater Mumbai* (2014) 1 SCC 490.

194 *Maharashtra Ekta Hawkers Union Municipal Corpn., Greater Mumbai* (2014) 1 SCC 490 para 7.

195 33 of 2008.

> … a home-based worker,[196] self-employed worker[197] or wage worker[198] in the unorganized sector[199] and includes a worker in the organized sector who is not covered by any of the Acts mentioned in Schedule II of the Act.

Definitions of the categories of workers covered are wide as the vocabulary in the act includes words such as *any*, *irrespective* and *whatsoever*. The use of "worker" in the Act legitimises categories of informal workers such as street vendors, waste pickers and domestic workers and provides recognition of their status as workers.

Domestic workers and migrant workers are specifically included under *wage worker* and coverage is linked to wages as determined by the state. This seems to exclude high-income earners from the scope of the Act. It is important to note that the scope extends to workers who receive payment in kind, as many domestic workers are often remunerated in this manner.[200]

Social security benefits that are covered by specific welfare schemes include life and disability cover,[201] health and maternity benefits,[202] old age protection,[203] and any other benefits as determined by government.[204] It is important for women workers in the informal economy that such benefits do not consist of a closed list, due to their heterogeneity and diverse needs and challenges. In respect of suitable welfare schemes this includes provident funds,[205] employment injury benefits,[206] housing,[207] educational

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196 A home-based workers is defined as "a person engaged in the production of goods or services for an employer in his or her home or other premises of his or her choice other than the workplace of the employer for remuneration, irrespective of whether the employer provides the equipment, materials or inputs" (s 2(b)). It is clear from this definition that a defining characteristic of home workers is that they do not work from the workplace of the employer.

197 This means "any person who is not employed by an employer, but engages himself or herself in any occupation in the unorganised sector subject to a monthly earning of an amount as may be notified by the Central Government or the State Government from time to time or holds cultivable land subject to ceilings as may be notified by the State Government. This section appears to be implementing a means test or limit in respect of earnings and fixed assets.

198 Section 2(n) states the following in respect of a wage worker:"[A] person employed for remuneration in the unorganised sector, directly by an employer or through any contractor, irrespective of place of work, whether exclusively for one employer or for one or more employers, whether in cash or in kind, whether as a home-based worker, or as a migrant worker or workers employed by households including domestic workers, with a monthly wage of an amount as may be notified by the Central Government and State Government, as the case may be.

199 This is defined in s 2(l) as: "… an enterprise owned by individuals or self-employed workers engaged in the production or sale of goods or providing service of any kind whatsoever, and where the enterprise employs workers, the number of such workers is less than 10.

200 Section 2(n).

201 Section 3(1)(a).

202 Section 3(1) (b).

203 Section 3(c).

204 Section 3 (d).

205 Section 3(4)(a).

206 Section 3(4)(b).

207 Section 3(4)(c).

schemes for children,[208] skills training,[209] funeral assistance[210] and old-age care.[211] The Act embraces a wider concept of social protection and through the welfare provisions they also provide for the empowerment of these workers, providing for decent work and embracing the dignity of all. In terms of this Act domestic workers enjoy coverage in respect of employment injuries through welfare schemes, unlike the position in South Africa where domestic workers are excluded from this protection. The Act allows for the welfare schemes to be funded partly by central Government.[212]

One of the most notable features of the Act refers to the composition of the National Social Security Board and the State Social Security Boards.[213] The composition of the boards allows for representatives from the workers in the sector, employers, and members of civil society and provides that adequate representation must be given to minorities and women.[214] Legislative provisions requiring adequate representation by women legitimises their position and promotes gender equality. This allows for social dialogue with the workers and recognises the valuable role of civil society in the extension of protection of these workers.[215]

The Act also recognises that different categories of workers according to their needs may require distinct suitable schemes.[216] Workers are required to register for schemes and will receive smartcards and where required by specific schemes, benefits may be linked to contributions by the workers.[217] Challenges in respect of this Act is that many of the terms are vague. The establishment of the schemes and the welfare boards and implementation may be problematic unless comprehensive regulations are provided;[218] however, it is an attempt to provide a legal framework, social protection and decent work to a vast number of workers in the unorganised sector. The success of this Act depends on its implementation and the subsequent enforcement through adequate mechanisms.

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208 Section 3(4)(d).
209 Section 3(4)(e).
210 Section 3(4)(f).
211 Section3(4)(g).
212 Section 4.
213 Section 5. The National Board will monitor the welfare schemes for these workers and act in an advisory capacity on the administration of the Act and can make recommendations to government on various schemes for different categories of workers (s 5(8)(a)-(g)). See also s 6(1).
214 Sections 5 and 6.
215 Section 5(2)(a)-(c).
216 Section 8(a).
217 Section 10.
218 Section 13 does allow central government to issue rules in respect of the implementation of this Act and the collection of contributions from beneficiaries and/or employers. The schemes are not specified and are dependent in many ways on the issuing of rules for the various provisions of the Act.

6.3.1.4.2 Draft Labour Code on Social Security 2017

The Ministry of Labour and Employment in India issued a draft Labour Code on Social Security Bill[219] in 2017. The aim of this Code is as follows:

> To simplify and rationalize, consolidate and amend laws relating to social security of the workforce as to make them less complex for easier comprehension, implementation and enforcement.

This aim is important to workers in the informal economy as the complexity of legislation and regulation normally creates challenges for these workers that they face when accessing social security schemes. This Code is an example of wide and innovative conceptualising to include workers in the informal economy. The Code applies to all entities and workers employed by entities, including workers who are owners of entities and households.[220] The Code defines an employee in clause 2.42, and endeavours to remove all uncertainties by expressly including part-time workers, casual workers, domestic workers and workers in the informal economy. This expanded definition is more effective than a mere presumption that serves only as an evidentiary tool as to who is an employee.

The unorganised sector includes small enterprises where the number of workers is less than a prescribed threshold, self-employed units and households that employ domestic workers.[221] A further definition is then provided for an unorganised worker, namely:

> A home-based worker, self-employed worker, owner-cum-worker or a wage worker in the unorganized sector.[222]

The code provides for representation by women on the National Council.[223] All workers within the scope of this bill are obliged to register, and assistance will be provided by various State Boards with the registration.[224] The Code makes provision for workers with multiple employers by allowing the worker to select one employer through which registration will be facilitated.[225] This is a possible solution in respect of domestic workers in South Africa who are employed by multiple employers and must register with the UIF.

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219 The English version was obtained from http://www.prsindia.org/uploads/media/draft/draft%20Labour%20Code%20on%20Social%20Security%20&%20Welfare.pdf.
220 Clauses 1.4 and 2.46.
221 Clause 2.140.
222 Clause 2.141.
223 Clause 3.3.
224 Clause 11.4.
225 Clause 11.10.

A distinctive feature of the Code is its focus on empowerment and this includes the distribution of information among workers about available social security schemes, assistance with administrative procedures and the facilitation of disputes.[226] Contributions are determined based on the categories of workers and unspecified government contributions.[227] The code addresses the specific challenge of contributions of workers in the informal economy (unorganised sector) as a result of low wages or irregular wages by allowing for a reduced contribution or a waiver of contributions for a specific period.[228] This introduces a more flexible approach to accommodate these workers with reference to income securities. The Code also allows for contributions by self-employed persons.[229] Government may establish welfare funds for categories of workers, including a fund for domestic workers.[230] The concept of social security is widened in this Code and includes social protection measures such as improvement of sanitation, access to water, training and educational facilities, and provision of transport for work activities.[231] This is an integrated and holistic approach to ensure sustainability and improve the welfare of these workers. The Code created a model framework for the extension of social protection to workers in the informal economy through a comprehensive framework of application. It also contains tailor-made and innovative provisions with reference to contributions. The Code also recognises that these workers face many other risks over and above the nine "classic" risks and aims to address these issues. However, the Code is vague and does not provide for specific details with reference to regulation and application; thus its success will depend on its implementation and enforcement. Having said this, the broad conceptualisation is innovative and will allow for protection of vulnerable workers as it applies to a comprehensive sphere and includes "entities", "workers that are employed by any entity" and it even extends coverage to "owners of entities or self-employed units". These concepts are wide in scope to encompass a broad spectrum of vulnerable workers.

6.3.1.5 Social protection measures in India

The majority of the people in India form part of the unorganised sector: vulnerable, poor and without adequate social protection. In an attempt to extend social protection to the poor the government established the Rashtriya Swasthya Bima Yojana (RSBY) in 2008 to provide health insurance to families living below the poverty line and certain categories

226 Clause 18.1.
227 Clauses 20 and 25.1.
228 Clause 20.3.
229 Self-employed persons do not earn a wage but are engaged in any occupation for profit or family gain. Clauses 2.121 and 2.122.
230 Clause 22.2.
231 Clause 22.6.

of workers in the unorganised sector, such as domestic workers, street vendors and waste pickers.[232] This is the largest national health insurance scheme in India[233] and an example of universal health coverage to include the poorest of the poor.

This national cashless scheme is in line with the provisions of the *Unorganised Workers' Social Security Act* of 2008 to provide a framework for social protection to workers in this sector. This scheme is an example of an innovative and tailor-made solution to extend protection. It recognises that many of the beneficiaries are poor, marginalised members of society that may be illiterate and hence provides for paperless operation.[234] A large number of these beneficiaries are in remote rural areas and therefore the portability is ensured through the use of the smartcard at all listed hospitals.[235] Simplifications like these are important considerations when extending social protection to vulnerable workers in the informal economy. This scheme has been commended by the UN, the ILO and the World Bank for its efforts to extend health protection to the most vulnerable.[236]

The objectives of the scheme are to provide protection against health risks and to improve access to adequate health care for the poor. The scheme promotes equality as there is no age limit in respect of beneficiaries.[237] The scheme is funded by central and state governments and public and private insurance companies manage the scheme.[238] In respect of social protection it is important that financing is obtained from various sources, private as well as public.[239] Beneficiaries are identified through a biometric smartcard system that includes fingerprints and a photograph for purposes of identification at

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232 See RSBY http://www.rsby.gov.india. The scheme provides hospital coverage up to INR 30 000 per annum, all age groups are covered and coverage is extended to five family members. These members are entitled to hospitalisation coverage. Studies have indicated that nearly half of the household members that are enrolled are women ans are from disadvantaged groups in respect of caste (Swarup and Jain "Rashtriya Swasthya Bima Yojana – India"). The success of this universal health coverage is illustrated by the fact that 41 million of the identified 65 million families were registered under RSBY in 2016, nearly 63% of the targeted families. There are other health insurance schemes in India, but these are not national schemes and include Vimo SEWA (community based scheme); Rajiv Aarogyasri (State Government – Southern State) and Yeshasvini (private sector – Southern State of Karnataka) (see Jain "Health financing and delivery in India" 7).

233 Jain "Health financing and delivery in India" 2.

234 Swarup and Jain "Rashtriya Swasthya Bima Yojana – India" 261.

235 Swarup and Jain "Rashtriya Swasthya Bima Yojana – India" 261. To extend coverage to those in rural and remote areas, mobile enrolment stations are used.

236 RSBY date unknown http://www.rsby.gov.in/about_rsby.aspx.

237 RSBY date unknown http://www.rsby.gov.in/about_rsby.aspx. Beneficiaries have access to private and public hospitals that are identified by the scheme.

238 States are responsible for the establishment of State Nodal Agencies and their responsibilities include the implementation, monitoring and supervisory functions and part financial aid (RSBY date unknown http://www.rsby.gov.in/about_rsby.aspx).

239 WIEGO date unknown http://www.wiego.org/wiego/core-programmes/social-protection.

hospitals.[240] An important characteristic of the scheme is the involvement and participation of various role players.[241] Moreover, the use of NGOs to assist with the enrolment, outreach and marketing and customer service is an innovative business model that includes other role players.[242] In an attempt to ensure the participation of the role players and to promote the sustainability of the scheme, role players are provided with certain incentives.[243]

In respect of coverage of domestic workers the identification procedure required by the guidelines are problematic. Before registration, the domestic workers must be identified as a domestic worker and be 18 years or older.[244] This identification process is cumbersome and requires third parties to identify these workers that may be in an adversarial position towards these workers as a result of class, caste and gender differences.[245] The identification process requires that a certificate of identification be issued by a resident welfare society, the employer, a trade union or the police.[246] If we consider the challenges in organising domestic workers, specifically by traditional trade unions, then this procedure seems problematic and creates a barrier for many domestic workers in accessing the scheme. Gender inequalities in societies with reference to the status of women and the lack of information deny women access to available social protection.[247]

Out-of-pocket expenditure is extremely problematic for the poor in India and the RSBY constantly endeavours to reduce this expenditure.

Any health scheme should recognise the special needs of women and that these needs may differ from those of men. Women workers face many challenges in respect of access to healthcare. They are often reluctant to visit medical centres due to an absence from work which means lower wages or an absence from their family responsibilities. Due to systemic inequalities they will rather allocate these resources of time and effort to their

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240 The use of these cards is an example of how countries can use technology to ensure adequate service delivery in respect of social security benefits (Swarup and Jain "Rashtriya Swasthya Bima Yojana – India"" 264). Beneficiaries are only required to pay a small registration fee.

241 These role players are central government, state governments, insurers, NGOs and the care providers (Swarup and Jain "Rashtriya Swasthya Bima Yojana – India"" 266).

242 Swarup and Jain "Rashtriya Swasthya Bima Yojana – India" 266.

243 Insurers are paid a premium per household, hospitals are paid for each beneficiary that they have treated and NGOs are paid for their various services (Swarup and Jain "Rashtriya Swasthya Bima Yojana – India" 266-268).

244 RSBY date unknown http://www.rsby.gov.in/about_rsby.aspx.

245 Dasgupta 2016 http://sanhati.com/excerpted/18181/.

246 RSBY date unknown http://www.rsby.gov.in/about_rsby.aspx.

247 WIEGO date unknown http://www.wiego.org/wiego/core-programmes/social-protection.

children and men.[248] Systemic challenges must be addressed if one considers social protection coverage of these women and their empowerment as essential. It is important that social protection reach as many people as possible.

6.3.2 Brazil

6.3.2.1 Introduction

In 2014 Brazil was categorised as the 7th largest global economy. Brazil has contributed to the attainment of the Millennium Development Goals by alleviating extreme poverty by half by 2015, and addressing food insecurities by reducing the number of undernourished people by 82%. From 2004 to 2014, unemployment levels were reduced from 9,5% to 6,9, however towards the end of 2017 it had risen to 11,8%.[249] Factors such as minimum wages, improved collective bargaining measures and cash transfer programmes addressed income inequalities in the country. Decent work is fundamental to poverty eradication and equality in the workplace, as well as democratic governance and sustainable development.[250] Brazil is one of the largest countries in the world with a population of nearly 210 million and there are about 31 million workers in the informal economy.[251] The Brazilian constitution is also the supreme law of the country and embraces fundamental principles, such as human dignity and the social values of labour and free enterprise.[252] Fundamental objectives include the eradication of poverty and the reduction of inequalities.[253] Chapter II of the constitution, Social Rights, includes employment protection against dismissals, unemployment insurance, severance pay and a nationally unified minimum monthly wage, established by law. This minimum wage must satisfy the basic living needs of families, with reference to housing, food, education, health and social security.[254] Various labour rights are included in Chapter II, such as payment

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248 Jain "Health financing and delivery in India" 15.

249 For Brazil unemployment rates see Trading Economics 2018 https://tradingeconomics.com/brazil/unemployment-rate.

250 ILO 2016 ilo.org http://www.ilo.org/wcmsp5/groups/public/---americas/---ro-lima/---ilo-brasilia/documents/publication/wcms_496601.pdf.

251 Worldometres 2017 http://www.worldometers.info/world-population/brazil-population/. See also Dias and Silva "Waste pickers in Brazil" 179.

252 See article 1 of the Constitution of the Federative Republic of Brazil of 1988. A translation of the Constitution was obtained from constituteproject.org as translated by KS Rosen (https://www.constituteproject.org/constitution/Brazil). The constitution initiated a process of legal reform, recognised collective rights and introduced a framework of representative democracy to be aligned with a political participatory paradigm (Fernandes "Right to the city and the new urban order" 57, 58). The Brazilian constitution was the result of a peaceful political transition similar to the South African transition (Barroso "Constitutional law" 18).

253 See article 3.

254 See article 7 IV.

for night work, working hours and overtime rates.[255] These rights are applicable to urban and rural workers. In Brazil, informal workers are categorised as workers without registration or a formal employment contract and they constitute more than half of the labour force.[256] A formal employment contract remains essential for legal protection in Brazil.[257]

The main source that regulates employment matters in Brazil is the Consolidated Labour Laws (Consolidação das Leis do Trabalho) of 1943.[258] The definition of employee in article 3 is as follows:

> Employee shall mean any person who performs services other than casual services for an employer under the direction of the employer and in return for remuneration.[259]

This definition requires the following, the employee to work under the control of the employer, continuity[260] and also economic dependence.[261] Although a labour contract does not have to be in writing these three elements are indicative of an employment relationship. This is referred to as the reality principle that will establish the real relationship between the parties. In South Africa, section 200A of the *LRA* also lists control and economic dependence as factors that lead to a presumption as to the status of an employee. Moreover, the CCMA also considers control, economic dependency and continuity as factors determinative of an employment relationship.

The following table illustrates the most recent statistics (2013) available with reference to informal employment, as a percentage of non-agricultural employment in Brazil.

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255 Article 7.
256 Santana *et al* 2016 *NewSol* 173-190.
257 Filho "When informal work becomes litigious in a labour court room" 109.
258 Mallet "Labour law" 159.
259 An employee must be a natural person, who works on a regular basis for remuneration and under supervision. See Fernanda de Medeiras *et al* 2016 https://content.next.westlaw.com/1-503-5032?transitionType=Default&contextData=(sc.Default)&__lrTS=20170511002014832 &firstPage=true&bhcp=1.
260 This refers to work on a daily basis and domestic workers will not be covered if they work for an employer for example for three days per week (Filho "When informal work becomes litigious in a labour court room" 112).
261 Filho "When informal work becomes litigious in a labour court room" 112.

Table 6.2 Informal employment as a percentage of non-agricultural employment in Brazil

Description	**Men**	**Women**	**Total**
Informal employment	36%	37%	37%
Informal sector	22%	17%	26%
Self-employment as % of total employment (2014)	32%	23%	28%

The only fundamental ILO convention that Brazil has not ratified is the Freedom of Association and Protection of the Right to Organise Convention 87 (1948).

6.3.2.2 Domestic workers in Brazil

In Brazil there are 7,2 million domestic workers; 92,6% of them are women and 64% are black women.[262] They are also one of the most vulnerable groups in respect of labour and social protection. One-third of them are poor or very poor women, historically disadvantaged in respect of access to formal education and other training opportunities.[263] Domestic work in this country (similar to South Africa) is thus a category of informal work that provides work for a large number of black women workers. Domestic work also evolved from a heritage of slavery and these workers were exposed to multiple grounds of discrimination based on race, gender and class. Their contributions at household, community and national level are extremely undervalued.[264] Statistics have also indicated that more than half of these workers are the breadwinners in their family.[265] It must be noted that Brazil has not ratified the Domestic Workers Convention 189 (2011), as initially it was argued that ratification of this convention will require Brazil to amend their

262 ILO *Initial effects of Constitutional Amendment 72 on domestic work in Brazil* 10.

263 Cornwall, Oliveira and Gonçalves "If you don't see light in the darkness, you must light a fire" 149. See also ILO *Initial effects of Constitutional Amendment 72 on domestic work in Brazil* 10.

264 Cornwall, Oliveira and Gonçalves "If you don't see light in the darkness, you must light a fire" 149. The slavery heritage also contributed to lack of education and skills; reasons that meant that domestic work was the only option into the labour market (ILO *Initial effects of Constitutional Amendment 72 on domestic work in Brazil* 2).

265 ILO *Initial effects of Constitutional Amendment 72 on domestic work in Brazil* 23.

constitution[266] to extend all rights that other workers enjoy to domestic workers.[267] In Brazil the following organisations in respect of domestic work were established, namely the Domestic Workers National Council and FENATRAD, the national federation of domestic workers.[268] FENATRAD is also affiliated to the International Domestic Workers Federation.

Employers are prohibited from employing children under 18 as domestic workers in line with one of the fundamental ILO conventions, namely Worst Forms of Child Labour, that Brazil ratified in 2002.[269]

In Brazil, a domestic worker is defined as follows:

> Every person, older than 18 years, who works for a person or a family who provides continuous and non-profit (no lucrative purpose) services to a person or family at their home.[270]

Domestic workers were initially not specifically regulated however could be included under the *Civil Code* of 1916 under the auspices of hiring of services.[271] In 1923 domestic work was specifically categorised in Decree 16.107 to include a wide range of services such as cooking, cleaning, gardening, child care duties and waitressing. The workplaces also included private homes, hotels and even offices.[272] The legislation really only provided for more detailed information about the work and requirements of submission and respect towards the employers and households.[273] The scope of the above Decree was limited to the private home and limited activities in 1948.[274]

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266 Of 1988. Article 7 of the Constitution of the Federative Republic of Brazil, 1988 provides for social rights to urban and rural workers specifically to improve their social conditions. These rights include protection against dismissal; social insurance; national unified minimum wage; normal working hours; leave, maternity leave and a prohibition on discrimination in respect of wages based on grounds such as sex and marital status.

267 Cornwall, Oliveira and Gonçalves "If you don't see light in the darkness, you must light a fire" 149.

268 Cornwall, Oliveira and Gonçalves "If you don't see light in the darkness, you must light a fire" 151-152. Thirteen unions form part of this federation; see FENATRAD http://idwfed.org.

269 ILO Convention 182 of 1999.

270 Lei no 5.859/72 article 1. See De Melo Costa, De Holanda Barbosa and Hirata *Effects of domestic worker legislation reform in Brazil* 149. See page 2 for translation of the definition of domestic worker. Continuity is an important element of the definition. See also Dias 2014 *HumSocR* 10 for the definition as translated. A monthly worker (*mensalista*) works for a single household for three days or more and a daily workers (*diarista)* who has one employer works for up to two days (p. 6). According to Dias the non-profit element in the definition refers to the non-economic nature of the work performed at the house of the employer. See Dias 2014 *HumSocR* 10.

271 ILO *Initial effects of Constitutional Amendment 72 on domestic work in Brazil* 4.

272 ILO *Initial effects of Constitutional Amendment 72 on domestic work in Brazil* 5.

273 ILO *Initial effects of Constitutional Amendment 72 on domestic work in Brazil* 4.

274 Decree 3.078. See also ILO *Initial effects of Constitutional Amendment 72 on domestic work in Brazil* 5.

From 1943 until 1972, domestic workers were excluded from labour laws that pertained to conditions of work and maternity leave.[275] In 1972, legislation specifically drafted for domestic workers, provided for labour rights such as an entitlement to leave upon signature of what was labelled a *work booklet*[276] and access to social security as provided for by the Organic Social Security Law and registered under the National Social Security Institute.[277] Classic social security benefits such as disability, sickness and retirement were available, based on contributions by both parties and penalties were raised for non-compliance.[278]

Even after the promulgation of the Brazilian constitution in 1988,[279] domestic workers did not enjoy equal rights and protection, and only after a constitutional amendment[280] were they specifically included in provisions for social rights that included labour and social security rights.[281]

These workers are now included in article 7 of Chapter II that provides for social rights. Article 7 provides for the rights of urban and rural workers to improve their social conditions. These rights include prohibition of unfair dismissals,[282] weekly rest periods,[283] a national uniform minimum wage,[284] a thirteenth monthly salary,[285] remuneration for night work,[286] equal pay for all.[287] This article in the constitution basically provides for basic conditions of employment. In respect of social security provisions measures provide for a safe working environment,[288] insurance against occupational injuries,[289] a guarantee fund for the length of service,[290]maternity leave,[291] and unemployment insurance.[292]

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275 ILO *Initial effects of Constitutional Amendment 72 on domestic work in Brazil* 6.
276 This booklet also contains a certificate of good conduct and a health certificate.
277 ILO *Initial effects of Constitutional Amendment 72 on domestic work in Brazil* 6.
278 ILO *Initial effects of the Constitutional Amendment 72 on domestic work in Brazil* 7.
279 See the Constitution of the Federative Republic of Brazil, 1988. The preamble of this constitution provides for a democratic state, guaranteeing social and individual rights and ensuring values such as equality and justice.
280 CA 72 of 2013 (*Emenda Constitutional* – EC -72).
281 See chapter II, article 7; ILO *Initial effects of Constitutional Amendment 72 on domestic work in Brazil* 9.
282 Art 7(I).
283 Art 7(XV).
284 Art 7(IV). This minimum wage must allow for the worker's basic living needs, including health, education and social security.
285 Art 7(VIII).
286 Art 7(IX).
287 Art 7(XXX).
288 Art 7(XXII).
289 Art 7(XXVIII)
290 Art 7(III).
291 Art 7(XVIII).
292 Art 7(II).

Specifically important is the provision for free assistance for children from birth to five years in daycare facilities and pre-schools.[293] The amendment includes a specific paragraph that provides that domestic workers are guaranteed certain rights in article 7, including, a guaranteed minimum wage, a salary floor, the regulation of working hours, rest periods, overtime rates, annual leave, maternity leave, notice of dismissal, retirement pension, the recognition of collective bargaining agreements, equal pay, and prohibitions on night work.[294] Not all the rights in article 7 are extended to domestic workers. The extension of specific provisions are subject to the conditions of law and accessory tax obligations. These provisions include employment protection against unfair dismissals, unemployment insurance, the Guarantee Fund for Length of Service, higher remuneration for night work, family allowances, and the assistance for children through state funds. The rights in article 7 that have budgetary implications are thus considered within conditions of law and accessory tax obligations, as well as their integration into the social security system.[295] The conditional exclusion of these rights from the ambit of protection is particularly problematic for women workers, with reference to childcare and unemployment insurance as these are specific challenges that these workers face with reference to adequate protection. The realisation of these rights is still dependent on the enactment of specific legislation and regulations.[296]

A number of rights were effective immediately, namely the limitation of working hours and overtime payment.[297] In 2015, after various campaigns by FENATRAD, *Complimentary Act n. Law* 150/2015 (Enabling Law (LC) of 2015) was approved to enable the realisation of these rights. This was despite opposition arguing this would lead to high levels of unemployment; however, this did not occur.[298]

Regulations now require parties to agree on written information about the nature of work, and a duty is placed on employers to pay wages as required. A fair reason for dismissal is misconduct or incapacity, and for the first time provision was made for health officials to inspect workplaces that employed large numbers of employees.[299] Although no provisions were made for social security, the Minister of Labour was tasked with a

293 Art 7(XXV).
294 See article 7 paras IV, VI, VII, VII, X, XIII, XV, XVI, XVII, XVIII, XIX, XXI, XXII, XXIV, XXVI, XXX, XXXI and XXXIII.
295 See Sole Paragraph of the Constitutional Amendment 72.
296 De Melo Costa, Barbosa and Hirata *Effects of domestic workers legislation reform in Brazil* 5.
297 De Melo Costa, Barbosa and Hirata *Effects of domestic workers legislation reform in Brazil* 5.
298 De Melo Costa, Barbosa and Hirata *Effects of domestic workers legislation reform in Brazil* 5.
299 ILO *Initial effects of Constitutional Amendment 72 on domestic work in Brazil* 5.

commission to investigate the establishment of a social security framework for domestic workers.

South Africa's Constitution provides for labour rights in section 23. However, unlike in the Brazilian constitution, domestic workers are not mentioned as a specific category but are included under the scope of "everyone" in section 23(1), social security provisions in section 27,[300] and equality provisions in section 9. The South African Constitution thus provides for all through use of a collective concept of "everyone" to ensure access to rights. Employers in Brazil who now fail to formalise the contracts of domestic workers face penalties. In 2015 legislation, was enacted that provided for the comprehensive regulation and a contextual framework for these workers.[301] Domestic workers in Brazil are thus provided with labour and social protection through the extension of existing constitutional provisions to these workers as a specific category through the *Complementary Federal Statute* n. 150 of 2015.

Even after legislative provisions that extended protection to domestic workers, only a third have a formal employment relationship despite the fact that employers must pay fines if they do not formalise a work contract.[302] Studies have indicated that the impact of the constitutional amendment at this stage is marginal and the delayed implementation of the amendments may affect compliance at this stage.[303]

Similar to South Africa, Brazil also excluded domestic workers that work less than three times a week for one employer, excluding a particular vulnerable group from protection.[304] This exclusion in Brazil is based on the continuity factor of an employment contract and a clear distinction based on this is made between formal and informal work. In order for these workers to enjoy protection in Brazil the nature of their relationship must be continuous.[305] Provisions such as these disregard the nature of domestic work in that it is often performed on a part-time basis for more than one employer. Although the constitutional amendment provides an extension of coverage to domestic workers they are still excluded from important provisions for women workers such as assistance with childcare and unemployment insurance, despite the fact that domestic work is one of the

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300 The Brazilian Constitution provides in a sole paragraph that the category of domestic workers is ensured of rights.

301 See the Enabling Law of 2015.

302 ILO *Initial effects of Constitutional Amendment 72 on domestic work in Brazil* 22. See also Normative Instruction 110/14.

303 De Melo Costa, Barbosa and Hirata *Effects of domestic workers legislation reform in Brazil* 23.

304 Gomes and Bertolin 2010 *LLDRL* 6.

305 Gomes and Bertolin 2010 *LLDRL* 6.

main occupations for women. It absorbs lower-skilled women and allows them entry into the labour market.[306]

The ratification of ILO Convention 189 by the Brazil government will now be possible after the amendment of the constitution.

6.3.2.3 Waste pickers in Brazil

In 2001 recycling or waste picking was formally recognised as an occupation in Brazil and through the adoption of inclusive policies protection has been provided to these workers. The Brazilian Occupation Classification (CBO)[307] provides for regulated professions and describes a collector of recyclables (*catador de material reciclável*) as "someone who might collect recyclables in streets or at disposal sites, works as a waste sorter and/or other related activities in cooperatives or junk shops". This description is wide and covers most of the activities of these workers. This official recognition also allows for more accurate statistics with reference to waste pickers and their activities that can influence legislation and policies. This recognition of workers in the informal economy is extremely important in the provision of labour and social protection. Protection provided for waste pickers in Brazil through progressive legislative interventions at local and national level was the result of advocacy campaigns and social mobilisation by representative MBOs.[308] Women leaders in particular have played an important role in the advocacy campaigns.[309]

The Brazilian constitution in article 30(I) provides that municipalities have the power to legislate local matters and clause 30(V) states that they have the responsibility to organise and render public services of local interest.[310] The South African Constitution in chapter 7 regulates local government. Section 152 list the objectives as follows:

> (a) to provide democratic and accountable government for local communities;
>
> (b) to ensure the provision of services to communities in a sustainable manner;
>
> (c) to promote social and economic development;

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306 De Melo Costa, Barbosa and Hirata *Effects of domestic workers legislation reform in Brazil* 23.

307 The CBO provides for regulated professions through a federal system (Dias *Overview of the legal framework for inclusion of informal recyclers in solid waste management in Brazil* 2).

308 Dias *Overview of the legal framework for inclusion of informal recyclers in solid waste management in Brazil* 6.

309 Dias *Overview of the legal framework for inclusion of informal recyclers in solid waste management in Brazil* 7.

310 In 2001, a city statute, Federal Law no. 10.257 (Estatuto da Cidade) was enacted to regulate the urban policy as provided for in the constitution. Municipalities must integrate legislation, management and urban planning to ensure a democratic decision-making process and to promote a participatory framework at local level (Fernandes "Right to the city and the new urban order" 58, 59).

(d) to promote a safe and healthy environment and to encourage the involvement of community organisations in the matters of local government.

In Brazil, as in South Africa, the constitution provides that local authorities are responsible for solid waste services. The duties placed on local government by the South African Constitution is certainly more comprehensive than that of the Brazilian constitution.

Initially waste pickers in Brazil were recognised through municipal laws in various jurisdictions that provided for the recognition of cooperatives[311] and formally organised groups,[312] establishment of specific departments tasked with educational programmes dealing with environmental issues;[313] the provision of technical assistance; the recognition of waste pickers as partners in municipal programmes and through contracts with these partners allowed for remuneration of services.[314]

These inclusive policies, initiated at municipal level, for recognition of organisations and the provision of remuneration for services are some of the most progressive legal frameworks in the world regarding the inclusion of these workers within the scope of protection. This requires national and local authorities to acknowledge the environmental contribution of these workers with reference to solid waste management, the design of an inclusive framework and awareness campaigns to address prejudice towards waste pickers.[315]

At state level, laws were enacted in 2004 that recognised waste pickers and cooperatives in respect of waste collected from public buildings.[316] Protection provided for waste pickers in Brazil through progressive legislative interventions at local and national level

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311 Article 151 Clause VIII, of the municipal constitution of Belo Horizonte in 1990, provided preference to cooperatives in respect of the sale and collection of recyclables as it stated that the collection and sale of recyclables should be done through cooperatives. See also Law#234 in Porto Alegre in 1990, article 14. This law also indicated that formal organisations of groups of waste pickers with the Urban Cleansing Department will be preferred for the municipal scheme of waste management. In 2000, in Diadema, Law# 1921/00 lists waste picker organisations as possible partners in the recycling process (Dias *Overview of the legal framework for inclusion of informal recyclers in solid waste management in Brazil* 2).

312 In Porto Alegre the Urban Cleansing Code recognised organised groups of waste pickers in its recycling programme.

313 In 2000 a department was specifically established in Belo Horizonte to conduct these activities. See Law #8052/00.

314 In 2004, the municipality in Diadema through the enactment of legislation (Law #2.336/04) could conclude contractually with the waste pickers, including contractual arrangements for remuneration (Dias *Overview of the legal framework for inclusion of informal recyclers in solid waste management in Brazil* 2).

315 Dias *Overview of the legal framework for inclusion of informal recyclers in solid waste management in Brazil* 9.

316 Law #3517/04. Law #3517/04 identified cooperatives as main collection point for all collected materials.

and a comprehensive policy framework were the result of advocacy campaigns and social mobilisation by representative MBOs.[317]

In 2006 a Presidential Decree, entitled Guaranteeing Access for Waste Pickers to Waste Generated in Federal Buildings, was issued. State institutions are committed to segregate waste at its source and provide it to waste pickers associations and cooperatives.[318] Cooperatives and associations can register to receive recyclable materials from federal administrations.[319] According to the Decree, these organisations must consist only of waste pickers whose livelihood depends on waste picking, they must be non-profit organisations, their infrastructure must include a place for sorting and classification of materials and these organisations must have a system in place for the division of shares for its members.[320] In 2007, Law #11.445/07 established national guidelines for basic sanitation services, including water supply, sanitary sewerage, urban cleaning and solid waste management that is in line with public health and environmental protection.[321]

In 2010, the National Solid Waste Policy became law. The policy calls for cooperation between state departments, business and society.[322] Solid waste is recognised for its economic advantages and social value and the fact that it generates income. This is an important provision as it legitimises these activities and provides that a legal framework is important to protect these workers and activities. The development of cooperatives or other workers' associations is encouraged through incentives.[323] Waste pickers also receive money based on the quantity and type of recycling materials they salvage in the form of a financial bonus from the state.[324] The bonus is paid to the cooperatives and then distributed among its members.[325] Protection provided for in waste pickers in Brazil through progressive legislative interventions at local and national level was the result of advocacy campaigns and social mobilisation by representative MBOs.[326] An inclusive legal

317 Dias *Overview of the legal framework for inclusion of informal recyclers in solid waste management in Brazil* 6.

318 Dias *Overview of the legal framework for inclusion of informal recyclers in solid waste management in Brazil* 3.

319 See Presidential Decree 5940/06 (Dias *Overview of the legal framework for inclusion of informal recyclers in solid waste management in Brazil* 3). These organisations must have as members waste pickers whose livelihood depends on waste picking, must be non-profit organisations and must have a location for sorting and a system for dividing shares among members.

320 See articles 5 and 6. See also Dias *Overview of the legal framework for inclusion of informal recyclers in solid waste management in Brazil* 3.

321 Article 2 para III.

322 See Chapter II para VI.

323 Chapter III para IV.

324 Dias 2016 *Env&Urb* 6.

325 Dias 2016 *Env&Urb* 6

326 Dias *Overview of the legal framework for inclusion of informal recyclers in solid waste management in Brazil* 6.

framework for waste pickers requires the political will of governments, the recognition of their status as workers and provision for social mobilisation, thus creating an enabling framework for social dialogue with these workers and their various organisations.

Currently waste pickers are still excluded from social security benefits, including pension and maternity provisions, but at present organisations are actively campaigning for inclusion in these benefits.[327]

Remaining challenges in Brazil include legislative provisions that allow for support to cooperatives and formal organisations but not to individuals.[328] Solidarity is often a foreign concept to the workers as the very nature of their work is competitive and therefore MBOs must encourage participation and promote membership.

Through various processes of mobilisation and organisation waste pickers and cooperatives were acknowledged as service providers.[329] Advocacy campaigns, social mobilisation, protests and liaisons with public officers formed part of the mobilisation strategies. The recognition of waste pickers as workers in Brazil also included the recognition of organisations that represent their interests at various forums.[330] The extending of protection to waste pickers in Brazil symbolises a movement from rigid policies to a more inclusive framework.[331] In Brazil, as in South Africa, the constitution provides that local authorities are responsible for solid waste services. Initially waste pickers in Brazil were recognised through municipal laws in various jurisdictions that provided for the recognition of cooperatives[332] and formally organised groups;[333] what followed was the establishment of specific departments tasked with educational programmes dealing with environmental issues;[334] the provision of technical assistance;

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327 Dias *Overview of the legal framework for inclusion of informal recyclers in solid waste management in Brazil* 7.

328 Dias *Overview of the legal framework for inclusion of informal recyclers in solid waste management in Brazil* 3.

329 Comaru and Werna *The health of workers in selected sectors of the urban economy* 16.

330 Comaru and Werna *The health of workers in selected sectors of the urban economy* 16.

331 Dias *Overview of the legal framework for inclusion of informal recyclers in solid waste management in Brazil* 1.

332 Article 151 of the municipal constitution of Belo Horizonte in 1990 provided preference to cooperatives in respect of the collection and sale of recyclables.

333 In Porto Alegre the Urban Cleansing Code recognised organised groups of waste pickers in its recycling programme.

334 In 2000, a department was specifically established in Belo Horizonte to conduct these activities. See Law #8052/00.

the recognition of waste pickers as partners in municipal programmes, and through contracts with these partners allowing for remuneration of services.[335]

Developments in Brazil with reference to waste management and waste pickers illustrate a move from restrictive policies to a systems of integration and this is a progressive model to be followed elsewhere in the world to extend protection to these workers.

6.3.2.4 Informal traders in Brazil

In Brazil only 51% of women are employed compared to 76% of men, but women represent 48% of workers in the informal economy. In 2011 there were 2 million informal traders[336] of which 45% were women.[337] Informal trading originates from Brazil's colonial past and the traders are part of the urban poor. Their activities were often seen as illegal.[338] Traders in Brazil are often categorised according to their trading space and goods, and can include vendors in malls,[339] vendors at fairs[340] and food vendors.[341]

Informal traders worldwide face similar challenges. They are not recognised as workers, their activities are often criminalised and they face eviction and harassment by local authorities. These traders are often the victims of urban renewal policies of local authorities and face regular displacement.[342] A balancing of constitutional rights such as the right to work and the use and occupation of urban spaces as regulated by municipal laws are often evident. National legislation does not regulate street trading, apart from Law No 6.586 of 1978 that provides for the registration for social security purposes of "travelling merchants" without an employment relationship with a supplier.[343] Street trading is thus inconsistently regulated by the many municipalities in Brazil through contradictory policies.[344] A comprehensive regulatory framework similar to that of waste pickers in Brazil is absent.

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335 In 2004, the municipality in Diadem through the enactment of legislation (#2.336/04) could conclude contracts with the waste pickers, including contractual arrangements for remuneration.
336 Informal traders are known as *camelôs* in Brazil.
337 Budlender *Statistics on informal employment in Brazil* 1.
338 Salej *Informal economy budget analysis in Brazil and Belo Horizonte* 16.
339 In Belo Horizonte 32% of these traders were women.
340 More than 68% are women (Salej *Informal economy budget analysis in Brazil and Belo Horizonte* 17).
341 Most of these vendors are registered as males, but women often work as contributing family members (Salej *Informal economy budget analysis in Brazil and Belo Horizonte* 16).
342 Cuvi 2016 *Social Problems* 1.
343 See article 4. These traders are categorised as own-account workers.
344 WIEGO date unknown http://www.wiego.org/informal_economy_law/street-vendors-and-law.

Various programmes have been initiated in an attempt to formalise informal trading.[345] In Rio de Janeiro, traders can be formalised through a registration process, but this process is conditional and vendors must comply with the provisions of a municipal law, *Lei do Ambulante 1876 of 1992* and included is a selection process.[346] Due to the complicated registration process, many traders choose to remain "informal".[347] Informal traders in the *Camelódro da Uruguaiana* market established an association. The association offered improved security, cleaning services, sanitation facilities and medical and legal advice.[348] The association collected a tax for their services. In Rio de Janeiro, a number of formal markets were established; where the local authorities did not provide any infrastructure, the traders, through these associations, established infrastructures with access to basic services within the markets, funded through the collection of a tax.[349]

São Paulo has more than 100 000 informal traders that often migrate from poorer regions, such as Africa and other countries in South America.[350] In this region the issuing of licenses is also conditional based on requirements such as health and seniority, and existing licenses can be revoked at the mayor's discretion.[351] Both the issuing and revoking of licenses are part of the public record and must be published.[352] Informal traders remaining unlicensed are at the lower end of the hierarchy and carry their goods with them, where licensed traders are mostly found in markets and roof stalls.[353] Municipal law (*lei Municipal*) 11.039 of 1991 stipulates that licenses are not transferable and subject to revocation that can be enacted unilaterally on vague grounds of "public interest". This process of issuing, revoking and even challenging of decisions is extremely bureaucratic. Various organisations are involved, such as the Union for Licensed Street Vendors, the Association for the Disabled and an NGO, Centre of Informal Workers (CIW), for informal workers.[354]

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345 In Rio de Janeiro the *Camelódro da Uruguaiana* was established to create a market in the city centre for traders; however, the municipality did not provide or assist with the infrastructure. The stalls in the market became fixed structures and adequate infrastructure was constructed through a vendors' association (Monte and Da Silva "Informal street vendors in Rio de Janeiro"). Various markets were allocated for vendors, among them the Centro de Tradiçõ Nordestinas and the Mercado Popular da Rocinha.

346 *Lei do Ambulante* (Municipal Law 1876 of 1992) (Monte and Da Silva "Informal street vendors in Rio de Janeiro").

347 Monte and Da Silva "Informal street vendors in Rio de Janeiro".

348 Monte and Da Silva "Informal street vendors in Rio de Janeiro".

349 Monte and Da Silva "Informal street vendors in Rio de Janeiro".

350 Cuvi 2016 *Social Problems* 2.

351 Cuvi 2016 *Social Problems* 6.

352 Cuvi 2016 *Social Problems* 6.

353 Cuvi 2016 *Social Problems* 6.

354 Cuvi 2016 *Social Problems* 11.

In Brazil the office of the public defender offers free assistance to persons in underprivileged social categories.[355] This resulted in a class action filed by the public defender on behalf of the traders against the revocation of licenses. The NGO (CIW) assisted the traders and worked closely with the public defender, and a preliminary injunction was granted. Court orders that resulted from such class actions highlight that according to the constitutional framework, urban planning must entail a democratic and participatory approach and the city must engage with all role players, including the street traders.[356] These orders brought the traders into a rights-based framework, through third party interventions. An injunction granted by a panel of 22 magistrates (the panel consisted of 25, 22 agreed) resulted in the return of 1500 traders whose licenses were revoked.[357]

The court stated the following in this regard:

> Finally, an offence to the principle of human dignity is noted, since these were blocked from the legal exercise of their activities, through which they derive, with dignity, the sustenance of their families.[358]

Studies indicate that informal traders are resilient in respect of adversarial state policies through organisation and mobilisation.[359] Access to court is often challenging as they do not have the necessary resources to enforce their rights, and resistance takes place through collective action. Informal trading displays its own hierarchy based on criteria such as gender, ethnicity, race, trading space and types of merchandise.[360]

Women traders are more susceptible to the following challenges:

(a) a restrictive regulatory framework and environment;
(b) gender discrimination within policies as well as and harassment from local authorities, law enforcement officers and male traders;
(c) lack of childcare facilities;
(d) inadequate infrastructures that increases their vulnerability include lack of sanitation, and no access to water, and
(e) crime and theft in public spaces.

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355 Cuvi 2016 *Social Problems* 12.
356 Cuvi 2016 *Social Problems* 12. See Legal process number 021030-15.2012.8.26.0053.
357 Special Appeal number 0117398-51.2012.8.26 0000/5000.
358 Special Appeal number 0117398-51.2012.8.26 0000/5000.
359 Cuvi 2016 *Social Problems* 2.
360 Cuvi 2016 *Social Problems* 5.

StreetNet International[361] has identified two main challenges with reference to ILO instruments in respect of informal workers, namely the lack of addressing the responsibilities of local governments, and failing to provide for tripartite structures that are more representative of these workers, including own-account workers such as street traders.[362]

A social security programme aimed at informal workers, such as informal traders, the Individual Micro-Entrepreneur (MEI), was adopted as part of the *Simples Nacional* program (National Simple Program).[363] Individual micro-entrepreneurs are defined as follows:

> A person who is self-employed and becomes legalized as a small-businessperson.[364]

Workers contribute monthly to the programme, registration procedures are simple and inexpensive. The programme offers benefits such as retirement and disability benefits as well as maternity benefits for women, conditional on a minimum amount of contributions. This is a unique system as support for business projects is also offered by the government, thereby supporting entrepreneurship.[365] Upon registration, the worker can also open a bank account and qualify for government subsidies.[366] This national policy allows street traders to register for social security benefits and business support, but it does not guarantee them a license to trade. Criticism includes the fact that government collects contributions, but does not take any responsibility for labour protection or decent work.[367] Brazil does not provide a forum for social dialogue between traders, federal government and local authorities and therefore the programme, though an innovative measure, does not provide for the real challenges that these workers face on a daily basis. An integrated policy must consider the many challenges experienced with the regulatory framework, including the issuing of licenses. However the policy does allow for access to resources such as access to credit and to financial institutions.

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361 This is an international federation that includes 52 organisations of traders in Africa, America, Asia and Eastern Europe (see StreetNet http://www.streetnet.org).

362 Scott 2014 http://www.streetnet.org.za/docs/newsletters/2014/en/StreetNet_English_nov.pdf.

363 This programme is aimed at reducing taxes and simplifying procedures for small businesses. Cardoso 2016 *Soc&Antr* 332.

364 Cardoso 2016 *Soc&Antr* 332.

365 Scott 2014 http://www.streetnet.org.za/docs/newsletters/2014/en/StreetNet_English_nov.pdf.

366 Cardosa 2016 *Soc&Antr* 232.

367 Vannuchi 2000 http://www.streetnet.org.za/show.php?id=605.

Informal traders in Brazil are in a more precarious position than waste pickers as a comprehensive regulatory framework is lacking. They must unite, mobilise and organise to improve their conditions.

6.3.2.5 Social protection measures in Brazil

Brazil is a country with more than 205 million people and alleviation of poverty is a major challenge.[368] Article 6 of its constitution provides as follows:

> Education, health, food, work, housing, leisure, security, social security, protection of motherhood and childhood, and assistance to the destitute are social rights ….[369]

The Brazilian constitution is heralded as a landmark for social security in Brazil.[370] The government must organise social welfare based on objectives such as universal coverage, uniformity of benefits, equitable participation and democratic and decentralised administration that involves workers and employers.[371] These are important objectives for a comprehensive social security system.[372]

In Brazil, the Bolsa Família, a means-tested programme, alleviates poverty and provides cash transfers and access to services such as health to more than 14 million households and 46 million Brazilians.[373] This scheme is comparable with the social assistance grant system in South Africa. It aims to alleviate extreme poverty, but also allows for benefits for those who live on less than 38 dollars per person per month. Benefits are conditional and beneficiaries must comply with requirements such as pre-and post-natal health checks, immunisation and mandatory minimum school attendance.[374] This integrated approach supports sustainability and it also provides for strategies to exit the scheme by empowering beneficiaries. Households receive a "basic benefit" per child, and pregnant women and breastfeeding mothers also receive benefits.[375] Women workers in the informal economy without adequate social protection measures will benefit from this scheme. This scheme contributed to poverty reduction in Brazil. Bolsa Verde is a programme that provides top-up transfers to beneficiaries of the Bolsa Família scheme;

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368 Ortiz, Schmitt and De *Social Protection Floors 2* 16, 19.
369 Article 6.
370 Durán-Valverde *et al Innovations in extending social insurance coverage to independent workers* 15.
371 Article 194.
372 Durán-Valverde *et al Innovations in extending social insurance coverage to independent workers* 15.
373 Durán-Valverde *et al Innovations in extending social insurance coverage to independent workers* 15.
374 Ortiz, Schmitt and De *Social Protection Floors 2* 18.
375 Ortiz, Schmitt and De *Social Protection Floors 2* 16, 19.

most of its beneficiaries live in rural areas.[376] This scheme encourages beneficiaries to develop sustainable economic activities and preserve natural resources.[377] Thus universal healthcare is provided to all citizens in Brazil free of charge and this includes informal workers.[378]

Social insurance in Brazil is divided into three schemes, the General Social Insurance Scheme that includes domestic workers and rural workers, the General Social Insurance Scheme for Civil Servants, and a Supplementary Insurance Scheme that allows for voluntary registration for high-income earners.[379] Approximately 29,87 million people do not contribute to any of these schemes.[380] Own-account workers are included in a special contributory category and they are regarded as particularly vulnerable.[381] The Social Security Simplified Plan provides protection for low-income earners and includes own-account workers as a contributory category.[382] To overcome the challenges that informal economy workers face, it allows for contributors to decide on the percentage of contribution, however this does effect the level of benefits.[383]

When one considers extending occupational health and safety provisions to workers in the informal economy, one needs to reconsider the role of governments and labour inspectors. In respect of informal traders, waste pickers and domestic workers, labour inspectors must be adequately trained and empowerment programmes must be established for these workers by governments.[384] Programmes can be designed to address the specific challenges in these categories and can also focus on prevention measures. This will result in a framework of empowerment and not just a punitive framework.

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376 Ortiz, Schmitt and De *Social Protection Floors 2* 19.

377 Ortiz, Schmitt and De *Social Protection Floors 2* 19.

378 This is provided through the Brazilian Unified Health System (SUS), established in 1988. Monitoring of occupational health care is the responsibility of SUS (Santana *et al NewSol* 174).

379 Durán-Valverde *et al Innovations in extending social insurance coverage to independent workers* 14.

380 Durán-Valverde *et al Innovations in extending social insurance coverage to independent workers* 15.

381 Durán-Valverde *et al Innovations in extending social insurance coverage to independent workers* 16.

382 Durán-Valverde *et al Innovations in extending social insurance coverage to independent workers* 16.

383 A reduced contribution rate from 20% to 11% means that these contributors are not entitled to a retirement pension according to the years of contribution (Durán-Valverde *et al Innovations in extending social insurance coverage to independent workers* 17).

384 Comaru and Werna *The health of workers in selected sectors of the urban economy* 3.

6.4 Comments on extending social protection to women in the informal economy

Globally, women workers in the informal economy are often excluded from social protection[385] measures and this contributes to the social exclusion of these workers.[386] In respect of contributory social insurance schemes, challenges include schemes that were designed for workers in the formal economy and are hence based on the traditional employee-employer relationship as well as the limited contributory capacity of these workers due to low or irregular income, where combatting the immediate risks such as poverty are often prioritised over long-term risks, such as old age.[387] In 2015, the UN estimated that 58 million children worldwide are not in primary school and 31 million of these children are girls and therefore the majority of children that do not receive primary education are girls.[388] The UN reported in 2015 that women are more likely to be occupied in work with low wages, subjected to longer working hours and without adequate social protection.

Social protection measures for women in the informal economy may differ from country to country and between various categories of informal work. It is important for countries to adopt a rights-based approach with reference to social protection, instead of mere policy-based guidelines, to also ensure inclusion of the most vulnerable in societies and the promotion of equality in line with requirements in international instruments.[389] Social protection strategies must thus address the specific vulnerabilities of groups such as women.[390] Coordination and integration between institutions and role players is of paramount importance for effective social protection systems.[391] Countries must adopt a systemic approach to the extension of social protection measures and social protection floors and identify causes of systemic inequalities, poverty and other vulnerabilities.[392] For women workers in the informal economy, adequate social protection measures also have an essential transformative component, that ensures inclusion, promotes equality and contributes to social justice.[393] For these women social protection measures should also include cash transfers where needed, but also basic food provisions, empowerment programmes, improved access to resources, and the promotion of gender equality in

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385 See para 1.2 above for the definitional context of social protection for purposes of this study.
386 ILO Resolution concerning Decent Work and the Informal Economy, Conclusion 10.
387 Mpedi "Informal sector: Introduction" 290.
388 United Nations Statistics Division 2015 https://unstats.un.org/unsd/gender/worldswomen.html 59.
389 UNDP *Social protection for sustainable development* 43.
390 UNDP *Social protection for sustainable development* 44.
391 UNDP *Social protection for sustainable development* 44.
392 UNDP *Social protection for sustainable development* 44.
393 UNDP *Social protection for sustainable development* 49.

policy and regulatory frameworks. Social protection measures must also be responsive to natural disasters.[394] Social dialogue with relevant role players is a vital component of sustainable social protection measures. Gender mainstreaming must be a key principle of social protection measures, as gender is often a barrier for women to access these measures. Studies have indicated that women are more affected by poverty, carry both the reproductive and care burden and are often found in vulnerable employment.[395] Social protection measures must be integrated and also aim to empower women. Countries such as South Africa have a rights-based approach to the provision of social security and this is important as it imposes a duty on the state.[396] Many countries combine methods of universalism and targeting.[397] Through targeting, the poorest are identified and provided with resources, whereas a universal approach avoids any discrimination in respect of a specific group and can be citizen based.[398]

6.4.1 Maternity protection and childcare

A major challenge for all women in the informal economy is maternal healthcare and quality childcare. According to the UN, in developing regions women are still severely affected by complications linked to pregnancy, childbirth and HIV and AIDS.[399] Maternity protection is a human right and prerequisite for gender equality;[400] however, more than 60% of women worldwide are not covered by a statutory right to maternity leave.[401] According to the World employment social outlook: Trends for women 2017, 65,9 % of employed women worldwide are not covered by mandatory cash benefits through legal regulation.[402] Africa is mentioned in the report because ineffective enforcement and implementation, a lack of legal empowerment, and irregular or low incomes hamper the contributory capacity of these women, meaning that the effective coverage of women in this regard is even lower.[403] According to this report nearly 800 mothers die daily as a

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394 In a ten-year time frame, South Africa experienced 307 climate-related events (UNDP *Social protection for sustainable development* 54).

395 ASSAf *Social protection in Africa* 17.

396 See s 27(1)(c) and (2).

397 See for example South Africa. Targeting measures can include a means test or identifying a specific vulnerable group such as women and children (ASSAf *Social protection in Africa* 17).

398 ASSAf *Social protection in Africa* 17.

399 United Nations Statistics Division 2015 https://unstats.un.org/unsd/gender/worldswomen.html x.

400 ILO *Social protection for maternity* xi.

401 ILO World employment and social outlook: Trends for women 2017 ilo.org http://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_557245.pdf.

402 ILO World employment and social outlook: Trends for women 2017 ilo.org http://www.ilo.org/wcmsp5/groups/public/---dgreports/---inst/documents/publication/wcms_557245.pdf.

403 ILO Social protection for maternity.

result of childbirth. Adequate social protection in the form of healthcare can largely prevent this. These statistics highlight the global importance of adequate social protection for women. Maternity protection should also include women against loss of income and protection against dismissal as well as discrimination. If we consider the large number of vulnerable women in the informal economy, it should be a matter of urgency for governments to strive towards universal maternal healthcare for all. Maternal healthcare should include appropriate antenatal and postnatal healthcare.

Quality childcare will ensure that women workers can earn a living to support their families and combat poverty.[404] There is a distinct relationship between availability of childcare and the security of income of these women, and this includes the following:

- more choices with respect to the type of employment[405]
- child care will affect their schedule and can result in lower earnings;[406]
- own-account workers often keep their young children with them which causes decreased productivity, and their workplace (such as urban spaces and dumpsites) poses many health and safety issues for children.[407]

The importance of quality daycare is also linked to the role of women as the primary caregivers in most societies, balancing dual responsibilities of earning a living and providing unpaid care and domestic work in the home. The various work places of these workers often include streets, markets and waste areas, all of which pose dangers and increase risks for children. Family benefits are also part of the nine classic risks covered by the ILO Convention 102 and recognised by Recommendation 202 in respect of social protection floors. These women are poor and vulnerable as their income is often low and irregular and if they do not have access to childcare facilities, they may lose their income and increase their vulnerabilities and levels of poverty. Lack of childcare facilities can also result in girl children not receiving education as they are required to take over the responsibilities of childminders within families.[408] SEWA provides their members, including domestic workers and street vendors, with various childcare facilities and thus allows their

404 Moussié *Women informal workers mobilizing for child care* 2.

405 Women who are responsible for the care of young children are more likely to choose work that is more flexible. Waste pickers in South Africa indicated that the work allows them time to care for their children. A lack of adequate childcare facilities thus forces them into low-income irregular work such as waste picking (Alfers *WIEGO Child Care Initiative Summary Report* 2).

406 Street traders have indicated the challenges with regard to childcare and work as the most profitable times for street trading are early morning and late afternoon, but these times are also crucial with reference to the care of young children (Alfers *WIEGO Child Care Initiative Summary Report* 3).

407 Alfers *WIEGO Child Care Initiative Summary Report* 3.

408 Harvey *et al Compendium of WIEGO and SEWA case studies* 34.

members to increase and secure more regular wages.[409] SEWA's success can be ascribed to a holistic sustainable approach towards the labour and social protection of its members and also its distinct undertaking to address challenges specific to women workers and to recognise wider societal issues that can impact on their lives. The provision of childcare facilities, vaccination services, training programmes for parents in respect of nutrition and other health challenges illustrates an integrated, innovative and tailor-made approach.[410] The provision of childcare facilities allows these women to earn a regular income and studies have even indicated an increase in their income when quality childcare services are available.[411] If we consider the challenges faced by women and girls in respect of inequalities and gender discrimination, the provision of quality childcare is of paramount importance. It allows for the alleviation of poverty as women workers are able to earn a regular income and girls within households can attend school. Various studies have indicated links between the childcare provisions and the income of women workers.[412] This also contributes to Sustainable Development Goal 5, namely the achievement of gender equality and the empowerment of all girls and women.

Certain categories of informal work, such as street trading and waste picking, are specifically problematic for women workers if they do not have access to quality childcare services. These workplaces, including public trading spaces and waste dumps, comprise many occupational health and safety risks. In Belo Horizonte in Brazil, women waste pickers, with assistance of cooperatives, local government, NGOs and private role players, were successful in establishing a childcare centre that was eventually transformed into a public childcare centre that specifically provides for the childcare needs of these waste pickers by accommodating their specific working hours.[413] The provision of childcare facilities to these workers is the result of committed local authorities, strong organisation among the workers and alliances with various associations. Childcare provisions and adequate maternity protection for women in the informal economy requires support and public will from local and national governments, but role players must consider the various challenges specifically experienced by women workers in the informal economy. Quality care for children is of paramount importance to all households, communities and countries and can contribute to a life lived with dignity.[414] Governments must design policies that provide for quality childcare services, and in terms of an integrated approach this must

409 Harvey *et al Compendium of WIEGO and SEWA case studies* 34.
410 Harvey *et al Compendium of WIEGO and SEWA case studies* 34.
411 Harvey *et al Compendium of WIEGO and SEWA case studies* 34.
412 Harvey *et al Compendium of WIEGO and SEWA case studies* 35.
413 Moussié *Women informal workers mobilizing for child care* 2.
414 Moussié *Women informal workers mobilizing for child care* 1, 2, 6.

include awareness campaigns in respect of shared responsibilities between women and men.[415]

Childcare is a fundamental aspect of social protection for women workers and requires governments and other role players to support the provision of childcare facilities for all women workers.[416] It can be argued that the right of children to childcare and the rights of women workers to decent work and adequate social protection are mutually dependent.[417]

6.4.2 Occupational health and safety for women workers in the informal economy

Women workers in the informal economy earn low and irregular incomes, although they work long hours. They are particularly vulnerable to occupational health hazards and are often without social protection coverage.[418] One of the many challenges of extending social protection to these workers is the diversity of their workplaces and often the remoteness thereof, including the public nature of their workplace in the case of street traders or the private home in the case of domestic workers. This certainly increases the difficulties when determining the health and safety of these workers at their place of work. This also means that other role players, and not always the employer, are involved, such as public authorities, including municipalities, informal workers organisations, governments and civil society.[419] If we consider and debate the future of labour law, it is of the utmost importance to consider the occupational health and safety of workers in the informal economy, as more than half of non-agricultural workers are engaged in activities in the informal economy.[420]

Women street traders are extremely vulnerable and face various challenges including harassment by local authorities and male traders, gender discrimination, health and safety challenges, such as lack of access to water and sanitation facilities and a lack of adequate childcare facilities.

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415 Budlender *Child care initiative* 3.

416 Harvey *et al Compendium of WIEGO and SEWA case studies* 35.

417 Moussié *Women informal workers mobilizing for child care* 5. See the Forum for Crèche and Child Care Services (FORCES), a network committed to improve childcare in India. India provides public childcare services to 83 million children; however, challenges do exist, such as ensuring access for all and quality of services provided.

418 Indian Institute for Public Health 2013 http://www.wiego.org/sites/default/files/publications/files/SEWA_Productivity_Impact_Study_2013.pdf.

419 Lund and Naidoo 2016 *NewSol* 145.

420 Alfers *et al* 2016 *NewSol* 272.

One of the most important aspects to consider in the extension of labour and social protection to more workers, is the realisation that these activities, in this instance street trading, must be regarded as work, and the place of trading must be regarded as the workplace for these traders.[421] An awareness must be created of the value and economic contribution of these traders and their activities must be seen as work. In fact this creation of an awareness is applicable to all workers in the informal economy, including domestic workers and involves a process of "conscientisation of the world".[422]

These workers contribute to environmental protection and the recycling of waste in a world where the percentage of solid waste is constantly increasing and a major challenge for most cities.[423]

Women waste pickers face multidimensional discrimination and earn less than their male counterparts. They also face social exclusion and are the victims of continuous harassment.[424] Women waste pickers often occupy the lowest positions in the value chain and are forced to collect recyclables of lower value; even when their activities are recognised and formalised, they do not enjoy the same status as men.[425] They are also excluded from leadership positions, often because they also have childcare and household duties. Women waste pickers have very specific needs in respect of childcare. Their place of work is often dangerous and they need safe childcare facilities.

In 2013, WIEGO launched the Rethinking Gender in Waste Recycling project. The objectives include an analysis and investigation into the challenges and various levels of discrimination that women waste pickers face at home, at the work place, and in the workers' organisations at local and national level.[426] These women workers are often denied equal opportunities to participate in both a public and private life and to life a life with dignity. They often face discrimination based on race and do not have high levels of formal education. Policies regulating waste management must be gender sensitive and include empowerment programmes to ensure gender equality. Through mobilisation and organisation these women can strengthen their agency.

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421 Alfers *et al* 2016 *NewSol* 275.

422 Freire *Pedagogy of the oppressed* 35.

423 Dias 2016 *Env&Urb* 3. In Brazil, for example, waste pickers are responsible for recycling 80% of cardboard and 92% of aluminium.

424 WIEGO date unknown http://www.wiego.org/informal-economy/occupational-groups/waste-pickers.

425 WIEGO date unknown http://www.wiego.org/informal-economy/occupational-groups/waste-pickers.

426 WIEGO date unknown http://www.wiego.org/informal-economy/occupational-groups/waste-pickers.

6.5 Conclusion

Extending labour and social protection to workers in the informal economy will require a paradigm shift from existing legal regimes.[427] This should include an analysis of the specific vulnerabilities associated with the various categories of women workers in the informal economy. Public and private role players must provide enabling frameworks to support vulnerable workers for the following reason:

> When the poor come together on the basis of their work and build organizations that decentralize production and distribution, promote asset formation and ownership, build people's capacities, provide social security and allow for active participation they are the drivers of progress and need our full support.[428]

When considering the extension of legal and social protection of these workers, their general recognition as workers is an important step, as well as a legal recognition. This recognition must be reflected in all policies and legal instruments.[429] Legislation enacted to regulate workers in the informal economy must provide clear definitions of the categories of workers it aims to cover. For example, legislation drafted for protection of domestic workers must consider the nature of work, the fact that many domestic workers may have more than one employer, the fact that domestic workers maybe placed through agencies, et cetera. Such legislation must include all actual workplaces, such as the private home and other premises where the services of these workers may be used.[430] Due to the intimate nature of domestic work at the home of the employer, specific regulation may be required.

Collection of accurate statistics is also particularly important in the extension of protection to these workers and in the drafting of a policy framework. Without adequate statistics policy will fail to address the specific needs of these workers.

The achievement of gender equality must also include a structural approach that challenges gender hierarchies in employment, societies and political hierarchies.[431]

In India, domestic workers are excluded from the scope of the main legal framework and a national minimum wage is absent; however, they do enjoy extensive protection through the *Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal)*

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427 Chen 2016 *NewSol* 167.

428 Bhatt "Looking back on four decades of organizing" 276.

429 In Pakistan home-based workers were legally recognised as workers in 2017 and reflected in a national policy. This is an excellent example of how policies for women workers in the informal economy can be established through social dialogue with various role players including all levels of governments, organisations representing workers and employers and civil society.

430 Sankaran, Sinha and Madhav *Domestic workers – Background document*.

431 Rowlands "A world of the times, but what does it mean?" 17.

Act of 2013. This Act addresses one of the biggest challenges that domestic workers face, namely sexual harassment. Although the Act extends coverage, it also provides for the distinctive innate nature of domestic work. This is thus an example of an extension of existing legislative provisions to extend protection to vulnerable women in the informal economy, but it also allows for tailor-made provisions to accommodate specific challenges.[432] Domestic workers in South Africa appear to enjoy more protection through the specific extension by Sectoral Determination 7; however, enforcement remains problematic. Domestic workers in India and South Africa can benefit from social assistance for poverty alleviation. In Brazil, protection was extend to domestic workers through a constitutional amendment. Although the amendment ensured equal rights with reference to working conditions, certain social rights such as unemployment insurance and childcare assistance are still dependent on specific regulation. This means that currently, they are not treated equally, although the amendment provided them with basic rights, such as restriction of working hours and compulsory rest periods. Enforcement also remains a challenge and employers must through advocacy campaigns, be alerted to the legal framework and compliance with reference to these workers. It is important to note that statistics in Brazil indicate that even prior to the constitutional amendment that extended the scope of coverage to domestic workers, there was an increase in the formalisation of domestic work and this was linked to social dialogue at public forums, and a greater awareness of the precarious position of these workers through various advocacy campaigns.[433]

Certain commonalities exist with reference to domestic work in India, South Africa and Brazil, namely:

- domestic work in all three countries illustrates a distinctive notion of feminisation;
- these workers are from previously disadvantaged groups and are exposed to an inextricable entanglement of multiple grounds of discrimination, such as race, gender and caste;
- many of these workers are illiterate, display low skill levels and have a lower level of education; and
- a clear distinction between the employer and the domestic workers exists with reference to class, education, caste and/or socio-economic circumstances.

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[432] The Act allows for a specific dispute route, taking in consideration the intimate relationship of domestic work and allows for assistance for women who are illiterate. See s 9.

[433] ILO *Initial effects of Constitutional Amendment 72 on domestic work in Brazil* 24.

In all three countries these workers are therefore at risk for exploitation. Domestic work also reinforces patriarchal constructions in all three countries as these reiterate the role of women within societies and this is supported by inequalities with reference to gender, race, class and caste. The low social status undermines any recognition of the value of their work. These inequalities influence and engender the lack of political will to establish an appropriate legal paradigm that challenges the traditional boundaries, notions, objectives and infrastructure of labour law.

When considering to prove these workers with adequate protection and policies that are aimed at addressing gender inequalities in the informal economy, statistics on work in the informal economy are important. At national and international levels measurements must be introduced to provide more accurate statistics to enable the role players to provide adequate protection.

In all three countries women waste pickers ranked the lowest on the occupational hierarchy of the informal economy. In all instances a distinctive employee-employer relationship is absent and any kind of relationship is often with local authorities such as municipalities. In most countries waste management is the responsibility of local authorities and comprehensive uniform regulation is lacking. In all instances where waste pickers were recognised and integrated into municipal systems, certain factors were present. These factors include the political will, inclination and support of local authorities to extend protection to these workers; the recognition of various organisations, including cooperatives; social dialogue, extensive advocacy campaigns and legal and economic empowerment through training and educational programmes, and the use of the courts to enforce rights. In India, the courts have on occasion ordered comprehensive policies to be implemented with regard to waste management and India has adopted a National Policy to integrate these workers. Waste pickers in India have been able to change their circumstances through the courts and through mobilisation, but an overarching policy is still not in place.

Brazil's integrative policies with reference to waste pickers is an example of how protection can be extended to these workers through an integrative system. An important feature is the support offered by municipalities for cooperatives and associations representing these workers. This inclusive framework required the political will of government, the recognition of waste pickers as workers and extensive social dialogue with all actors.

In India, in contrast to South Africa, street trading is regulated through specific national legislation and policies, establishing a comprehensive legal framework. Strategies to

extend protection and address challenges experienced must be based on an integrated framework that includes a rights-based approach and simultaneously must support a worker-based collective approach.[434] Any singular undertaking will not result in sustainable solutions as these systemic disadvantages associated with women workers in the informal economy must be addressed through various mechanisms and at various levels to achieve social justice, decent work for all and gender equalities.

In India, the KKPKP argues that the formal businesses whose waste they recycle should contribute to the health and safety of the workers.[435] This argument can also be submitted with reference to waste pickers in South Africa. It can be argued that local authorities save money on recycling by the labour of waste pickers and thus should bear a duty to contribute to their social protection. Such contribution can include issuing protective clothing and providing infrastructure where these workers can work.

Role players such as individual households and municipalities can contribute to a waste management fund through levies raised through rates and taxes to provide basic welfare benefits to these workers. The collection of waste contributes to its recycling and ensures a safer and greener environment. Raising such a levy would mean that waste pickers are recognised as a category of workers in line with the ILO's recognition of wide continuum of working relationships. A wide concept of worker should include all stages of production.[436]

Where national legislative provisions do exist, particularly vulnerable categories of domestic workers are often still excluded because of the hours worked for a particular employer. Social insurance measures often do not provide for registration of multiple employers in respect of a single employee due to various administrative challenges. Extending social insurance protection to these workers will require review of administrative procedures to include these workers and innovative measures to accommodate the registration of multiple employers.[437] Contributions by multiple employers in this respect will require a modification of systems to provide for this, and online systems must allow for the registration for more than one employer in respect of a single worker. An innovative solution also includes the allocation of a specific employer

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434 Routh and Fassi "Informal workers' organising strategies in India and Argentina" 206.
435 Alfers, Lund and Moussié "Informal workers and the future of social protection" 12.
436 Sankaran and Madhav "Legal and policy tools to meet informal workers' demands" 10.
437 ILO *Social protection for domestic workers* 19. Mauritius adapted their contributory system in respect of these part-time workers, whereby employers contribute according to the duration of a contract period within a month. (ILO *Social protection for domestic workers* 31).

number that allows employees to register more than one employer.[438] This is an example of the diverse nature of informal work and highlights the fact that in certain instances, innovative and tailor-made solutions are required.

Various factors impact on the livelihoods of informal traders and waste pickers. Spatial displacement and spatial inequalities affect these workers as access to public spaces remains limited.[439] Political displacement, including political struggles, also have an impact on their livelihoods as their bargaining partners are often local authorities.[440] Moreover spatial and political displacements result in economic displacements when these workers cannot earn a livelihood.[441] Lastly the abuse of human rights through spatial, political and economic displacements culminate into sociocultural displacement.[442] When considering decent work for these workers, an integrated approach is required that allows for spatial, political, economic and social and cultural tolerance.[443] Such an approach will also allow for the recognition of the value and economic contribution of these workers and is part of the process of "conscientisation of the world" with reference to informal workers.

It is proposed that to ensure adequate implementation and enforcement of innovative and tailor-made legislation for women workers in the informal economy, a committee representative of the workers, specifically of the women workers and other applicable role players, must be established to assist in this regard.

Through various processes of mobilisation and organisation waste pickers cooperatives were acknowledged as service providers.[444] Waste picking is recognised as an occupation in Brazil,[445] the recognition of these vulnerable workers in the informal economy is extremely important when one considers the extension of labour and social protection of these workers. This recognition includes a realisation of their status as workers. This recognition in Brazil also includes the recognition of organisations that represent their interests at various forums.[446] The extension of protection to waste pickers in Brazil symbolises a movement from rigid policies to a more inclusive framework.[447] In Brazil, as in South Africa, the Constitution provides that local authorities are responsible for solid

438 Colombia utilises this system (ILO *Social protection for domestic workers* 31).
439 Mackie, Swanson and Goode "Street trading and revanchism in Latin America" 67.
440 Mackie, Swanson and Goode "Street trading and revanchism in Latin America" 68.
441 Mackie, Swanson and Goode "Street trading and revanchism in Latin America" 69.
442 Mackie, Swanson and Goode "Street trading and revanchism in Latin America" 70.
443 Mackie, Swanson and Goode "Street trading and revanchism in Latin America" 67, 72-74.
444 Comaru and Werna *The health of workers in selected sectors of the urban economy* 16.
445 Comaru and Werna *The health of workers in selected sectors of the urban economy* 16.
446 Comaru and Werna *The health of workers in selected sectors of the urban economy* 16.
447 Dias *Overview of the legal framework for inclusion of informal recyclers in solid waste management in Brazil* 108.

waste services.[448] Initially waste pickers in Brazil were recognised through municipal laws in various jurisdictions that provided for the recognition of cooperatives[449] and formally organised groups,[450] establishment of specific departments tasked with educational programmes dealing with environmental issues;[451] the provision of technical assistance; the recognition of waste pickers as partners in municipal programmes and through contracts with these partners allowed for remuneration of services.[452] At state level several laws were enacted in 2004 that recognised waste pickers and cooperatives in respect of waste collected from public buildings.[453] Recycling or waste picking was formally recognised as an occupation in Brazil in 2001.[454] This recognition of workers in the informal economy is extremely important in the provision of labour and social protection. Protection provided for waste pickers in Brazil through progressive legislative interventions at local and national level was the result of advocacy campaigns and social mobilisation by representative MBOs.[455]

An inclusive legal framework for waste pickers requires the political will of governments, the recognition of their status as workers and provision for social mobilisation which requires social dialogue with these workers and their various organisations such as cooperatives and MBOs.[456] The regulation of street traders in India is an example of

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448 The Brazilian constitution in article 30(I) provides that municipalities have the power to legislate local matters, and article 30(V) states that they have the responsibility to organise and render public services of local interest. The South African Constitution in Chapter 7 regulates local government. S 152 list the objects as: (a) to provide democratic and accountable government for local communities; (b) to ensure the provision of services to communities in a sustainable manner; (c) to promote social and economic development; (d) to promote a safe and healthy environment and to encourage the involvement of community organisations in the matters of local government. The duties placed on local government by the South African Constitution are certainly more comprehensive that those of the Brazilian constitution.

449 Article 151 of the municipal constitution of Belo Horizonte in 1990 provided preference to cooperatives in respect of the sale and collection of recyclables.

450 In Porto Alegre the Urban Cleansing Code recognised organised groups of waste pickers in its recycling programme.

451 In 2000 a department was specifically established in Belo Horizonte to conduct these activities. See Law #8052/00.

452 In 2004, the municipality in Diadema through the enactment of legislation (#2.336/04) could conclude contractually with the waste pickers, including contractual arrangements for remuneration.

453 Law #3517/04.

454 The Brazilian Occupation Classification provides for regulated professions and describes a collector of recyclables as: "someone who might collect recyclables in streets or at disposal sides, work as a waste sorter and/or other related activities in cooperatives or junk shops". This description is wide and covers most of the activities of these workers.

455 Dias *The health of workers in selected sectors of the urban economy* 6.

456 The integration and recognition of waste pickers in Brazil was a result of parliament recognising the various groups that represented these workers, including civil society and extensive consultations with the various role players through workshops and seminars (Harvey J *et al Compendium of WIEGO and SEWA case studies* 8).

innovative tailor-made provisions to regulate vulnerable workers in the informal economy and could serve as an example for the extension of protection to other categories. In India, the *Unorganised Workers' Social Security Act* also specifically provides for coverage of workers in the informal economy; however, enforcement remains a major challenge. The regulation of street traders in Brazil is problematic as no comprehensive policy exists, and contradictory policies are prevalent thought the many municipalities. Street traders in Brazil and South Africa have been able to enforce their rights through the courts, but their abilities to organise and mobilise must be further strengthened.

States must recognise the social, economic and environmental contribution of waste pickers.[457] Countries like India and Brazil have recognised the value of their contribution and provide for representation at local levels and remuneration for their services, thereby avoiding costly contracts with private companies.[458] These workers must be integrated into the waste management system and countries must consider the improvement of facilities and the provision of equipment. Providing these workers with adequate labour and social protection contributes to the alleviation of poverty and the promotion of social justice and in this regard the function of labour law becomes vital. Although many of the challenges that waste pickers across the world face are similar, these challenges also differ according to various geographical locations, and policy makers must consider regional circumstances when providing for these workers.[459] In respect of waste pickers and street traders where the bargaining partners often include public authorities, it is of the utmost importance that these workers and their organisation are included in any social dialogue in respect of urban policies and waste management policies. In the design of policies, contributions by worker organisations play an important role, specifically when they share links with other national and international networks in respect of expertise and shared experiences and possible alternatives and solutions.[460]

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457 WIEGO date unknown http://www.wiego.org/informal-economy/occupational-groups/waste-pickers.

458 In India the Supreme Court in *Almitra H P Patel vs The Union of India*, 2000, recognised that Delhi, the capital of India, is also one of the most polluted cities and declared that all municipalities must allow for door-to-door collection of waste. Waste pickers in Colombia have used the courts to extend protection and gain rights through judicial activism. In 2003, an association for waste pickers, namely the *Asociación de Recicladores de Bogotá* (ARB) challenged policies of the authorities that did not allow concessions to waste pickers by declaring these policies unconstitutional as they infringed on the human dignity and equality of these workers. By allowing only Stock Corporation to provide the services it infringed on the right to freedom of association of the waste pickers and their cooperatives. The burden of proof was then placed on the municipality to prove non-discrimination. The court agreed with the arguments and found the municipality's acts discriminatory (Samson *Refusing to be cast aside* 68).

459 Samson *Refusing to be cast aside* 1.

460 Abizaid *ARB: Fighting for an inclusive model for recycling in Bogotá* 11.

The starting point for any consideration of labour and social protection must be the recognition of waste picking and street trading as an occupation.[461] For both street traders and waste pickers this recognition, coupled with the issue of identity or smartcards by the public authorities, would legitimise their activities and thus improve and limit their vulnerabilities. This would contribute to creating decent work conditions for them. In respect of waste pickers identity cards can assist in the payment of remuneration by public authorities for their services. For street traders these cards validate that they are lawfully engaged in their activities. In the consideration of protection of waste pickers, governments must allow for systemic changes in their waste management systems that allow for shared responsibilities to manage waste and promote recycling.[462] For both street traders and waste pickers the protection of their fundamental human rights through institutional legal mechanisms have been beneficial, and courts through judicial activism have started the process of providing these workers with the protection they need to ensure a life lived with dignity. It is of the utmost importance to recognise the positive contribution of waste pickers across the world. This contribution includes the reduction of pollution in cities and valuable environmental contributions in collecting waste for recycling purposes. In countries such as Colombo the use of waste pickers instead of large private companies has reduced the waste management costs in cities.[463]

South Africa urgently needs to consider integrative and inclusive policies in respect of these workers and, as the government did in Brazil, to extend protection to these vulnerable workers. Extending protection to these workers must include formal recognition as workers, recognition by local authorities of waste picker organisations and representatives and the provision of social protection measures.[464] Local government authorities must focus on awareness campaigns. It is proposed that to ensure adequate implementation and enforcement of innovative and tailor-made legislation for women workers in the informal economy, a committee representative of the workers, specifically of the women workers and other applicable role players, must be established to assist in this regard.

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461 Abizaid *ARB: Fighting for an inclusive model for recycling in Bogotá* 9.
462 Abizaid *ARB: Fighting for an inclusive model for recycling in Bogotá* 9.
463 Abizaid *ARB: Fighting for an inclusive model for recycling in Bogotá* 11.
464 Dias and Silva "Waste pickers in Brazil" 179.

CHAPTER 7
VOICE AND REPRESENTATION IN THE INFORMAL ECONOMY

7.1 Introduction

Voice and representation for women workers in the informal economy is of paramount importance in achieving labour and social protection for these workers. Without a voice, the notion of substantive equality and decent work will never become a reality for these workers. Collective action can bring the necessary change that is required to provide protection through the extension of existing measures and also new regulatory paradigms and tailor-made measures. The lack of representation contributes to the fact that these workers are trapped in poverty and are unable to fight for decent work and living conditions.[1] Hepple[2] states that labour legislation for the new world will be the result of "processes of conflict between different social groups and competing ideologies". He provides as follows:

> It is the powerfulness of the opponents of reform which is the decisive factor in the making of labour law.[3]

Women workers in the informal economy in particular are often without voice and representation as they are beyond the reach of traditional methods of organisation and mobilisation.[4] Women workers as own-account workers are deprived of the right to collective bargaining since it is assumed that an employer is required for this.[5] Frequently the work they perform is undervalued and not recognised by societies or governments and this contributes to barriers with reference to mobilisation and organisation.[6] Exclusion from participation and social dialogue at various levels characterises a dimension of poverty,[7] and voice and representation must include a process of social dialogue.[8]

1 ILO Resolution concerning decent work and the informal economy (2002), Conclusion 4. See also Webster, Britwum and Bhowmik *Crossing the divide* (cover page).
2 Hepple 1996 *CLLPJ* 627.
3 Hepple 1996 *CLLPJ* 627.
4 Cornwell *et al* "Preface" viii.
5 Von Broembsen and Chen *Eliminating legal barriers from the perspective of the informal economy* 6.
6 Cornwell *et al* "Preface" xi.
7 United Nations Statistics Division 2015 https://unstats.un.org/unsd/gender/worldswomen.html 184.
8 The Recommendation Concerning the Transition from the Informal Economy to the Formal Economy 204 of 2015 also requires member states to adopt integrated policies that address organisation and representation of workers to promote social dialogue (para 11(e)).

Organising is a vital tool for women in the informal economy to "overcome systemic disadvantages":[9]

> The first step out of poverty is organization. Organizing allows us to become social actors because through it we can engage in stable transactions, build convergence of interests and access social protection.[10]

From the outset, it is also important to identify the bargaining partners for the various categories of workers. The lack of representation also means that they have very limited collective representation with public authorities and employers.[11] Strategies for the successful organising may vary for various occupational categories; however, certain common challenges exist, such as the lack of recognition as workers, the exclusion from labour and social protection measures and various barriers to legal and economic empowerment. Organisations representing these workers must recognise the challenges associated with the heterogeneous nature of work in the informal economy, and that this may require very diverse strategies to successfully organise these workers. A range of organisational forms contributes to the voice and representation of women in the informal economy, and may include MBOs,[12] NGOs,[13] cooperatives,[14] associations,[15] networks,[16] branches of national unions, trade unions,[17] and regional and international networks.[18] The above illustrates that the range of organisational forms in the informal economy varies from clearly identifiable trade unions and MBOs to NGOs with no formal membership base.

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9 Eaton, Chen and Schurman "Broadening labor's repertoire?" 5.

10 Bernardo Toro 2008 http://www.wiego.org/sites/default/files/resources/files/Bernardo_Toro_Waste_Pickers.pdf

11 Resolution Concerning Decent Work and the Informal Economy 2002, conclusion 9.

12 Chen *et al* define membership-based organisations as those in which the members elect their leaders and which operate on democratic principles that hold the elected officers accountable to the general membership. Important characteristics for women workers include the democratic nature, a common purpose to improve the livelihoods of their members through organisation and transparency of these organisations (Chen *et al* "Membership-based organizations of the poor" 1).

13 Non-government organisations often operate as an outside entity without a membership base.

14 These organisations represent ownership by members (Bonner and Spooner *The only school we have* 31). Cooperatives are often defined in national legislationand and are described as enterprises that assist members through cooperation to solve mutual problems (Tchami *Handbook on cooperatives for use by workers' organizations*; see also para 7.3.1 below).

15 Associations can promote empowerment and can also be used as a generic term to include all other membership-based organisations. A group of persons joined together by agreement, rules or a constitution with a common object can also be described as an association (Theron *Options for organising waste pickers in South Africa* 14, 15).

16 StreetNet is an example of an international network affiliate with MBOs, unions, cooperatives and associations representing street traders. Objectives include the promotion of organisation among these workers and advocacy campaigns. See StreetNet date unknown http://www.streetnet.org.

17 A definition of trade unions is often provided in national legislation. See para 7.3.1 below.

18 These networks often focus on awareness and advocacy campaigns for vulnerable workers and promote campaigns for the ratification of international instruments, such as the Domestic Workers Convention. See para 3.3.6.4 above; Bonner and Spooner *The only school we have*.

Certain organisations have a hybrid nature[19] and display elements of both MBOs and NGOs.[20] Many of these organisations do not comply with the conceptual framework of trade unions, applicable to the traditional employment paradigm. Community-based organisations (CBOs) can also contribute to the voice and representation of these workers by providing links at national and international levels and assisting in promoting the interests of workers.[21] Cooperatives can be an important alternative organisation form for women, as it promotes economic freedom and ensures that they are the owners of their own work.[22]

An ILO report recently stated the following:

> A significant number of workers in the informal economy have formed cooperatives in the quest for labour rights, recognition and social protection and to secure economic gains, such as access to markets, skills development opportunities, financial and social services and others. Globally cooperatives are gaining momentum and present a potential alternative for workers in the informal economy to secure economic gains and reduce their vulnerability. In the light of the failures of the prevailing economic model, cooperatives provide potential for a bottom-up approach to inclusive and sustainable development.[23]

When considering the effectiveness of these organisations as opposed to trade unions, it is important to note that these workers often face other bargaining partners, such as municipalities and government officials, and not necessarily the traditional employers or employers' organisations.[24] MBOs in the informal economy may vary in size and internal structure; however, they have certain common characteristics. These characteristics include principles of democracy and independence, transparency, the notion of solidarity, and mutuality.[25] Strategies of organisations in the informal economy differ from those for

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19 SEWA is an example of a hybrid organisation. See para 7.9.1 below.

20 Carré *Defining and categorising organisations of informal workers in developing and developed countries*.

21 Fourie and Smit "Precarious work, gender and non-discrimination in the informal economy".

22 Samson *Refusing to be cast aside* 39. Studies have indicated that the prevalence of women as waste pickers differs from country to country and that these women prefer to being organised through cooperatives and associations (Schenck, Blaauw and Viljoen *Unrecognised waste management experts* 24). In Brazil most of the women are organised through worker organisations such as cooperatives. In South Africa formal waste collection activities through private enterprises are male dominated; however, informal activities represent low entry barriers and are accessible to women (Schenck *et al* 2017 *CDJ* 3). A group of women in the Eastern Cape started collecting scrap metal as a survivalist activity since their low education and skill levels pose barriers to work in the formal economy. The following statement by one of the women indicates the important role the informal economy plays in respect of poverty alleviation: "We are self-employed and independent. We have cleaned the village and we are not the poorest of the poor-at least not anymore" (Schenck, Blaauw and Viljoen *Unrecognised waste management experts* 10).

23 Kerbage and Abdo *Cooperation among workers in the informal economy*.

24 See also Fourie 2016 *ILJ* 841.

25 Bonner and Spooner *The only school we have* 15.

employees in the formal economy. These organisations must be able to adapt to the evolving needs of the workers they represent and will often have to change strategies to accommodate the interests of their members.[26]

Globally, international networks have created an increased awareness of the plight of these women workers and this is particularly important in respect of ratification campaigns for applicable international instruments and for their recognition as workers. Women's rights have been on the forefront of international advocacy campaigns and are on a number of international agendas.[27] Interrelationships can exist between grassroots activism, governments and international development communities.[28]

Domestic workers pose many challenges to successful organisation as their workplace is the private home of the employer and often the home of the worker too. Long and irregular working hours create barriers for mobilisation as the organisations may have limited access to the workers. These factors contribute to their isolation and vulnerability. The adoption of the ILO Domestic Workers Convention has created an increased awareness in respect of domestic work across the world and has contributed to the establishment of various organisations representing their needs.[29] Despite the challenges they face domestic workers across the world are organising to improve their working conditions. A popular South African trade union and social struggle song is often sung at trade union meetings, as workers reflect on a time during apartheid when these workers were not protected by labour laws.[30] Informal traders and waste pickers also pose challenges with reference to successful organisation as they are own-account workers and their bargaining partners include local authorities. Challenges and limitations encountered by women workers in the informal economy are often based on contextual and sector specific frameworks.[31]

Despite these challenges, they are engaging in diverse and creative strategies to change their circumstances. Innovative organisational strategies exist in various categories of workers in the informal economy, but these remain fragmented.

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26 Carré *Defining and categorising organisations of informal workers in developing and developed countries*.

27 See para 3.2.2 above. Advocacy campaigns are important to create an awareness of the vulnerable situation of workers and to gain public support (Carré *Defining and categorising organisations of informal workers in developing and developed countries* 9).

28 Kabeer N, Milward K and Sudarshan R "Beyond the weapons of the weak" 5.

29 Bonner and Spooner *The only school we have* 29. See also para 3.3.6.4 above.

30 The trade union songe has the following lyrics: "My mother was a kitchen girl, my father was a garden boy, that's why I am a unionist." The lyrics were written by Rebecca Malope.

31 Bonner and Spooner 2011 *LC&S* 1.

This chapter will consider the contribution of these organisations in the extension of protection to these women and analyse successful strategies. This chapter will also explore the value of networks between national and international organisations to promote decent work for these workers. The fragmented nature of existing best practices in this regard requires a broader scope of consideration of categories of vulnerable workers, for example to include farm workers, to best analyse innovative strategies for women workers with reference to organising. This analysis includes:

(a) the identification of barriers and constraints for organising approaches;
(b) the identification of various organisation forms representing workers within the informal economy,
(c) the identification of successful best suited models; and
(d) an analysis of strategies which have the greatest impact on improving the livelihoods of these women.

The discussion that follows illustrates that these women

> … are not passive victims but are building new forms of collective solidarity to promote their rights and interests.[32]

7.2 The role of trade unions and women in the informal economy

Trade unions are hesitant to represent these workers. This can be ascribed to the challenges associated with organising these women and antagonism towards these workers as they are seen as a threat to the rights that unions have gained through bargaining and organisation of workers in the formal economy.[33] The challenges that trade unions face include:

(a) the lack of resources needed to represent these heterogeneous workers;
(b) the widespread and remote nature of workplaces;
(c) the fact that a clearly identified employer is not the norm; and
(d) the very diverse needs of categories of workers in the informal economy.[34]

Conceptual challenges also exist, such as narrow definitions contained in legislation based on the traditional formal employment paradigm. Procedural challenges include barriers in respect of formal, cumbersome registration procedures for trade unions and other organisations representing these workers. Bargaining partners for these workers can include governments and local public authorities, and traditionally the role of trade unions

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32 See also Webster, Britwum and Bhowmik *Crossing the divide* (cover page).
33 Kabeer, Milward and Sudarshan "Beyond the weapons of the weak" 3.
34 Kabeer, Milward and Sudarshan "Beyond the weapons of the weak" 1.

is characterised by its struggles with employers.[35] Representation of these workers will also require organisations to represent their members' interests at other fora, including at community level and at various government levels. Lastly trade unions often lack political resolution,[36]and unions have developed well-established organisational strategies based on the needs of those in the traditional formal employment relationship. In many countries, such as Brazil, trade unions have been male dominated and are not concerned with the precarious position of women workers as they are seen as dependent on their male partners and therefore enjoy the joint benefits.[37]

Despite these considerations trade unions can play an important role in the empowerment of these workers and will in many instances have the existing infrastructure to provide the necessary support. The decline in trade union membership globally also supports a realisation that they have to consider extending representation to the increasing number of workers in the informal economy. This will require unions to be flexible and respond specifically to the needs and challenges of women workers. A trade union in Brazil commented on addressing the specific needs of women workers in the informal economy and the paradigm shift in strategies as follows:

> We wanted to gain influence amongst the workers and help them improve their lives and working conditions and we realized that to win their leadership we needed to appeal to women workers in a special way.[38]

The specific needs that were recognised and prioritised by the above union for these women included childcare facilities, paid leave for medical care, breastfeeding time and paid maternity leave.[39] This trade union realised that in order to gain members among these women workers they had to consider their specific needs as women and as workers. The above illustrates that women workers have very specific needs that often relate to their care duties as women and mothers, and organisational strategies must take cognisance of this.

Strategies must include empowerment programmes for their members to ensure sustainability and develop leadership from within.[40] Where possible trade unions should

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35 SEWA has been involved in tripartite negotiations where bargaining partners included distributors, state parties and members. The subject of these negotiations was contributions towards the health fund of beedi workers.

36 Fourie and Smit "Precarious work, gender and non-discrimination in the informal economy".

37 Selwyn "Women and rural trade unions in North-East Brazil" 53.

38 Selwyn "Women and rural trade unions in North-East Brazil" 60.

39 Selwyn "Women and rural trade unions in North-East Brazil" 60.

40 ILO Resolution Concerning Decent Work and the Informal Economy, Conclusion 34.

negotiate for the inclusion of these workers in collective agreements, although these workers will often have specific needs that may differ from those in the formal economy.[41]

7.3 Voice and representation for women workers in the informal economy: the contemporary national framework

The challenges in South Africa in this regard can mostly be ascribed to restricted conceptual frameworks and deficient institutional structures. The objectives of the *LRA* in respect of the collective bargaining framework do not recognise worker organisations other than trade unions, and employers' organisations.[42] This narrow conceptual framework, right from inception, is problematic for workers in the informal economy, specifically as other organisations such as MBOs, NGOs and cooperatives may be better equipped to represent these workers.

Domestic workers are included within the conceptual framework of being an employee in the definition of section 213.[43] Domestic workers thus enjoy the right to freedom of association as provided for in the *LRA*.[44] The South African Domestic Service and Allied Workers Union (SADSAWU) is the largest trade union for domestic workers in South

41 ILO Resolution Concerning Decent Work and the Informal Economy, Conclusion 34.

42 Section 1(c) of the *LRA* describes the purpose as: "to provide a framework within which *employees* and their *trade unions*, employers and *employers' organisations* can (i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest".

43 See also Sectoral Determination 7.

44 See chapter II and III of the *LRA*. S 23(2), (3) and (4) of the Constitution provides for the fundamental rights of workers to form and join trade unions, to strike, and to take part in their activities, and subsection (5) provides for the right to engage in collective bargaining. These rights are supported by the fundamental rights in s 17 to assembly, demonstration, picket and petition in a peaceful manner, and s 18 that provides for freedom of association. The fundamental rights in ss 17 and 18 are applicable to everyone. In *South Africa National Defence Union v Minister of Defence* 1999 6 BCLR 615, paras 26 and 27, the Constitutional Court, confirmed the specific provisions in article 2 of the Freedom of Association and the Protection of the Right to Organise Convention 87 (1948) that provides as follows: "Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation." This is supported by both the Domestic Workers Convention 189 (2011) and Recommendation 201 (2011). Article 3(3) of this convention states: "In taking measures to ensure that domestic workers and employers of domestic workers enjoy freedom of association and the effective recognition of the right to collective bargaining, Members shall protect the right of domestic workers and employers of domestic workers to establish and, subject to the rule of the organisation concerned, to join organisations, federations and confederations of their own choosing." This convention embraces a wide conceptual framework for organisations to be formed for these workers and is not limited to trade unions. See also para 3.3.6.4 above.

Africa.[45] Trade unions such as SADSAWU, that represent workers in the informal economy, may have bargaining partners other than employers, and these can include state actors.[46]

Protection of the right of freedom of association is in line with the Domestic Workers Convention 189 (2011) and its Recommendation 201 (2011) to provide decent work to domestic workers. The constitutional rights to assemble, picket and petition[47] as well as the right to freedom of association[48] are also relevant as these fundamental rights are provided to "everyone" and not reserved only for those in formal employment relationships. The state also has positive and negative duties to respect, protect and promote these rights.[49] Informal traders and waste pickers do enjoy the constitutional right to freedom of association,[50] but not as employees within the *LRA* framework.

The *LRA* provides protection to employees for exercising their rights in terms of the Act,[51] provides for collective bargaining and organisational rights[52] and the right to strike.[53] Domestic workers, as employees, enjoy all these rights in the *LRA*. However, the unique nature of the employment relationship in respect of domestic workers render a number of these rights unsuitable. The provisions for organisational rights[54] were drafted for a formal workplace, and are not necessarily suitable or applicable for the private household. The private nature of this workplace thus poses challenges in respect of organisational

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45 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 (COSATU) was established and in 1960, the government banned political organisations. Although women protested pass laws in 1956, specifically for domestic workers, all black persons 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. See SADSAWU http://www.sadsawu.com/about-us.html.

46 Domestic workers remain excluded from the compensation fund, and SADSAWU has presented a report to the South African Human Rights Commission on the unsafe and unhealthy working conditions of these workers in private homes. SADSAWU is currently also involved in negotiations with the Minister of Labour to provide adequate occupational health and safety protection (see SADSAWU http://www.sadsawu.com/about-us.html). The extension of social protection measures, specifically social insurance measures, must include empowerment campaigns to create awareness about these rights.

47 Section 17.

48 Section 18.

49 Section 7(2).

50 See s 18 of the Constitution.

51 Section 5.

52 Sections 11-22.

53 The *LRA* regulates strikes and lock-outs in ss 64-77.

54 The *LRA* provides for the following organisational rights: s 12 provides for access to the workplace; s 13 provides for trade union subscriptions; s 14 provides for trade union representatives; s 15 provides for leave for trade union activities and s 16 for disclosure of information.

rights, such as access[55] and disclosure of information.[56] Therefore section 17 of the *LRA* restricts the application of these two rights with reference to the domestic sector.[57] Section 13, on the deduction of trade union levies, also poses challenges for the domestic sector. Private employers may not be prepared to deduct levies and remit these to trade unions. Domestic workers who are members of trade unions will in most cases bear the responsibility for the payment of levies to the union themselves.

The *LRA* defines a strike as follows:

> The partial or complete concerted refusal to work, or the retardation or obstruction to work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a *dispute* in respect of any matter of mutual interest between employer and *employee*, and every reference to **work** in this definition includes overtime work, whether it is voluntary or compulsory.

The definition provides for a concerted refusal and the nature of strikes encompasses collective action.[58] The courts have indicated that a single employee cannot strike, as concerted action must be involved.[59] Unfortunately, adequate protection with reference to freedom of association and collective bargaining thus cannot be said to be provided to domestic workers through the *LRA* framework.

The objectives of the *LRA* should include other workers' organisations and should not be limited to trade unions, specifically in respect of bargaining and the formulation of industrial policies.[60] In respect of the regulation of freedom of association and collective bargaining of these workers, innovative and tailor-made solutions are required in South Africa to comply with the ILO Convention and Recommendation for Domestic Workers.[61] Recommendation 201 (2011) requires member states to

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55 Section 12.

56 Section 16.

57 For the purpose of this restriction "domestic sector" means: "employment of employees engaged in domestic work in their employer's home or on the property on which the home is situated". See s 17(1). According to s 17(2)(a) access by a trade union representative or office bearer can only be obtained through the agreement of the employer. The right to disclosure does not apply to this sector (s 17(2)(b)).

58 Van Niekerk *et al Law@work* 446.

59 See *Schoeman v Samsung Electronics (Pty) Ltd* 1997 10 BLLR 1364 (LC).

60 Section 1 of the *LRA* provides the framework according to which employees, trade unions and employers' organisations can formulate industrial policies. Industrial policies can impact on women workers in the informal economy and it is of paramount importance that they are represented through their chosen organisations.

61 ILO Domestic Workers Convention 189 (2011) provides that member states must take measures to promote freedom of association and the right to collective bargaining. See also para 3.3.6.4 above.

> … identify and eliminate legislative restrictions and obstacles to the rights of domestic workers to establish and join their own organisations or to join workers' organisations of their own choosing.

This will require South Africa to provide for the recognition, registration and regulation of worker organisations, other than trade unions, including MBOs and cooperatives either in the *LRA* or preferably through innovative and tailor-made legislative measures. This illustrates the challenges when existing legislative provisions drafted for the traditional employment are merely extended to those in the informal economy.

7.3.1 Cooperatives as appropriate organisational models

The restrictive conceptual framework in labour legislation excludes worker organisations, other than trade unions from its scope. In South Africa, a trade union is defined as:

> …. an association of *employees* whose principal purpose is to regulate relations between employees and employers, including any *employers' organisations*.[62]

It is clear from the above why the trade union notion is not always appropriate for workers in the informal economy. Concepts limit the accessibility of these organisations to the traditional formal employment relationship. However, when we consider the scope of cooperatives,[63] they can be more accessible and flexible as workers' organisation.[64] A cooperative is defined by the International Co-operative Alliance as follows:

> A cooperative is an autonomous association of persons united voluntarily to meet their common, economic, social and cultural needs and aspirations through a jointly owned and democratically controlled enterprise.[65]

Organisations representing women in the informal economy in many instances have to address social and cultural needs in addition to economic needs and the notion of a jointly

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62 Section 213 of the *LRA.*

63 Challenges that organisations face when organising these workers often result in exploring innovative solutions. In India when SEWA could not succeed in organising a group of women Muslim workers to negotiate with contractors without harassment and victimisation, the women established their own cooperative. This enabled them to take control of their work. This example illustrates that the development of alternatives, such as cooperatives, to the traditional trade union model is often more successful. This is also an example where SEWA, as a trade union, also fulfilled a developmental role in empowering these workers to take control and enhance their leadership and provided more sustainable solutions within communities and with relevant role players, such as public authorities (Hill *Women identity, agency and economic development* 76).

64 ILO Recommendation concerning the Transition from the Informal to the Formal Economy 204 (2015) highlights the importance of an integrated policy framework by member states that promotes economic units such as cooperatives. This Recommendation supports the important role that cooperatives can play in any transition to formality (see para 11(g)).

65 ICA date unknown https://ica.coop/en/what-co-operative-0.

owned democratic organisation is certainly a more fitting enterprise for their mobilisation. Cooperatives support values of equality, human dignity and freedom.[66]

Du Toit distinguishes between two types of cooperatives, namely "service cooperatives" and "worker cooperatives".[67] The objective of worker cooperatives is to find work for its members, whereas service cooperatives[68] aim to provide new services to its members, which they previously did not had access to.[69] Worker cooperatives are then divided into "producer cooperatives" with objectives to produce goods and/or services and "labour cooperatives".[70] Members of "labour cooperatives" provide their labour and skills to others.[71] Cooperatives will provide domestics workers with opportunities for self-regulation as the owners of the cooperative. They will be able to determine their own terms and conditions of employment. This design promotes the empowerment of these women.[72]

Policy instruments with reference to cooperatives in South Africa include the Decent Work Country Programme (2010-2014) and the Department of Trade and Industry's Integrated Strategy on the Development and Promotion of Cooperatives.[73] The strategies focus on employment creation and not on the extension of labour and social protection of these workers similar to the ILO Promotion of Cooperatives Recommendation 193 (2002).[74]

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66 According to the International Co-operative Alliance co-operatives are based on seven important principles, namely (a) voluntary and open membership; (b) democratic member control; (c) member economic participation; (d) autonomy and independence; (e) education, training and information; (f) co-operation among co-operatives; and (g) concern for community (ICA date unknown http://ica.coop/en/whats-co-op/co-operative-identity-values-principles).

67 Du Toit and Tiemeni 2015 *ILJ* 1680.

68 Service cooperatives include, financial cooperatives, farmers' cooperatives, public service provision cooperatives and support services cooperatives (Du Toit and Tiemeni 2015 *ILJ* 1681).

69 Du Toit and Tiemeni 2015 *ILJ* 1680, 1681.

70 Du Toit and Tiemeni 2015 *ILJ* 1681.

71 Du Toit and Tiemeni 2015 *ILJ* 1680, 1681.

72 Du Toit and Tiemeni 2015 *ILJ* 1680, 1689.

73 2011. See Du Toit and Tiemeni 2015 *ILJ* 1682. In South Africa there are a few cooperatives; one of the most important cooperatives is the Housing Co-operative that also operates in the domestic sector and was established to address specify issues in respect of housing of vulnerable workers (Du Toit and Tiemeni 2015 *ILJ* 1681).

74 Du Toit and Tiemeni 2015 *ILJ* 1682. The preamble of the Recommendation specifically recognises the importance of cooperatives in job creation. The recommendation defines a cooperative as "an autonomous association of persons united voluntarily to meet their common economic, social and cultural needs and aspirations through a jointly owned and democratically controlled enterprise" (item 1).

The *Co-operatives Act*[75] provides *inter alia* for the formation and registration of cooperatives. For women workers in the informal economy, the following objectives in the Act are relevant:

> (i) [to] promote equality and greater participation by black persons, especially those in rural areas, women, persons with disabilities and youth in the formation of, and management of, cooperatives;[76] and
>
> (ii) [to] facilitate the provision of support programmes that target emerging cooperatives, specifically those cooperatives that consist of black persons, women, youth, disabled persons or persons in the rural areas and that promote equality and greater participation by its members.[77]

The purpose refers to the promotion of cooperatives, the encouragement of persons to register cooperatives and the creation of an enabling framework to do so.[78] The registration procedure is relatively easy, but compliance regulation is more formal and complicated.[79] These provisions are more aligned to a formal business enterprise structure and are not aligned to the needs of vulnerable workers in the informal economy. In its current format, access to cooperatives through the Act is problematic.[80] Another problematic provision is contained in schedule 1 of the Act. This specifically provides that members of cooperatives are not employees. The *BCEA* aims to give effect to section 23(1) of the Constitution and the international obligations of South Africa and it should be possible to use the factors in section 83A of the *BCEA* to deem members of cooperatives to be employees for purposes of certain employment laws.[81]

Cooperatives can also play an important role in the promotion of gender equality. Studies have indicated that cooperatives consisting of women generally address wider societal issues and challenges experienced by these women and can play and important role in poverty reduction.[82]

> Recent research from the ILO's Cooperatives Unit shows there are strong links between women's involvement in co-operatives and poverty reduction. After becoming involved in co-operatives, women report they perform new and more productive labour activities and earn higher incomes. Women also share that joining

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75 14 of 2005. An in-depth analysis of the current *Cooperatives Act* is beyond the scope of this study.
76 See s 2(d).
77 See s 2(f).
78 Section 2.
79 This is in line with the Recommendation that highlights the role of governments. This includes quick and easy registration procedures for cooperatives. See item 6(a).
80 For example, s 14 refers to a number of burdensome provisions such as the requirements for withdrawal of membership, the structure of decision making, provision for the tabling and adoption of resolutions and processes and conditions for general meetings. These provisions are all more suitable for formal enterprises and do not provide for workers in the informal economy.
81 Du Toit and Tiemeni 2015 *ILJ* 1690.
82 ILO *Advancing gender equality: The cooperative way*.

co-operatives increases shared caregiving and their decision making in the household, and improves their participation in community affairs.[83]

The above indicates that cooperatives can improve the livelihoods of these women. Cooperatives play an increasingly important role in access to employment, better working conditions, increased collective bargaining power[84] and access to social benefits.[85]

Although the establishment and registration of cooperatives are relatively simple, the compliance regulation is designed for formal business structures.[86] A more enabling framework for the regulation of cooperatives in South Africa will require an innovative legal framework that provides for more informal and simplified compliance, administrative and regulatory provisions with reference to the termination of membership; decision making structures; the adoption of resolution processes and the conditions for general meetings that are more aligned to provide for activities in the informal economy.

7.3.2 A new regulatory framework for workers in the informal economy

In the South African framework, collective agreements[87] allow for variations of terms and conditions of employment, and bargaining councils[88] provide for a decentralised regulatory framework at sectoral level. However, these provisions have very little impact on workers in the informal economy as they provide for employees in formal employment relationships, within the restricted conceptual framework of labour legislation.

Collective bargaining at workplace and sectoral levels is mostly invoked in respect of wages and working conditions, although the *LRA* provides for a more involved role of bargaining councils in respect of policy and legislative proposals within their registered scope.[89] It specifically provides for bargaining councils to extend their services and

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83 ILO *Advancing gender equality: The cooperative way*.

84 Cooperative structures allow member to negotiate with bargaining partners, such as local authorities in the case of waste pickers and street traders.

85 ILO *Advancing gender equality: The cooperative way*.

86 Section 14 of the Act.

87 In terms of s 213 of the *LRA*, a collective agreement means a written agreement concerning terms and conditions of employment or any other matter of mutual interests concluded by one or more registered *trade unions*, on the one hand, on the other hand- (a) one or more employers; (b) one or more registered employers' organisations; or (c) one or more employers and one or more registered employers' organisations.

88 In terms of s 213, a council includes both a bargaining and a statutory council. Ss 27-34 regulate the establishment of bargaining councils, their powers and functions, the registration, the constitution, the effect of collective agreements concluded at this level and the extension of these agreements. Ss 39-48 provide the regulatory framework for statutory councils. Ss 49-63 contain general provisions in respect of councils including registration and dispute functions.

89 Section 28(1)(h). This section provides for bargaining councils to submit proposals to NEDLAC, or other relevant fora, on policy and legislation affecting a sector or area.

functions to workers in the informal sector and home workers.[90] This provision refers to workers and is thus wider than the definitional scope of employee, in terms of section 213 of the *LRA*. In respect of policy and legislative provisions, they can certainly play an important role, specifically in respect of promoting gender equality and extending labour and social protection. It is suggested that bargaining councils can also assist with the empowerment of these workers through training programmes [91] and awareness campaigns. This will, however, require the political will of all relevant parties, including policy makers and government.

Workers in the informal economy are without adequate social protection measures. In terms of the *LRA*, bargaining councils have the power to establish and administer various social insurance schemes, such as pension, unemployment and health schemes for the benefits of parties or members to the bargaining council.[92] The extension of these services in terms of section 28(1)(l) to workers in the informal economy can provide social protection measures to these vulnerable workers. Bargaining councils can start by identifying specific categories of informal workers, such as domestic workers, waste pickers or informal traders, to extend their services within a category or sector. Governments can introduce incentive schemes to bargaining councils that extend their services to these workers.[93]

Challenges in this regard include the absence of a clearly identified employer in certain categories, such as street traders and waste pickers, or in the case of domestic workers the large number of individual employers. However, SADSAWU, has suggested that Business Unity South Africa (BUSA)[94] could function as a representative body with reference to domestic workers. This is of course more problematic in respect of waste pickers and street trades where local authorities constitute the bargaining partner and a distinctive employer is absent. Organisation established at national level to represent the interests of street traders and waste pickers could also be elected as a representative body within a bargaining council framework.

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90 Section 28(1)(l).
91 Section 28(1)(g).
92 Section 28(1)(g).
93 Certain common grounds between bargaining councils and workers can be identified when considering the extension of services to categories in the informal economy. For example; the National Bargaining Council for the Clothing Manufacturing Industry can consider the extension of services to homeworkers. Public Service bargaining councils, such as the South African Local Government Bargaining Council, may be applicable to informal traders and waste pickers. Various bargaining councils in the service industry, including the bargaining council for the Food Retail, Restaurant, Catering & Allied Trades can extend services to domestic workers.
94 This is an organisation that represents business at NEDLAC.

The abovementioned provisions support the purpose of the *LRA*, namely to advance social justice and economic development.[95] This provision can also contribute to decent work for all and address decent work deficits in the informal economy. Moreover, within a transformative constitutional framework, and an emphasis on concepts such as social justice, social change and substantive equality, bargaining councils should consider extending their services to the poor and vulnerable workers in the informal economy. This will promote equality, human dignity and fair labour practices, thereby realising our constitutional guarantees. Currently only registered trade unions and registered employers' organisations can establish a bargaining council and be party to the council.[96] This restrictive framework means that unorganised workers in the informal economy, as well as other worker organisations, such as MBOs and cooperatives, are excluded from the scope. The scope of this provision be reconsidered to extend protection to workers in the informal economy, including own-account workers such as street vendors and their organisations. A revised bargaining council structure can function as an important stakeholder in the extension of social and labour protection to all workers. The structure will have to be redesigned to accommodate the diverse nature of work relationships of informal economy workers, as the bargaining partners may not always include employers and employers' organisations but various other role players, including governments and local authorities, suppliers and civil society. Their powers and functions can then include the prevention and resolution of disputes,[97] the promotion and establishment of training and education schemes,[98] the development of proposals for submission to NEDLAC or any other appropriate forum on policy and legislation relevant to the informal economy.[99]

In any proposal, the specific needs of women workers in the informal economy must be considered. These needs include adequate maternity and health provisions, childcare provision, equal access to resources and protection against various forms of harassment.

The establishment, structure and powers and functions of fora similar to that of bargaining councils may differ from those established for trade unions and employers' organisations

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95 Section 1.

96 Section 27 of the *LRA*.

97 Section 28(1)(c) and (d). The resolution of disputes may include disputes between governments and local authorities in respect of waste pickers and for street traders with reference to local by-laws and policies.

98 Section 28(1)(f). This is an important function which can contribute to the empowerment of these workers and can include training in respect of their existing legal rights.

99 Section 28(1)(h). This is one of the most important provisions which can contribute to the labour and social protection of workers. As a feature of responsive regulation the specific nature of work can be considered in proposals for innovative and tailor-made regulation for the various categories of informal economy workers and specifically for women, rather than a mere extension of existing provisions in all matters.

in terms of the *LRA*. However it is argued that the establishment of similar or different "regulatory structures"[100] for workers in the informal economy does have a role to play. In the case of domestic workers, waste pickers and street vendors, the bargaining parties can include various workers' organisations such as trade unions,[101] COSATU, civil society, MBOs and cooperatives that are currently representing these workers. In respect of waste pickers and street traders, these councils can play an important role in respect of: inclusive by-laws; recognition as workers deserving of protection; gender-sensitive policies; integrated urban policies; social protection measures, including occupational health and safety; elimination of harassment and the empowerment of these workers.

Due to the intimate nature of the relationship between the domestic worker and the employer, representation from the various private employers will be challenging. However, the role of the state is extremely important in regard to the precarious position of domestic workers. This proposed structure can provide a platform for negotiations in respect of social protection. Social protection measures can include coverage in term of occupational health and safety, provisions for childcare as well as the monitoring and enforcement of existing labour and social protection measures.[102] If we consider the intimate nature of the employment relationship of domestic workers, many of the challenges faced by these workers may best be addressed at a macro- rather than at a microlevel.

The heterogeneous nature of work in the informal economy implies that centralised, uniform regulation is not always the most suitable regulatory framework. This also means that in many instances a mere extension of existing labour laws will not be a recommendable outcome. A proper response to challenges faced by these workers may require responsive regulation as part of a decentralised approach, as opposed to a model of centralised regulation.[103] Such an approach must ensure the participation of workers in determining the appropriate framework of regulation. In South Africa, there are various instances of "regulatory differentiation"[104] in respect of labour protection. Vulnerable atypical employees enjoy specific protection[105] and smaller enterprises are excluded from

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100 Du Toit "Situating domestic work in a changing global labour market" 24.

101 In respect of domestic workers the South African Domestic Service and Allied Workers Union (SADSAWU) represents the interests of domestic workers in cities such as Johannesburg, Cape Town and Durban.

102 Although domestic workers are included in the scope of the UIF, enforcement is problematic.

103 Du Toit "Situating domestic work in a changing global labour market" 20-21.

104 Du Toit "Situating domestic work in a changing global labour market" 22.

105 Section 198A, 198B and 198C. Employees that earn below the threshold as determined by the Minister, currently R204 433,30. See also s 6(3) of the *BCEA* and para 4.3.4 below.

certain provisions.[106] The *LRA* and the *BCEA* also provide specific protection to employees earning below a threshold in respect of an evidentiary tool as to a presumption of employee status.[107]

Particular challenges experienced by specific categories of workers must be dealt with by a distinct regulatory framework developed through dialogue with all role players rather than a uniform legal framework that is not suitable or adequate to deal with the specific challenges.[108] In the case of informal traders and waste pickers, general laws, such as the national *Business Act*, cannot deal with these challenges, and governments must through devolution provide local authorities with the power to draft policies and laws that can effectively provide protection to these workers as guaranteed by our Constitution.[109] However, this process must include social dialogue with all parties and a preferred outcome is overarching national legislation that regulates these workers.

Existing regulatory paradigms are unable to adequately regulate the position of workers in the informal economy as the very nature of their designs are ineffective. It is submitted that a new regulatory system is required. The structure, duties and functions may vary from the provisions in the *LRA*, as the priorities and challenges of these workers may differ for employees in formal employment relationships. Currently section 28(1)(l) of the *LRA* is an enabling provision and can be expanded to include a framework of responsive regulation[110] to include workers in the informal economy.

Responsive regulation is triggered by the new forms of work and in this instance specifically by work in the informal economy, and possibly the inadequacy of existing labour laws to regulate these forms of work. This responsiveness initiates regulatory intervention through an innovative and tailor-made framework within a contextual environment.[111]

Du Toit argues as follows in this regard:

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106 Section 198B(2)(b) exempts employers of small business (less than 10 employees) and also endeavours to assist new smaller businesses (less than 50 employees and for the first two years) from the regulatory framework of providing protection to fixed-term workers.

107 Section 200A of the *LRA* and s 83A of the *BCEA*. See also para 2.5 above.

108 Du Toit "Situating domestic work in a changing global labour market" 21.

109 Du Toit "Situating domestic work in a changing global labour market" 21.

110 Ayres and Braithwaite describe this concept as follows: "Responsive regulation is not a clearly defined program or set of prescriptions concerning the best way to regulate. On the contrary, the best strategy is shown to depend on context, regulatory culture and history. Responsiveness is rather an attitude that enables the blossoming of a wide variety of regulatory approaches …" (Ayres and Braithwaite *Responsive regulation* 5).

111 Ayres and Braithwaite *Responsive regulation* 4.

> The essence of responsive regulation would be to supplement or replace top-down administrative or centralised regulatory procedures with representative (decentralised) structures and processes adapted to the conditions of the sector or, in the case of general statutory provisions, delegate their detailed implementation to such structure.[112]

In respect of the very diverse nature of work in the informal economy that extends from the very intimate nature of domestic work, to own-account workers, responsive regulation is adequately suited as it is not a "clearly defined program".[113] This then includes a strategy that "is shown to depend on context, regulatory culture and history".[114] This is an effective strategy for vulnerable women workers to consider the various cultural and historic and contextual realities. This approach can then address the inequalities within these realities that stigmatise and marginalise these women workers and can thus promote substantive inequality.

As an alternative to tailor-made provisions, existing labour laws, such as the *LRA*, can be amended to provide for the establishment of these representative structures. These structures will provide innovative and tailor-made regulation to categories of workers in the informal economy within the framework of existing laws. Labour law will represent not a discipline on its own, but will establish a new definitional context, regulatory framework and institutional structures involving various branches of specialisation.[115] The development of this framework must be imbued by the constitutional values of freedom, equality and human dignity to provide a future of decent work for all.[116]

Du Toit further argues as follows:

> A key feature of the globalized economy has been its increasing integrated nature at entry level. This approach also supports the notion of responsive regulation through these fora rather than a centralised approach that is unable to regulate the diverse nature of work in the informal economy. A responsive regulatory model needs to be grounded in the reality, taking account of the diverse forms of work interwoven into productive processes across national and sectoral boundaries, as opposed to the traditional approach of focusing on "sectors" as entities themselves. A useful mechanism for achieving this broader understanding can be found in the methodology of "value chain analysis (VCA)."Value chain" refers to a series interlinked activities performed by different actors in delivering a specific product or service. It is thus a tool for identifying elements of the productive process, including "work" other than formal "employment" that may not be confined to a particular sector and may be less obvious within a convention business model.[117]

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112 Du Toit "Situating domestic work in a changing global labour market" 24.
113 Ayres and Braithwaite *Responsive regulation* 5.
114 Ayres and Braithwaite *Responsive regulation* 5.
115 Du Toit "Situating domestic work in a changing global labour market" 25.
116 Du Toit "Situating domestic work in a changing global labour market" 25.
117 Du Toit 2014 *ILJ* 1815.

This value chain analysis (VCA) is also described as

> … an analytical tool whereby a particular supply or value chain is analysed from the inception of a product until its final destination to the map the relationships between the different actors in the chain, the governance structures, the distribution of value added (and extracted) by each firm and the distribution of power among firms.[118]

The VCA has specifically been used with reference to home workers to extend protection to them. The value of this approach to regulation of women workers in the informal economy lies in the identification of all role players that are involved in the process, and therefore also must be involved in both the establishment of a proper regulatory frameworks and enforcement mechanisms to ensure adequate regulation.[119] This tool can be used to identify the applicable role players within the "value chain" of street traders, waste pickers and domestic workers, and thus influence policies, promote economic development and alleviate poverty.[120] The VCA as an analytical tool can contribute to the recognition of the value and contribution of domestic work to the economy. With reference to the social contribution of domestic workers, Du Toit states the following:

> To the extent that paid domestic workers participate in the production of "labour time" sold by the household, they contribute to the value created as an output of labour. This may also take the form of releasing domestic employers from domestic duties and enabling them to pursue economic activities outside the household. What may be termed "social" value of domestic work is thus broader that the purely transactional value of the services performed by the individual worker for the individual employer. Disregarding this, it is submitted, detracts from the domestic workers' inherent right to dignity and/or equality and is likely to find expression in antagonistic attitudes around the questions of regulation. Rather, it is submitted that negotiation should be approached as an exercise in regulating a social significant area of work as opposed to extend protection to unskilled workers providing menial services without economic value.[121]

The VCA assists with identification of power imbalances and inequalities within value chains. This identification can play an important role with reference to street traders and waste pickers, where local authorities abuse their powers. This unequal distribution of power has an impact on the vulnerability of these women workers and contributes to their marginalisation within societies and economies.[122] Women who work as domestic workers, street traders or waste pickers contribute to the value created as an output of their labour, in their various work activities.[123] All three occupations also have a social value. Domestic

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118 Von Broembsen 2012 *LD&D* 14.
119 Du Toit 2014 *ILJ* 1815.
120 Von Broembsen 2012 *LD&D* 14.
121 Du Toit 2014 *ILJ* 1816.
122 Du Toit 2014 *ILJ* 1816.
123 Du Toit 2014 *ILJ* 1816.

workers enable their employer to pursue their own economic activities, by releasing them of their domestic and care duties within the household. Waste pickers contribute to the waste management of municipalities through the collection and sorting of recyclables and thus promote an environment that is less harmful. Street traders are part of most cities and provide accessible cheaper services and goods to many poorer households. Disregarding the social value of the work performed by these workers, including women, impairs their human dignity and right to equality.[124] Any regulatory framework established to provide a framework for the extension of protection to these workers must also recognise and promote their social value. Understanding the various contributions and roles of these workers will promote a more holistic and integrated approach to any regulatory framework and bargaining platforms.[125] Any responsive regulatory framework must thus be reactive to the needs of these workers to ensure adequate design and implementation of their rights. The abovementioned approach applied to vulnerable workers in the informal economy will contribute to South Africa's commitment to ensure decent work for all in line with its international obligations. With regard to voice and representation for these workers in South Africa, innovation is required that includes a new institutional and regulatory framework, that promotes a democratic participatory paradigm.[126]

7.4 Voice and representation: the Indian national framework

This paragraph will briefly consider the national framework in India in respect of voice and representation.[127] However, as the majority of workers in the informal economy are excluded from the conceptual framework that covers the formal employment relationship, this chapter will consider specific case studies among categories of women workers in India to distil successful principles and strategies in this regard.

Article 10 of the Indian constitution provides for all citizens to have the right to form associations or unions or cooperative societies and section 43B provides, that the state shall–[128]

> … endeavor to promote voluntary formation, autonomous functioning, democratic control and professional management of co-operative societies.

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124 Du Toit 2014 *ILJ* 1816.
125 Du Toit 2014 *ILJ* 1816.
126 Du Toit 2014 *ILJ* 1818.
127 See para 6.3.1 above.
128 See also para 6.3.1 above.

Various policies exist in India that recognise organisations representing categories of workers, such as waste pickers.[129] The *Street Vendors (Protection on Livelihood and Regulation of Street Vending) Act*, 2014, also specifically provides for the promotion of organisation and social dialogue at various levels.[130] This act is tailor-made and specifically provides for voice and representation of street vendors outside the scope of general national labour laws. Domestic workers in India are excluded from most labour legislation.[131] The *Trade Unions Act* of 1926, a national statute, provides for the registration of trade unions in India. The act defines a trade union as:

> … any combination, whether temporary or permanent, formed primarily for the purpose of regulating the relations between workmen and employers or between workmen and workmen, or for imposing restrictive conditions on the conduct of any trade or business and includes any federation of two or more trade unions.[132]

Chapter II of the Act regulates the registration of trade unions and the appointment of a registrar. A trade union with seven or more members can apply for registration.[133] The act also regulates rights and liabilities of trade unions in Chapter III.

There is no fundamental right to strike in India; however, it is derived from the constitutional provision to establish trade unions.[134]The *Industrial Disputes Act* 14 of 1947 aims to maintain industrial peace.

The Act defines a strike as follows:

> [It] means a cessation of work by a body of persons employed in any industry acting in combination or a concerted refusal under a common understanding, of any number of persons who are or have been so employed to continue to work or to accent employment.[135]

The IDA also provides conditions for prohibitions of strikes and lock outs.[136]

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129 See para 6.3.1.2 above.
130 See para 6.3.1.3 above.
131 See para 6.3.1.1 above.
132 See s 2(h). The earliest trade union was formed in 1918 and in 2015 there were more than 84 642 registered unions and a large number of unregistered unions (Nishith Desai Associates 2015 http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/India-Trade-Unions-and-Collective-Bargaining.pdf 1).
133 See s 4(1).
134 Nishith Desai Associates 2015 http:// http://www.nishithdesai.com/fileadmin/user_upload/pdfs/Research%20Papers/India-Trade-Unions-and-Collective-Bargaining.pdf 1.
135 See s 2(q).
136 See Chapter V ss 22-25 of the *IDA* which provides for prohibitions of strikes.

Collective bargaining in India was defined in *Karol Leather Karamchari Sangathan v Liberty Footwear Company*[137] as:

> The technique by which disputes as to conditions of employment are resolved rather than coerced.

The refusal to bargain collectively in good faith with the employer is an unfair labour practice in terms of the *Industrial Disputes Act* (IDA) of 1947. In India a number of cases dealt with issues pertaining to trade unions and representation.[138] Collective bargaining agreements are structured as memorandum of settlements and section 18(1) of the IDA provides that these agreements are binding on the parties.[139]

Cooperatives in India, have been characterised by state control and state participation.[140] However this has changed as government has become less involved and there has been an increase in registered and unregistered cooperatives formed by women in the informal economy to secure an income and improve their livelihoods. The *Multi-State Cooperatives Societies Act*, 39 of 2002, applies to all states, facilitates the voluntary and democratic functioning of cooperatives not confined to one state.[141] The act allow for the appointment of a registrar.[142] These cooperatives can only be registered under certain conditions, such as:

(a) Its main objects are to serve the interests of members in on more than one state; and
(b) its by-laws provide for social and economic betterment of its members through self-help and mutual aid in accordance with the cooperative principles.[143]

The Act is not prescriptive with reference to the functioning of cooperatives and allow these cooperatives to make by-laws to provide for the eligibility of membership, the procedure for withdrawal and the procedure of notice and voting at meetings.[144] The *Cooperatives Society Act* 2 of 1912 has been repealed in most states, where they have

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137 1989 4 SCC 448.

138 In *B. Srinivasa Reddy v Karnataka Urban Water Supply & Drainage Board Employees' Association* (2006) 11SCC 731 (2), it was held that an unregistered trade union has no right in terms of legislation in India. In *B.R. Sing v Union of India* (1989) 4 SCC 710, strikes were recognised as action to resolve grievances in the workplace.

139 See also the *Industrial Employment (Standing Orders) Act* 20 of 1946. The Act provides for the submission of standing orders by industrial establishments. These orders regulate hours of work, paid leave, dismissals, disciplinary matters and termination of employment.

140 WIEGO *Co-operatives and workers in the informal economy*.

141 See the long title of the Act.

142 Section 4.

143 Section 5.

144 Section 10.

enacted their own specific legislation to regulate cooperatives. Section 243Z-I, Part IXB of the Indian constitution provides that laws may provide for the incorporation, regulation and winding up of cooperative societies within their jurisdiction.

Domestic workers in India are excluded from the scope of labour protection and domestic work is not listed as a scheduled employment.[145] Therefore these workers are excluded from the formal framework regulating freedom of association and collective bargaining. Waste pickers and street vendors as own-account workers also fall outside the ambit of this legal framework. Organisation and mobilisation of these workers are fragmented and exist outside the scope of a formal labour law paradigm. SEWA's biggest challenge was the restrictive conceptual framework as the registrar of trade unions did not consider these self-employed women as workers, and hence did not want to register SEWA. The absence of an employer meant that someone could not be classified as a worker.[146] However, after numerous campaigns they succeeded and were registered.[147] The registrar of cooperatives also refused to register the SEWA Bank, as these women were illiterate and could not sign documents.[148] Initially the registration of the various cooperatives was problematic as the various categories of work were not seen as economic activities.[149] In this chapter it will be illustrated how these women nevertheless have overcome many challenges to create new forms of collective action to improve their working conditions and livelihoods.

7.5 Voice and representation: the Brazilian national framework

As discussed in paragraph 6.3.2, a formal employment contract remains a prerequisite for protection in Brazil and therefore most informal workers are excluded from labour legislation.[150] The Freedom of Association and Protection of the Right to Organise Convention is the only fundamental convention that Brazil has not ratified, despite the fact that the Brazilian constitution guarantees freedom of association. Chapter 1 of the Constitution provides for fundamental rights and guarantees to all Brazilians and foreigners residing in the country the rights to life, equality, security and property. Furthermore article 5 (XVII) states:

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145 See para 6.3.1.1 above.

146 Bhatt "Looking back on four decades of organizing" 276.

147 Advocacy campaigns included arguments that a union was not just about a relationship with an employer but includes unity among its members to for example challenge exploitations (Saini 2007 *IndJLE* 824).

148 Bhatt "Looking back on four decades of organizing"279.

149 Bhatt "Looking back on four decades of organizing" 279. The midwives' cooperative was refused registration as this was not seen as an economic activity.

150 See para 6.3.3 above for the Brazilian national framework.

> There is total freedom of association for lawful purposes, but any paramilitary association is prohibited.

In addition article 5 (XVII) states:

> Creation of associations and, as set forth in law, of cooperatives, requires no authorization, prohibiting state interference in their operations.

Article 8 of the Constitution restricts organisations to one per category or profession in a certain region.[151] This in not in line with the Convention that promotes plurality and therefore should Brazil ratify the convention, the constitution will have to be amended.[152]

The right to strike enjoys constitutional protection in article 9 and workers have a discretion when to embark on a strike and which interests to defend. Laws may determine which services are essential and abuses may be subjected to penalties.[153] The constitution also provides that in larger enterprises (more than two hundred employees), the election of an employee representative is guaranteed to promote negotiations between the parties.[154]

Labour laws are provided for by Law (Decree 5.452 of 1943 – The Labour Code). Sections 511-539 provides for organisation and the regulation of trade unions. Recognition of unions requires the association of one-third of the companies (employers) and 1/3 of the workers in the same industry.[155] Mandatory registration is required.[156] Trade unions can represent workers and can conclude collective bargaining agreements.[157] Collective bargaining agreements in Brazil mostly take place at industry level, although certain professional occupations, such as lawyers and nurses, can be represented by unions within these categories.

Strikes in the private sector are regulated by Law 7, 783/89 of 2007. However, this form of industrial action is not appropriate for waste pickers, informal traders or domestic workers. The above exposition indicates that the laws provide solely for those in formal employment and exclude workers in the informal economy.

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151 Article 8(II) states: "[C]reation of more than one syndical organization, representing a professional or economic category, is forbidden in the same territorial base, which shall be defined by the interested workers or employers; a base may not be less than the area of one country."

152 Article 3 states: "In this convention, workers and employers, without distinction, have the right to organize or be part of an organisation of their choosing, to promote and defend their interests." See also Aparecido 2017 *ILSA JICL* 385.

153 See article 9(1) and (2).

154 Article 11.

155 Article 515.

156 Article 558.

157 Article 513.

Worker cooperatives (*Cooperative de Trabalho*)[158] are regulated by Law No. 12690 of 2012.[159] Cooperatives are seen in two modalities, namely production and service cooperatives.[160] This Act promotes the concept of worker cooperatives and this new legal relationship between the worker and the recipient of his services in the cooperative context creates a new paradigm where parties act on equal terms and not in a relationship of subordination.[161] The Act provides for values and principles, including democratic governance and autonomy and independence, and highlights the importance of social rights.[162] The Act also highlights the importance of empowerment and education, and training is specifically mentioned in article 3. Of special importance for workers in the informal economy is the provision that a minimum of only 7 workers can form a cooperative.[163] This has been reduced from 20 workers in a previous dispensation. The Act also provides for night shift payment, overtime, working hours not exceeding 44 hours per week, and stipulates that members must be treated as workers with reference to social protection measures and labour rights such as leave and working time.[164] The recognition of social rights ensures the promotion of decent working conditions and includes occupational accident insurance and mandatory compliance with health and safety standards.[165]

Article 11, section 2 of the Act promotes participation by members at general meetings.[166]The act also establishes the National Program for the Promotion of Labour Cooperatives to promote and develop economic and social factors.[167] Cooperatives that provide service or products are covered. Although the provision of social protection measures is important, many cooperatives are not profitable and members generate a low income, therefore covering additional costs is problematic.[168] Cooperatives in Brazil

158 Article 2 provides that a worker cooperative is considered to be a company constituted by workers for the exercise of their work. Principles of a common advantage, autonomy and self-management are highlighted. The improvement of the workers' socio-economic circumstances and their working conditions form part of the contextual framework in article 2.

159 See also Law 5764 of 1971 *Lei Geral das Cooperatives* – also known as the General Law of Cooperatives.

160 Fici "An introduction to cooperative law" 11.

161 Alves "Brazil" 275.

162 Article 3.

163 Article 6.

164 Article 7.

165 Article 7.

166 This provision requires effective participation of members at general meetings.

167 Article 19.

168 WIEGO *Co-operatives and workers in the informal economy*.

will also be considered in specific case studies. The Act appears to regulate a new working relationship, namely "the cooperated working relationship".[169]

7.6 Women workers in the informal economy: organisation, voice and representation

Women in the informal economy are particularly vulnerable as they lack strong organisations and are therefore unable to make their voices heard by the various role players, including employers, the state and local authorities. A weak voice and representation framework characterises work in the informal economy and is a distinctive deficit of decent work. This contributes to the precarious position of these women workers and it affects their livelihoods. It is of the utmost importance to promote the collective voice of these women to improve their working conditions and ensure decent work. Across national and international borders women in the informal economy endeavour to make their voices heard through various organisations. In many instances these workers have been able to overcome barriers and through collective action, they have achieved the necessary recognition as workers and in certain instances the extension of labour and social protection measures to ensure better working conditions.

The following information about SEWA was obtained from their website.[170] Organisation of these women workers gained momentum by the establishment of SEWA, the largest union representing women in the informal economy, in Gujarat in India, in the 1970s. Through their association with the International Union of Food and Agriculture, Restaurant and Tobacco and Allied Workers, own-account workers were recognised as workers in respect of mobilisation and representation. This alliance also emphasised the importance of links with international organisations to create awareness and support for these workers through organisation and representation.

During the 1980s both domestic workers and waste pickers in Latin America started mobilising. In the 1990s HomeNet and WIEGO were established. Another important network, namely StreetNet International was formed in 2002. The formation and work of these organisations were also influenced and supported by the ILO's work in respect of the informal economy. This included the adoption of the Resolution and Conclusions on Decent Work and the Informal Economy which recognised the right of informal economy workers to decent work. Domestic workers united globally in 2006 and this resulted in the

169 Alves "Brazil" 276.

170 WIEGO date unknown https://www.wiego.org/wiego/self-employed-women%E2%80%99s-association-sewa.

establishment of the International Domestic Workers Network, and in 2011 the ILO adopted the Convention on Decent Work for Domestic Workers.

The above highlights the global existence of various forms of representation, organisations and mobilisation of these workers and that their endeavours in certain instances resulted in the extension of labour and social protection and have even led to the ratification of international instruments and legislative amendments.[171]

7.7 Distinctions in creating typologies of organisations in the informal economy

An analysis of organisations of informal economy workers require certain distinctions, including:

(a) the category of workers in the organisation (this classification can include the sector, occupation, location of work,[172] employment status and gender);[173]
(b) the applicable legal framework with reference to the worker, if any;[174]
(c) the nature of the organisation;[175] and
(d) the applicable legal framework with reference to the organisation, if any.[176]

When considering the organisation of women in the informal economy, organisations must consider the unique challenges that these women face. Access to resources is a vital

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171 According to WIEGO, there are currently more than 800 organisation representing informal workers registered on their data base. In South Africa this includes, the Cape Council of Hawkers & Informal Business (CACHIB); the Cape Town Lower Deck Traders Association (Enclodeck, a close corporation that allows street traders to buy shares); Durban Informal Trade Management Board (DITMB) and Sikhula Sonke. Currently more than 37 organisations in South Africa are listed here. COSATU, and other trade unions such as the South African Clothing and Textile Workers Union (SACTWU) and the South African Domestic and General Workers Union (SADAGWU), are listed organisations as well (WIEGO http://www.wiego.org/organizing/ organizations).

172 The location of work can also determine the bargaining partners. Street traders occupy public spaces and local authorities are often their bargaining partners.

173 Organisations that represent these workers must be knowledgeable about that trade or occupation of its members to understand the challenges they face as well as their economic situation. Apart from knowledge about a sector, knowledge about the industry and the regulatory framework is required for successful representation and organisation. It is important for the organisation to have a clear understanding of the employment status of those they represent. If these workers are not recognised within a regulatory framework, strategies must be developed to promote recognition (Carré *Defining and categorising organisations of informal workers in developing and developed countries* 5).

174 The identification of the organisation will then determine the legal framework applicable. This will also determine the contextual framework in which the organisation will function (Carré *Defining and categorising organisations of informal workers in developing and developed countries* 6).

175 The nature of the organisation is important with reference to the objectives and strategies. See para 7.10 below.

176 The legal framework will determine the structure and processes of the organisation (Carré *Defining and categorising organisations of informal workers in developing and developed countries* 5).

component of substantive equality, but most women in the informal economy do not have access to any resources. Organisations must endeavour to improve their access to resources by negotiating for public policies that include gender-responsive principles.[177] Policies should also promote women's entrepreneurship[178] and aim to reduce barriers in this respect. Often this will entail the removal of discriminatory practices and laws. Women must be able to partake in business transactions and have access to markets and various resources, including property, on an equal basis. Important components of economic empowerment must consider access to financial resources such as credit and other related financial products and services. [179] Redistribution programmes must be gender responsive.[180]

Although a number of studies have indicated that cooperatives can promote gender equality and advance the status of women workers, there are also instances where hierarchical gender issues are prevalent within cooperatives.[181]

7.8 The empowerment of women workers

Women workers in the informal economy face many challenges in respect of legal and economic empowerment.[182] These challenges include gender norms within societies and

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177 ILO *Women at Work: Trends 2016*. See also ILO *World employment and social outlook: Trends 2017*.

178 A large percentage of women workers in the informal economy are own-account workers, therefore programmes that support entrepreneurship become extremely important.

179 ILO *Women at Work: Trends 2016* . See also ILO *World employment and social outlook: Trends 2017*.

180 For example, in a redistribution programme in South Africa, nearly half of the recipients of land were women (ILO *Women at Work: Trends 2016* 44). See also ILO *World employment and social outlook: Trends 2017.*

181 See para 7.3.1 below; ICA date unknown http://ica.coop/en/whats-co-op/co-operative-identity-values-principles; Dias and Ogando 2015 *WOLG* 51.

182 Voice and representation can play an important role in the empowerment of women. Empowerment includes economic, legal, economic, human and social, cultural and political as well as individual and collective empowerment. See para 1.1 above for legal and economic empowerment. Specifically important for vulnerable women workers is human and social empowerment that allows them to control their own lives through their recognition as workers and elimination of social marginalisation that domestic workers, informal traders and waste pickers often experience. An aspect of political empowerment includes "the capacity of people to analyse, organise and mobilise" through levels political education and awareness. This can also lead to the development of innovative organisational structures that are best suited to deal with the challenges faced by these workers (Mgijima, Wiid and Du Toit "Organizing for empowerment" 273). If we consider that these women represent previously disadvantaged groups in South Africa, Brazil and India, cultural empowerment is important as new norms and practices must established that promoted gender equality. Through this, human dignity is promoted and this may increase self-esteem and confidence required for mobilisation and organisation. Individual empowerment may be a prerequisite for collective empowerment and in both instances education, training and skills development can play an important role (Mgijima, Wiid and Du Toit "Organizing for empowerment" 283).

at a wider policy level, including gender discrimination practices and inequalities, and their status as workers. Legal and economic empowerment of these women is of paramount importance to give effect to various basic human rights, including the right to human dignity and equality.[183] Empowerment of these women must be included in organisational strategies to ensure sustainability and can also contribute to the alleviation of poverty.[184] Empowerment programmes must consider patriarchal social norms within societies as well as existing discriminatory practices. These programmes also call for various role players, such as societies, governments, civil societies and various other organisations involved in mobilising the informal economy.[185] These links must also be formed at various levels: national, regional and international levels.

Empowerment is defined by Rowlands as "that which enables people who are traditionally outside the decision making process to be included".[186] Rowlands argues that to understand the composition of the labour force and specifically the informal economy it is necessary to consider "the processes by which gender relations are negotiated and renegotiated" as well as the then derivable social structures.[187] A wider notion of empowerment is required, that includes all facets of a woman's life[188] and will allow women to take part in decision making at all levels, thereby influencing policies in a wider sense.[189] Through a process of empowerment, these vulnerable women can critically consider and analyse their circumstances as an initial process.[190]

We can also distinguish between personal and collective empowerment[191] and however distinct, personal empowerment is probably necessary for successful collective empowerment. Personal empowerment is closely linked to self-confidence and dignity.[192] In respect of collective empowerment, it includes a "group identity, a collective sense of agency and group dignity".[193] This group empowerment enables these workers to develop as leaders within the organisation to ensure sustainability and promote equality.

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183 Klugman and Tyson *Leave no one behind*.
184 Klugman and Tyson *Leave no one behind* 1.
185 Klugman and Tyson *Leave no one behind* 2.
186 Rowlands "A world of the times, but what does it mean?" 23.
187 Rowlands "A world of the times, but what does it mean?" 23.
188 Discrimination and gender inequality normally affects all facets of a woman's life, therefore to successfully provide for empowerment programmes and policies all facets must be considered (Rowlands "A world of the times, but what does it mean?" 15).
189 Hill *Women identity, agency and economic development* 124. See also Rowlands "A world of the times, but what does it mean?" 12.
190 Narayan and Chikarmane "Power at the bottom of the heap" 216.
191 Rowlands "A world of the times, but what does it mean?" 23.
192 Rowlands "A world of the times, but what does it mean?" 23.
193 Hill *Women identity, agency and economic development* 124.

Legal empowerment is also concerned with poverty alleviation and Golub defines it "as the use of legal services and related activities to increase disadvantaged populations' control over their lives".[194] The process of legal empowerment means that the poor have the ability to exercise their human rights as individuals within a community and live and work with dignity.[195] For all people, this should start with recognition through identification documents, such as a birth certificate in a country. However, when we consider the legal empowerment of these marginalised women workers in the informal economy, the first step is for them to be recognised as workers and the combined realisation of the economic value of their work and the value of their work within a community. The recognition as workers must also occur at various levels, including governments and employers. Recognition as workers should include the recognition of various organisations, which endeavour to organise these workers. Role players in any legal empowerment strategy cannot operate in isolation when considering the need for legal reform and must include consideration of the role of government, including policy makers and private role players, including civil society.[196] Through legal empowerment, vulnerable and precarious workers can gain opportunities to participate and compete on equal terms thus supporting Rowland's theory that empowerment refers to the inclusion in decision making processes.[197] The achievement of social justice and long-term social change requires that these workers are aware of their rights and can actively campaign for legal reform, but to achieve this, these workers require the necessary skills. Through a framework of legal empowerment they can achieve this, in particular when combined with economic empowerment.

Economic empowerment refers to increased access to and control over resources and markets, as well as increased agency and improvements in and control over specific outcomes,[198] and contributes to human development.[199] The economic empowerment of women and the reduction of the gender gap are important themes of the 2030 Agenda

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194 Golub 2013 https://www.opensocietyfoundations.org/sites/default/files/justice-initiatives-legal-empowerment-20140102.pdf .

195 Golub 2013 https://www.opensocietyfoundations.org/sites/default/files/justice-initiatives-legal-empowerment-20140102.pdf.

196 Banik "Introduction" 1.

197 See Rowlands "A world of the times, but what does it mean?" 23.

198 These outcomes include improved well-being and dignity, better work-life balance and improved economic opportunities. See also Fourie 2016 *ILJ* 837.

199 Klugman and Tyson *Leave no one behind* x.

for Sustainable Development.[200] Systemic limitations in respect of economic empowerment of women include adversarial social norms, discriminatory practices with reference to access to resources, and discriminatory policies and laws.[201]

Decent work plays a vital role in the reduction of poverty among women workers and contributes to their economic empowerment. The UN has recently highlighted six important factors that must be considered by policy makers in respect of the economic empowerment of women, namely:

(a) to support and strengthen the implementation of inclusive growth strategies;
(b) to promote employment creation and the enhancement of existing livelihoods;
(c) to devote adequate resources for women's economic empowerment, including through financing for development mechanisms;
(d) to recognise, redistribute and value unpaid care work and care work;
(e) to promote women's collective voice in economic decision making; and
(f) to strengthen data collection and analysis to inform evidence-based economic policymaking.[202]

Economic empowerment symbolises *change* whereby vulnerable women workers are able to gain access to resources, but at the same time they have the ability to influence wider policies.[203] This is a more sustainable approach and workers' organisations play a vital role in the achievement of empowerment. To be effective, stakeholders must aim to support workers' organisations, thereby strengthening the voice of these women workers.[204]

It is a priority to provide these women with the ability to gain access to resources, including land and access to financial products, to provide them with the means to influence their communities and wider policies. This is an enabling tool to allow them to shape their livelihood and their lives within their immediate communities and at a wider public level. In pursuing gender equality, the empowerment, including economic and legal empowerment of these women, should consequently be a core focus area. Empowerment must be aimed at social, economic, cultural and political level and can be an important tool to achieve social justice.[205]

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200 See para 3.2.2 above.
201 See Klugman and Tyson *Leave no one behind* 3.
202 Klugman and Tyson *Leave no-one behind* 3. See also para 3.2.2 above.
203 WIEGO date unknown http://www.wiego.org/wee. See also Fourie 2016 *ILJ* 837.
204 WIEGO date unknown http://www.wiego.org/wee. Voice symbolises organisational strength, solidarity, bargaining power and involvement in decision making processes.
205 Rowlands "A world of the times, but what does it mean?" 17.

Women workers in the informal economy often face discrimination within organisations and associations representing these workers.[206] The role of other organisations, such as NGOs, should not be underestimated. These organisations often exist at national and international level and provide technical support to these workers and their organisations.[207] They also play a role in national and international awareness campaigns that promote the recognition of those in the informal economy as workers deserving of labour and social protection. It is remarkable to note how the roles and agendas of organisations in the informal economy often expand to include societal support and communal solidarity, reaching out to affected communities.[208] For women workers it is often difficult to be involved in the activities of the organisations that they have joined as they have to balance their work, household activities and care duties.[209]

Strengthening the voice of women workers in the informal economy requires organisations that represent them to have clear objectives and strategies according to the category of women workers that they represent. The organisations must develop leadership among their members through empowerment programmes to ensure sustainability and long-term solutions. They will often also have to address social, economic and political issues in respective societies that are important to their members.[210] Once systemic stereotyping and discrimination have been addressed these organisations can focus on labour-related demands such as equal wages. These organisations must be democratic, transparent and at all times accountable to their members.[211] Alliances with other national, regional and

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206 In South Africa waste pickers in Sasolburg established two associations, namely Ikageng and Ditamating. At the beginning, Ditamating refused to allow women to join; however, they eventually formed one association recognising the value of joint forces, solidarity and shared profits (Samson *Refusing to be cast aside* 21).

207 Alfers *et al* 2016 *NewSol* 274.

208 SEWA played a key role in the establishment of schools and a bank for their members and *Ankara Recycling Association,* a waste pickers organisation in Turkey, expanded its activities to provide assistance to trainees in the community (see Samson *Refusing to be cast aside* 16).

209 Samson *Refusing to be cast aside* 23.

210 These organisations will often have to address various issues and will need initial mobilisation at community levels in order to create an enabling framework for their members. Activities in respect of childcare, education and health, including maternal health, are often a common priority for these women that these organisations must address. These women are also often exposed to harassment and gender violence within households and communities and advocacy campaigns against this will also promote equality and empower these women (Pande "Organising for life and livelihoods in the mountains of Uttarakhand" 122). Women market traders in Tanzania were exploited and harassed daily. The informal economy in this country is often the only way in which these women can earn a living. A local organisation formed links with a UN Trust Fund to assist these market vendors. Strategies included the legal empowerment of these women through the creation of rights awareness campaigns and to develop leaders within the sector (UN Women 2017 http://untf.unwomen.org/en/news-and-events/stories/2017/03/tanzania-making-markets-safer-for-women-traders).

211 See also Abizaid *ARB: Fighting for an inclusive model for recycling in Bogotá* 13.

international organisations and networks are extremely valuable, both in respect of advocacy campaigns, resources, shared experiences and best practices. Government policies, regulations and practices are often discriminatory and exclusive with reference to the regulation of informal traders and waste pickers. Organisations must develop strategies and tools to negotiate with these authorities and to influence and design policies and norms that are non-discriminatory and inclusive.[212] Often these policies and norms also reflect societal perceptions and exclusionary and discriminatory practices that must be addressed.

Struggles by organisations representing women in the informal economy, will often include campaigns[213] for recognition in a wider sense, including as citizens and members of societies that live their lives and work with dignity.[214] Organisations will often also have to function as social movements to address systemic disadvantages and inequalities suffered by these members. Their roles may differ from that of traditional unions as their bargaining parties may include public role players such as local authorities and other state actors, specifically in the case of informal traders and waste pickers. Their strategies must aim at influencing wider policies to ensure equality for their members and social justice through social change.[215] Social change will often involve a change in the social identity of these women to ensure that they are recognised for their valuable contributions at all levels.[216] This must include the recognition of domestic workers for their valuable economic contribution and the fact that through this they allow other women to enter the labour market. Waste pickers in turn play an important role in promoting a safer environment and a valuable environmental service through recycling activities and in many instances local authorities save on costs through their activities. Street traders are a part of urban life and provide services and goods at affordable prices to communities. Worker organisations in the informal economy must campaign for an "occupational identity" for these workers.[217] Women in the informal economy must be recognised as workers deserving labour and social protection.

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212 Abizaid *ARB: Fighting for an inclusive model for recycling in Bogotá* 15.

213 Campaigns include demonstrations and protests (Narayan and Chikarmane "Power at the bottom of the heap").

214 Narayan and Chikarmane "Power at the bottom of the heap" 218.

215 Dias and Silva "Waste pickers in Brazil" 187.

216 Dias and Silva "Waste pickers in Brazil" 188.

217 Narayan and Chikarmane "Power at the bottom of the heap" 55.

7.9 Innovative organisational strategies: case studies

Vulnerable workers across the world are engaged in innovative organisational strategies to promote their rights and interests and for decent work and living conditions. Organisation of these workers remains fragmented throughout the various categories of women in the informal economy. Case studies were chosen based on innovative measures from a wider categorical approach and include categories other than domestic workers, informal traders and waste pickers. These case studies all provide valuable insights and strategies that are relevant to various categories of women workers.

7.9.1 SEWA and women workers in the informal economy in India

One of the most successful and sustainable organisational examples for women in the informal economy, is the Self-Employed Women's Association (SEWA) in India, established in 1972.[218] SEWA, a hybrid organisation, extends across unions and cooperatives.[219] The importance of widening the scope of concepts such as *workers* and *trade union* was one of their biggest challenges, as the women they represented were not seen as workers and thus SEWA could initially not be registered as a trade union.[220] SEWA strive to organise these women to achieve full employment.[221] A very important rationale and sustainable strategy includes their empowerment focus, namely to ensure that these women are autonomous and self-reliant in all factors that influence their lives.[222] The success of this organisation can also be ascribed to the fact that it is linked to various organisations in the informal economy, and also has created its own resources, including a bank and a housing trust to provide for their members.[223]

The lack of a distinct employment relationship and absence of an employer often contributes to the reluctance of trade unions to organise these workers or the unwillingness from governments to register organisations representing these workers. SEWA, faced with these challenges in India, argued that the main objective of a union was to unite these workers, notwithstanding their employment relationship.[224] SEWA's

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218 SEWA developed from the Women's Wing of the Textile Labour Association (Bonner and Spooner *The only school we have* 19).

219 Various cooperatives include vendor cooperatives and weavers' cooperatives (Bhatt "Looking back on four decades of organizing" 278).

220 Bhatt "Looking back on four decades of organizing" 276.

221 Nanavaty and Dave "Stitching local to global" 234. In this respect full employment refers to adequate labour and social protection for these workers.

222 Bhatt "Looking back on four decades of organizing" 228.

223 WIEGO date unknown https://www.wiego.org/wiego/self-employed-women%E2%80%99s-association-sewa.

224 Bonner and Spooner *The only school we have* 19.

membership is diverse and includes labourers, service providers, traders, home workers and small producers.[225]

Organisation of these women requires strategies that address the specific needs of members. The majority of women in India do not have access to banking facilities; consequently SEWA established a bank for its members through the consolidation of resources.[226] This is an example of an innovative measure in organising and mobilising these workers. This resulted in the financial inclusion of poor and previously marginalised women and promoted gender equality. The success of this financial institution can also be ascribed the fact that it provides specifically for the needs of its members as women.[227]

Traditional union strategies will not always have the desired effect when organising the informal economy. For instance, the right to strike is a fundamental right for workers, but SEWA found that these workers are often too poor to strike and cannot survive without their income.[228] Thus the extension of labour and social protection through traditional worker tools of struggle, such as industrial action, is not always appropriate in the informal economy and innovative measures in a new framework are required. These methods may further require developmental interventions such as the establishment of own economic organisations, including cooperatives, through which they can secure and direct their own work.[229]

The Indian constitution in section 19(1)(d) provides for the rights of citizens to form associations, unions or cooperative societies.[230] This is an important provision for those in the informal economy as the traditional trade union model might not be an appropriate model for representation of these workers and the section mentioned was included to encourage the economic activities of cooperatives. Waste pickers specifically often establish cooperatives through which they deliver services to local authorities.

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225 Hill *Women identity, agency and economic development* 47.

226 The bank falls under the scope of the Reserve Bank and also provides credit facilities to its members (Harvey *et al Compendium of WIEGO and SEWA case studies* 13).

227 These needs include health and life insurance, pension schemes and property finance (Harvey *et al Compendium of WIEGO and SEWA case studies* 13).

228 The right to strike was not an option. They were extremely poor and could not survive during a strike; moreover, strike action was a foreign concept to these women, because of their position and norms in society (Hill *Women identity, agency and economic development* 75).

229 The Khol (patchwork quilt workers) workers in India were victimised when they resorted to industrial action; however, through the formation of their own cooperative they could control their work and working conditions (Hill *Women identity, agency and economic development* 75).

230 See para 7.4 above.

The trade union's name, the Self-Employed Women's Association, is the first important step in the recognition of these women as workers in India.[231] This label refers to employment and raises their credibility as workers despite inferences that they are not workers and are unorganised.[232]

SEWA provides examples of how access to financial resources can empower these women and also illustrates the immense effect that a trade union can have on the lives of these women when it focuses on specific aspects typical of certain categories of workers. It recognised the value of the home as a productive asset and designed innovative and tailor-made solutions through credit-bearing programmes.[233] This also an example of a union taking action when other public role players, such as governments, and private role players, such as financial institutions, were unable to accommodate or provide for these women.[234] Through this innovative approach of "financial inclusion,"[235] women, their families and societies are empowered, thereby promoting the ideal of gender equality. A study indicates that home-based women workers used the finance obtained to repair and upgrade their homes, thereby enhancing the safety of their place of work and increasing productivity.[236] Initially the financial services provided were access to a savings account and this progressed to the provision of access to credit, where the repayment rate of these loans compared more favourable than that of many traditional financial institutions.[237] The provision of financial assistance through the provision of credit played an important role in poverty alleviation and promotion of a decent work framework. Simple application procedures together with support and assistance by these institutions are recommended. This also improves the economic standing of these women, both in their immediate families and in their communities, and alleviates poverty.[238] The success of this association is based on the holistic approach that they follow in the representation of their members and the realisation that sustainable empowerment of these women demands that social, political and economic aspects of their lives are viewed and treated as interrelated. This approach requires a new perspective which has regard for the worker, and the consideration of the appropriate role, opportunities and limits of labour law in a

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231 Hill *Women identity, agency and economic development* 75, 78.
232 Hill *Women identity, agency and economic development* 78.
233 Obino *Housing and finance for poor working women* 1. This includes measures by the SEWA bank and the Mahila SEWA Housing Trust. These measures have indicated that women in the informal economy can be successfully provided with credit facilities despite their low or irregular income or their lack of resources.
234 Obino *Housing finance for poor working women* 1.
235 Obino *Housing finance for poor working women* 1.
236 Obino *Housing finance for poor working women* 5.
237 Obino *Housing finance for poor working women* 1, 3.
238 Obino *Housing finance for poor working women* 1, 5.

new paradigm, as well as a new role for trade unions and other organisations in providing adequate protection. Financial institutions that provide these women with access to financial services must consider tailor-made approaches with strong links to empowerment programmes to achieve sustainability and gender equality. These programmes must aim at creating financial independence and confidence among these women, as well as to minimise their vulnerability. For instance, it should provide for irregular payments in cases of hardship.[239] Irregular payments are an obvious challenges for financial institutions, but it is suggested that with various checks and balance in place, as well as a regulated continuous relationships with these women, these risks can be minimised.

Through this innovative approach of "financial inclusion",[240] women, their families and society are empowered, thereby promoting the ideal of gender equality. The provision of financial assistance through the granting of credit played an important role in poverty alleviation and promotion of a decent work framework. This approach requires a new perspective when considering the needs of these workers, and a consideration of the appropriate role, opportunities and limits of labour law within a new paradigm.

7.9.2 Vemo SEWA

Vemo SEWA is a community-based health insurance scheme specifically for vulnerable women workers in the informal economy. This scheme is designed to accommodate the needs of its members and recognises that these women face many distinctive challenges in accessing healthcare.[241] The scheme, managed by SEWA, provides healthcare to members up to 70 years of age.[242] As part of the extension of healthcare to these women, SEWA also empowers their members through training programmes to ensure more sustainable solutions and to build capacity among its members.[243] An important aspect of this scheme is that access to the services is provided through stationary and mobile health units, therefore accommodating women living in remote and rural areas.[244] The tailor-made nature of the scheme means that it can deal with distinctive challenges experienced by its members. Many women in India do not have an educational background and submission of claims is a major challenge, specifically in remote areas. To overcome this challenge, SEWA introduced a cashless claim submission procedure with the support of

239 Obino *Housing finance for poor working women* 1, 5.
240 Obino *Housing finance for poor working women* 1, 5.
241 Jain *Health financing and delivery in India* 11.
242 Jain *Health financing and delivery in India* 11.
243 Jain *Health financing and delivery in India* 13.
244 Jain *Health financing and delivery in India* 13.

health workers.[245] One of the most important advantages of a tailor-made social protection scheme is that it can recognise challenges and barriers specific to categories of women workers. Women workers in the informal economy are vulnerable and disadvantaged and thus empowerment through education and training is essential for integrated and sustainable solutions.

7.9.3 Women on Farms Project (WFP)

During apartheid in South Africa black workers, such as farm workers,[246] for example, were without any labour rights and were also denied the fundamental right of freedom of association and thus could not join trade unions.[247] Despite this, workers were organising themselves and the Congress of South African Trade Unions (COSATU) was formed. It is interesting to note that during this time women, as workers, played an important role as leaders in the struggle to freedom and democracy.[248] After apartheid ended new labour legislation such as the *LRA* and the *BCEA* did not immediately overcome the precariousness of the working conditions of these workers; however, it did establish a new legal framework. The South African agricultural sector is characterised by the feminisation of this sector and by casualisation. Women on Farms Project (WPF)[249] is a South African NGO, established shortly after apartheid ended, to improve the lives and working conditions of women in commercial agriculture in the Western and Northern Cape.[250] These women believe that through self-organisation they could improve social inclusion in the farm community, prevent abuse and decrease their vulnerability as women farm workers.[251]

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245 Jain *Health financing and delivery in India* 14.

246 Farm workers are not included in the scope of this study; however, they are also vulnerable and this case study illustrates valuable strategies with reference to the organisation of vulnerable women workers.

247 Solomon "Understanding the dynamics of an NGO/MBO partnership" 75. Women farm workers in the São Francisco Valley in Brazil are organised by the principal trade union Sindicato dos Trabalhadores Rurais (STR). They launched specific campaigns to target the women workers in this area as the majority of workers in the grape sector are women. Through mobilisation they were able to gain crèche facilities, one paid day a month for health visits, the right to breastfeed at work, and paid maternity leave (Selwyn "Women and rural trade unions in North-East Brazil" 55, 60).

248 Solomon "Understanding the dynamics of an NGO/MBO partnership" 76.

249 Their vision included equality; respect and human dignity for all women; to promote the prominent role of women as leaders in agriculture, to guarantee access to work, food, land and housing, and access to all basic services (Women on Farms Project date unknown http://www.wfp.org.za/about-us/mission-a-vision.html).

250 Solomon "Understanding the dynamics of an NGO/MBO partnership "74.

251 Women on Farms Project date unknown http://www.wfp.org.za/about-us/mission-a-vision.html.

This NGO established a membership-based organisation, named Sikhula Sonke, for these workers in 2004.[252] This MBO was registered as a trade union in 2004.[253] In this case study it must be noted that WPF, as the NGO, established Sikhula Sonke, which can also be described as a social movement, and WPF acted as a "capacitator" in the creation of Sikhula Sonke.[254]

Farm workers are often not organised and trade unions show disinterest in organising this sector.[255] They are particularly vulnerable as they lack the socio-economic means to exercise their fundamental rights and other labour rights.[256] Other factors that contribute to their vulnerability include the fact that their workplaces are remote and widespread and they live in farming communities that are characterised by paternalism, gender inequality and stereotyping.[257] Organisation and mobilisation of women workers is particularly problematic in patriarchal communities as the concept of opposing and challenging existing structures of discrimination is unfamiliar to these women. Women are often excluded from decision making within households and communities and this contributes to their subordinate position at these levels.[258] An initial strategy in this transformation process is legal empowerment, through the provision of information in respect of their rights, and addressing specific challenges such as gender issues.[259] In respect of these workers this involved information and education about available social assistance applicable to these women, such as the child support grant.[260] Legal empowerment contributes to creating an awareness and building confidence to enable these women to be their "own agents of change".[261] WPF is an example of an organisation

252 Women on Farms Project date unknown http://www.wfp.org.za/about-us/mission-a-vision.html.
253 Solomon "Understanding the dynamics of an NGO/MBO partnership "85.
254 Solomon "Understanding the dynamics of an NGO/MBO partnership" 87.
255 Solomon "Understanding the dynamics of an NGO/MBO partnership" 75
256 Solomon "Understanding the dynamics of an NGO/MBO partnership" 73-75.
257 Solomon "Understanding the dynamics of an NGO/MBO partnership" 73-78. Farm women workers experience various forms of harassment and discrimination at multiple levels. At household level they are often the victims of violence and systemic gender discrimination. In the workplace there is a distinct wage gap between men and women.
258 Pande "Organising for life and livelihoods in the mountains of Uttarakhand" 101.
259 Solomon "Understanding the dynamics of an NGO/MBO partnership" 76.
260 Solomon "Understanding the dynamics of an NGO/MBO partnership" 80. Social assistance in South Africa is regulated through the *Social Assistance Act* 13 of 2004. The South African Constitution also provides in s 27(1)(c) that everyone has the right to have access to social security if they are unable to support themselves or their dependants. The child support grant is currently R380 per month. Requirements include that the applicant must be the primary caregiver, a South African citizen or permanent resident and earn not more that R45 600 annually. The child must be under 18 and living with the primary caregiver.
261 Solomon "Understanding the dynamics of an NGO/MBO partnership" 76.

that overcame the challenges of organising these workers through addressing the specific needs associated with this category of informal work.[262]

7.9.4 The Phephanati Project

In Durban, South Africa, an innovative project named *Phephanati*[263] was launched to provide occupational health and safety measures to informal traders in an informal market.[264] This project involved NGOs,[265] occupational health and safety professionals and a very diverse group of informal traders.[266] One of the biggest challenges that informal traders face is occupational health and safety, and the fact that when they are injured they are without an income.[267] The abovementioned project is an important example of how to extend social protection to workers in the informal economy. Firstly the abovementioned project recognised the importance of a participatory model and social dialogue. Hence the project established a Health and Safety Committee that included representatives from the various traders, traders' organisations,[268] as well as other health officials.[269] A very important activity of the committee was the empowerment of these traders through a number of health and safety training programmes[270] and awareness campaigns in respect of health and safety risks in the workplace. Educating these traders about hazardous behaviour in the workplace and how to minimise risks is vital and part of the empowerment of informal work, specifically when they are excluded from the scope of legislative provisions.[271] The identification of these risks allowed the traders to negotiate improvements in respect of the recognised risks with the various role players.[272] This project is an important example of how through mobilisation and social dialogue,

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262 Specific programmes were initiated to address issues such as social protection, labour rights, health, empowerment, housing, land and the development of capacity and organisational structures (Solomon "Understanding the dynamics of an NGO/MBO partnership" 74).

263 This means "be safe with us" in isiZulu. See Alfers *et al* 2016 *NewSol* 272.

264 Alfers *et al* 2016 *NewSol* 272.

265 Both national and international NGOs (Alfers *et al* 2016 *NewSol* 274).

266 Alfers *et al* 2016 *NewSol* 273, 274. This group included vendors selling beads, food and other goods.

267 Alfers *et al* 2016 *NewSol* 275.

268 In this area a number of traders' organisations exist and these traders were reasonably well organised (Alfers *et al* 2016 *NewSol* 277).

269 Alfers *et al* 2016 *NewSol* 276.

270 Conducting these programmes contributed to the recognition of these traders as workers and their places of trading can be recognised as workplaces. This is important because when we consider the extension of labour and social protection to these workers, the initial phase must include the recognition of those in the informal economy as workers (Alfers *et al* 2016 *NewSol* 279). Training programmes must be uniquely designed for specific occupational categories in the informal economy, and must consider the nature of work, the specific challenges and occupational health hazards related to the specific work.

271 Alfers *et al* 2016 *NewSol* 280.

272 Alfers *et al* 2016 *NewSol* 276. Training these workers includes interventions to improve their health, a safe workplace, and their work processes.

protection can be extended to workers in the informal economy. It is important to note that various organisations were involved, namely NGOs (at both national and international levels), MBOs and trade unions. Alliances with networks both at a national and international level are important, in particular as in many instances the employer as a bargaining partner is absent.[273] These networks have also contributed to an awareness of the plight of these workers, both within countries and internationally, including their lack of recognition as workers. These networks through their campaigns and support place pressure on governments and can influence policies and regulatory frameworks. It indicates that through the involvement and assistance of various organisations (at both national and international levels), not just the traditional trade union movement, innovative solutions can be reached, specifically in this instance where the bargaining parties are often not the employer but various other role players such as members of local authorities.[274] Extending occupational health and safety to informal economy workers, specifically informal traders, requires a multidisciplinary approach that involves various role players at local and national levels, including OHS specialists and those responsible for urban policies.[275]

7.9.5 Kagad Kach Patra Kashtakari Panchayat (KKPKP)

Women leaders in particular have played an important role in the advocacy campaigns.[276] Currently most waste pickers are excluded from social security benefits, including pension and maternity benefits, and in many countries organisations are actively campaigning for their inclusion in social security systems.[277]

An inclusive legal framework for waste pickers requires the political will of governments, the recognition of their status as workers and provision for social mobilisation, and social dialogue with these workers and their various organisations such as cooperatives and MBOs.[278] Solidarity is often a foreign concept to the workers as the very nature of their work is competitive and therefor MBOs must encourage participation and promote membership. In India, Brazil and Colombia, MBOs were largely responsible for

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273 Narayan and Chikarmane "Power at the bottom of the heap" 222.

274 Links between organisations at national, regional and international levels provide stronger bargaining power and create an awareness of the precarious situation of women workers in the informal economy.

275 Alfers *et al* 2016 *NewSol* 283.

276 Dias *Integrating waste pickers into selective waste collection*.

277 Dias *Integrating waste pickers into selective waste collection*.

278 The integration and recognition of waste pickers in Brazil was a result of parliament recognising the various groups that represented these workers, including civil society and extensive consultations with the various role players through workshops and seminars (Harvey *et al Compendium of WIEGO and SEWA case studies* 8).

representing these waste pickers at local levels with local authorities and influenced policies and legislative frameworks. The MBOs also have a direct impact on the improvement of the lives of these workers through negotiations for wages for services rendered, demanding improved working conditions, health protection, prevention of harassment and promoting the recognition of their contributions.[279]

One of the greatest challenges in organising waste pickers is to obtain recognition as workers, as they do not have an employer and their negotiations are with public authorities. In most countries they are marginalised and their contribution to the environment and waste management systems are undervalued. Kagad Kach Patra Kashtakari Panchayat (KKPKP), is a trade union for men and women waste pickers in Pune, India; it was registered in 1993.[280] One of the most difficult challenges for organisations in the informal economy is the lack of recognition and status of their members as workers. To address this KKPKP initiated a process of recognition as workers through the issuing of identity cards to these waste pickers.[281] The majority of members are women and this also illustrates the high percentage of women waste pickers in Pune.[282] Through the efforts of KKPKP, a cooperative owned by the waste pickers was established in 2007 and these workers provide waste management services to the municipality through this cooperative.[283] Local authorities often prefer to contract with organisations such as cooperatives for waste management services rather than with individual waste pickers. In Brazil, for example, legislative provisions allow for support to cooperatives and formal organisations but exclude individuals.[284]

Awareness campaigns must focus on the integration of these workers and the various positive contributions of their work, highlighting the economic value of this indispensable service and the concomitant environmental benefits.[285] Through obtaining recognition for these workers KKPKP were also able to negotiate for health benefits provided by the local

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279 Dias 2016 *Env&Urb* 8. In Pune, India, in 2010, approximately 118 000 tonnes of material were recovered by waste pickers in the informal economy in one year and in the same year the net environmental benefit from this sector was € 2830,33. Statistics also indicated that municipalities saved large amounts in municipal waste costs through the use of services provided by waste pickers (Chikarmane *Integrating waste pickers into municipal solid waste in Pune India* 3). This clearly illustrates the important contributions and valuable role of waste pickers in cities.

280 In 2014, they had more than 10 000 members (WIEGO 2018 http://www.wiego.org/ kagad-kach-patra-kashtakari-panchayat-kkpkp).

281 Narayan and Chikarmane "Power at the bottom of the heap" 209.

282 Narayan and Chikarmane "Power at the bottom of the heap" 55.

283 Harvey *et al Compendium of WIEGO and SEWA case studies* 17.

284 Dias *Integrating waste pickers into selective waste collection* 8.

285 Narayan and Chikarmane "Power at the bottom of the heap" 209.

authority.[286] In India, cooperatives have also played an important role in the mobilisation of waste pickers.[287]

7.9.6 Domestic workers in Bangalore, India

In Bangalore domestic workers are particularly poor.[288] The Karnataka Domestic Workers Union (KDWU) was formed in 2004. This union actively campaigned for the recognition of these women as workers by employers and governments.[289] Although the majority of these workers were women, men were also working in this sector as cooks, gardeners and as guards.[290] The gendered notion of housework is enforced by women working as cleaners and caregivers. One of the biggest challenges that this union faced was the diversity within the sector. Various categories of workers were working in Bangalore, including live-in workers, many whom were employed through agencies and as a result of their live-in status were difficult to reach, and part-time workers and full time workers who did not reside with their employers.[291] The last two categories were easier to reach than the live-in workers.[292] The membership fees were low to accommodate the low and often irregular income of many of these workers. Through surveys they collected information on the income and expenditure of these workers to establish a desired minimum wage.[293] Regular meetings were scheduled after hours and during weekends to accommodate these workers and to strengthen a collective voice.[294] Members received identity cards that promoted their status as workers. The union endeavoured to empower its members through training programmes that focused on themes such as cooking and childcare.[295] Many of these women faced discriminatory practices within the homes where they worked, often on caste-based grounds.[296] Through celebrating various practices and tradition among their members, the union transcended the boundaries that existed between the various women workers and promoted solidarity and a common identity.[297]

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286 Narayan and Chikarmane "Power at the bottom of the heap" 210.

287 SWaCH, a cooperative established in 2007, provides waste management services in Pune and more than 75% of its members are women. This cooperative gave waste pickers the opportunity to bargain on equal footing with the various stakeholders, such as service users (households) and the local authorities; however, the provision of social security benefits to its members must still be developed (Chikarmane *Integrating waste pickers into municipal solid waste management in Pune, India* 3).

288 Menon "The challenge of organizing domestic workers in Bangalore" 181.

289 Menon "The challenge of organizing domestic workers in Bangalore" 182.

290 Menon "The challenge of organizing domestic workers in Bangalore" 184.

291 Menon "The challenge of organizing domestic workers in Bangalore" 186.

292 Menon "The challenge of organizing domestic workers in Bangalore" 186.

293 Menon "The challenge of organizing domestic workers in Bangalore" 186.

294 Menon "The challenge of organizing domestic workers in Bangalore" 186.

295 Menon "The challenge of organizing domestic workers in Bangalore" 192.

296 Menon "The challenge of organizing domestic workers in Bangalore" 194.

297 Menon "The challenge of organizing domestic workers in Bangalore" 196.

Discussions were encouraged around the specific vulnerability of women and their dignity in the workplace. Adequate childcare is one of the biggest challenges that these women face. In this specific region, child labour was a major problem, specifically among girls, and often these domestic workers brought their children with them to work from as early as seven years of age.[298] In order to address this specific issue, the union promotes the right to education of all children through various advocacy campaigns.[299] This union also realised that the large number of employers of these workers pose a challenge to negotiations and focused on strategies that addressed various challenges with state parties.[300]

7.9.7 Organising in Brazil

Brazil is one of the leading countries with reference to the integration of waste pickers into the waste management system of local authorities.[301] The integration of these workers was the results of various advocacy campaigns, mobilising and the organisation of these workers into various organisations, such as cooperatives, that could negotiate and partake in social dialogue with authorities.[302] A national organisation, the National Movement of Waste Pickers (MNCR) was formed and represents 1200 cooperatives.[303] This is one of the largest organisations globally and 31% of the members are women and 66% are black.[304]

Cooperatives can play an important role in the extension of social protection measures to women workers. In Brazil a cooperative for waste pickers assisted in social dialogue with government for childcare facilities for its members. The Asmere Waste Picker Cooperative consisted of seven other cooperatives. Together with two NGOs, they bargained with government officials. As a result of their negotiations, childcare for these workers was incorporated into the public healthcare system. This is an indication of how other organisations such as cooperatives, together with NGOs and local public authorities can extend social protection, through organisations that can increase bargaining power.

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298 Menon "The challenge of organizing domestic workers in Bangalore" 200.
299 Menon "The challenge of organizing domestic workers in Bangalore" 200.
300 Menon "The challenge of organizing domestic workers in Bangalore" 201.
301 See para 6.3.2.3 above.
302 These workers began organising themselves in the 1980s in various cities across Brazil, supported by NGOs. This resulted in various agreements with municipalities in cities such as São Paulo, Poto Alegre and Belo Horizonte. Local authorities in these instances were managed by the Worker's Party, with a specific objective to integrate workers and support worker organisations (Dias and Ogando 2015 *WOLG* 51, 54.)
303 Dias and Ogando 2015 *WOLG* 54.
304 More than half of workers in cooperatives in this sector are women (Dias and Ogando 2015 *WOLG* 51, 54).

Traditional trade unions will often not focus on the specific needs of women, but alternative organisations as described above might be better equipped to address the specific needs of women in the informal economy. Waste pickers in Brazil often form cooperatives to gain access to incentives, services and support.[305]

Organising workers in the informal economy can pose many challenges. For example, the workplace of domestic workers poses specific challenges to organisations in respect of contact and communication. To overcome these challenges, organisations must implement innovative and tailor-made strategies to successfully organise these workers. Strategies in Brazil to reach these workers included communication within communities through friends and relatives, and training courses presented and designed for these workers.[306] This is an example where traditional strategies followed by trade unions will not be effective and innovative measures are required.

The process of organising women in the informal economy is often initiated trough meeting in churches and schools, as was the case in Brazil.[307] The success of voice and representation for domestic workers in Brazil through various organisational structures can be ascribed to the following:

(a) alliances with social movements;[308] and
(b) alliances with government and international organisations.[309]

In addition to the above, the success of mobilising and organising these women in Brazil can be ascribed to a number of country-specific factors, such as strong labour unions, political will and union officials elected to government positions.[310]

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305 Kerbage and Abdo *Cooperation among workers in the informal economy*. Through cooperatives they can be awarded waste management contracts by local authorities. Registration of cooperatives also allows waste pickers to access benefits through the Social Security National Institute.

306 Cornwall, Oliveira and Gonçalves "If you don't see light in the darkness, you must light a fire" 175.

307 Cornwall, Oliveira and Gonçalves "If you don't see light in the darkness, you must light a fire" 172. This is how the initial process of organising and mobilisation started in Brazil. Black domestic workers in Brazil began their quest for rights as early as 1920. At national level, the National Front for Domestic Workers was established in 1981. Thereafter 45 unions were established, as well as the Domestic Workers National Council and FENATRAD. FENATRAD was also affiliated with regional organisations such as the Latin American and Caribbean Domestic Workers' Confederation (CONLACTRAHO). The political change in Brazil created an enabling framework for social movements for women and provided platforms for engagements.

308 This included black and feminist movements (Cornwall, Oliveira and Gonçalves "If you don't see light in the darkness, you must light a fire" 173).

309 This included the ILO, UNIFEM and UNICEF (Cornwall, Oliveira and Gonçalves "If you don't see light in the darkness, you must light a fire" 173). Alliances with these organisations increase global awareness and thus often become a driving force for change in policies and legislation.

310 Cornwall, Oliveira and Gonçalves "If you don't see light in the darkness, you must light a fire" 173.

7.10 Strategies for the organisation of women workers in the informal economy

The question remains: How to extend labour and social protection to women in the informal economy through voice and representation? One of the initial strategies must include the promotion of recognition of these women as workers and of their valuable economical contribution to households and communities.[311] At national level these organisations will often have alliances with NGOs, MBOs, and civil society to promote protection and recognition of these workers. Strategies include awareness campaigns, projects to pressurise countries to ratify relevant international instruments, to include these workers in policies and to design innovative and tailor-made solutions.

If one considers the precarious nature of women workers in the informal economy and the systemic disadvantages that they suffer, it becomes clear that alternative strategies must be devised in organising these workers. The lack of an identifiable employer also poses challenges. An alternative to demanding better wages from an employer, specifically in the case of waste pickers and informal traders, may include demands from government in respect of social benefits, such as housing, education and healthcare. This approach can also ensure the well-being of these women and can contribute to a life lived with human dignity.

An analysis of the successful extension of protection to these workers through various organisations highlights the importance of alliances and cooperation between such organisations, such as NGOs, MBOs,[312] civil society, cooperatives,[313] national and

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311 Strategies may include negotiations and bargaining with employers where applicable or with various other role players such as local authorities or state departments. This may also include a process of social dialogue with stake holders. NGOs will often rather focus on advocacy campaigns than negotiations as such. Economic development strategies may focus on the wages of the workers and on gaining economic power within the sector or industry. Market strategies can be important for an organisation representing waste pickers as this provides for access to markets through a process of negotiations. This can provide these workers with access to waste sites and to the ultimate aim of concluding agreements with local authorities in terms of waste collection and recycling. A holistic and integrated approach that includes a combination of strategies is recommended, determined by the categories of workers within the informal economy (Carré *Defining and categorising organisations of informal workers in developing and developed countries* 7, 8, 9).

312 This organisational structure often refers to various workers groups within the informal economy through which these workers organise themselves, including trade unions, cooperatives and other voluntary groups. This is a broad concept that provides for variants across the different categories of workers in the informal economy. SEWA described this as "an organization where the members are the users of the services of the organization". Other definitions include "those in which the members elect their leaders and which operate on democratic principles that hold the elected office accountable to the general membership" (Bonner and Spooner *The only school we have* 12).

313 Studies have highlighted the importance of cooperative structures for workers in the informal economy. Workers have indicated that they comply with operative values and principles within a

international networks [314] and federations. These links form a support base for sustainability and are also important as representatives, as there is often no clearly identifiable employer with whom to negotiate for better working conditions.[315] This means that these organisations often have to negotiate with governments to achieve better conditions, and pressure from international networks and awareness campaigns can be useful in this regard. Links with both national and international organisations also provide these workers with an increased notion of solidarity and confidence to make their voices heard globally. An important common goal of these various organisations in the informal economy is that they have as members poor women that are joined in collective action to improve their conditions.[316] Organisations in the informal economy include trade unions that represent both formal and informal economy workers, trade unions that exclusively represent workers in the informal economy,[317] cooperatives,[318] voluntary associations and a large number of unregistered organisations.[319]

One of the main challenges that trade unions face when organising the informal economy is the collection and payment of financial contributions, as these workers have an irregular and low income and their workplaces are widespread and remote. Innovative measures are thus required to financially support organisations in the informal economy. MBOs in the informal economy overcome these challenges through external support from various organisations, including NGOs. However, being dependent on external financial support contributes to instability and can threaten independence.[320] In line with the notion of solidarity and shared interests, many MBOs do collect contributions from members, despite the irregularity of contributions.[321]

The success of organisations in the informal economy can be ascribed to the fact that they address wider common issues of these workers, such as patriarchal exploitation,

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cooperative's democratic structure. A traditional approach towards governance, electing representatives within the structure, allows these workers to design these organisations according to their specific needs (Kerbage and Abdo *Cooperation among workers in the informal economy*).

314 Important international and regional networks include the following: StreetNet International; HomeNet South Asia: Global Alliance of Waste Pickers; Latin America Waste Picker Network and the International Domestic Workers Network. All these organisations are dependent on external funding and are not self-sufficient. Gender equality is one of StreetNet's most important objectives and is highlighted in all its activities. This has raised the visibility of street traders across the world (Bonner and Carré *Global networking* 7-10, 13).

315 Narayan and Chikarmane "Power at the bottom of the heap" 226.

316 Bonner and Spooner *The only school we have* 7.

317 SEWA is an example of such a trade union.

318 Included are both worker cooperatives, consumer cooperatives and savings cooperatives (Bonner and Spooner *The only school we have* 13).

319 Bonner and Spooner *The only school we have* 13.

320 Bonner and Spooner *The only school we have* 15.

321 Bonner and Spooner *The only school we have* 16.

marginalisation and gender inequality in societies. There is a realisation among these organisations that to achieve decent work in the informal economy, they must address wider societal issues to ensure a sustainable and holistic approach. Organisations must also be sensitive to the changing needs of its members. At the initial phase of organisation, legal empowerment can be a priority, but thereafter in a quest for sustainability, organisational development is an important focus point.[322]

Surveys done among organisations representing informal traders in South Africa and other informal workers in Malawi, Mozambique and Zambia indicated that these organisations are confined to a specific geographical area and often only display links with local governments.[323] Membership fees are their main source of income and the majority of members are still male. The problems facing women are more severe, as they face the dual responsibilities of work and family. These organisations often face structural constraints and their effectiveness is diminished by the irregularity of employment and income of their members. Progress includes that in some countries small localised associations are united into larger alliances while in Asia home-based workers and supportive NGOs have joined together to form regional and national home nets.

Various categories of workers in the informal economy will be responsive to different organisational strategies. In respect of informal traders it is important to recognise the value and role of organisations in the extension of labour and social protection to these workers, specifically as the bargaining partners differ and often include public role players. Studies have indicated that MBOs[324] and NGOs play an important role in facilitating relationships with local authorities, often acting as mediators between traders and authorities and also among traders themselves.[325] These organisations also contribute to the empowerment of these workers through various training programmes.[326]

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322 Solomon "Understanding the dynamics of an NGO/MBO partnership" 81.

323 Bennett *Organising the informal economy* 1-67.

324 An example of a very successful MBO exists in Colombia. The *Asociación Cooperative de Recicladores de Bogotá* (ARB) is an MBO formed in the 1990s for waste pickers in the capital city Bogotá, Colombia. ABR consists of 17 cooperatives and represents 1800 waste pickers across municipalities. The majority of their members are women and household heads. Their formal education levels are low and waste picking is one of the few job opportunities available to them to alleviate household poverty. An important aspects of this MBO is that it is linked at national level with the National Association of Waste Pickers (*Asociación Nacional de Recicladores*) and at international level with various networks. Their strategies include the integration and remuneration of these workers; social dialogue at public forums with the local authorities; training programmes; protests and legal action (Abizaid *ARB: Fighting for an inclusive model for recycling in Bogotá* 3).

325 Roever *Informal economy monitoring study sector report: Street vendors*.

326 Roever *Informal economy monitoring study sector report: Street vendors*.

In respect of the organisation of specifically informal traders, SEWA has always played a major role. Studies in Ahmedabad, where SEWA has more than 80 000 members,[327] highlighted the following important factors in respect of achievements that can be reached through organisation and mobilisation of street traders:

(a) through negotiations the SEWA could ensure the integration of these traders into urban planning;
(b) market committees were established to assist with traffic control in market areas;
(c) organisations representing these traders can also assist in respect of harassment and illegal evictions and confiscation of goods; and
(d) legal empowerment of these traders is extremely important and assistance with legal action is an important factor.[328]

These types of strategies allow traders to take part in social dialogue and hence they are involved in policies that directly affect their livelihoods. This is also an example of specific strategies that are applicable to a specific group or category of informal workers due to their unique challenges and priorities. When organising women informal traders, certain strategies must be considered and these include the following:

(a) continuously undertaking to strengthen the bargaining power of their members with the applicable authorities;
(b) collaborating with local authorities on policies and regulatory frameworks that have an impact on informal trading;
(c) addressing the vulnerabilities and specific challenges of women informal traders and highlight these challenges to policy makers;
(d) enforcing the legal rights of these traders through various dispute resolution systems, including the courts;
(e) empowering these women through various training programmes; and
(f) launching advocacy campaigns for their recognition as workers.[329]

The importance of alliances between associations and trade unions at various levels, including national, regional and international, must not be underestimated. Advocacy campaigns lobbied by SEWA and the National Association of Street Vendors of India

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327 Across India, SEWA currently represents more than 1,2 million vulnerable women in the informal economy (Kerbage and Abdo *Cooperation among workers in the informal economy* 12).
328 Roever 2016 *Env&Urb* 12.
329 Harvey *et al Compendium of WIEGO and SEWA case studies* 2.

produced a National Policy on Street Vending in 2004 and a revised policy in 2009.[330] A number of associations represent informal traders in Cape Town.[331] The traders formed an overarching body, namely, the United Hawkers' Forum (the Forum) to represent them in negotiations with the city.[332] The Forum has negotiated with the city to ensure security of tenure and to provide structures to protect the workers' goods.[333] The value of these associations should not be underestimated as they seek collective solutions in negotiation processes with local authorities with references to fees, support, improvement of infrastructure to improve and develop their enterprises and livelihoods through empowerment programmes.[334] Through notions of solidarity traders protect their joint interests with reference to personal security challenges and access to resources.[335] These strategies might not be similar to the traditional trade union strategies or very sophisticated, but they have already successfully addressed issues relevant to their members.[336]

Solidarity is a fundamental concept in respect of the organisation of workers. It is accepted that it embodies a collective notion and a shift from the individual self-interest to a wider group interest. In respect of women workers in the informal economy this concept encompasses the identification of a shared position, not necessarily in an organisation, but also within a society, and the identification and recognition of their status as workers.[337] An important approach to organising will often include a "community-based approach" rather than an "employer-based approach".[338] This is important when a clear

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330 Public and private institutions can play a vital role in creating an enabling framework for street vendors as these women workers are often subject to harassment, bribery and adversarial relationships with authorities. In Bhubaneshwar, India, a Public-Private-Community Partnership model was designed to resolve the abovementioned issues and the success of this model has received widespread attention from other cities. The objectives were to bring all role players together for joint planning and to ensure implementation through the partnership. Vending zones were identified by all stakeholders, structures were erected and street vendors were recognised as an integral part of Bhubaneshwar. This model of co-operation is an example of what can be achieved through joint decision making processes, social dialogue and a policy that is designed for a specific sector of informal economy workers. Street vendors can now trade in a conducive environment and this promotes the concept of decent work, non-discrimination and alleviates poverty (Kumar *The regularization of street vending in Bhubaneshwar, India*).

331 These associations include the Mitchell's Plain Progressive Traders' Association and the Town Hawkers' Association (Bamu and Theron *"Nothing about us without us"* 25). See para 5.5.2.2 above.

332 Bamu and Theron *"Nothing about us without us"* 26.

333 Bamu and Theron *"Nothing about us without us"* 26.

334 Bamu and Theron *"Nothing about us without us"* 26, 27.

335 These traders assisted each other with reference to the protection of their goods and the collection of water within the City of Cape Town (Bamu and Theron *"Nothing about us without us"* 27).

336 Le Roux 2014 *ILJ* 38.

337 Webster, Britwum and Bhowmik "A conceptual and theoretical introduction" 25.

338 Wilderman "From flexible work to mass uprising" 91.

defined employee-employment relationship is absent, for example in the case of informal traders and waste pickers. Organisations in the informal economy must also identify and address wider societal issues, to overcome systemic disadvantages faced by these workers. This emphasises the importance of social movement in respect of these organisations.[339] Strategies must focus on the empowerment of these women to ensure sustainable development.

In respect of own-account workers a clear, distinct employment relationship is not discernible and their bargaining partners often include public role players, such as local authorities. Trade unions are therefore reluctant to organise these workers and they often form associations other than trade unions to represent their interests. These associations must engage with these divergent bargaining partners through a process of social dialogue. The ILO defines social dialogue as

> … the term that describes the involvement of workers, employers and government in decision making on employment and work issues. It includes all types of negotiation, consultation and exchange of information among representatives of these groups on common interests in economic, labour and social policy. Social dialogue is both a means to achieve social and economic progress and an objective in itself, as it gives people a voice and stake in their societies and workplaces.[340]

It is important that the notion of social dialogue embraces new role players that represent the interest of these women.[341] The notion of a participatory process on interests of social policy in social dialogue is important for women workers. The various challenges[342] that women workers face, require policies to address their specific challenges which are often the result of structural inequalities. This engagement between local authorities and informal traders and waste pickers can be described as policy concentration.[343] This concept refers to:

> … co-determination of public policy by governments and workers' representatives, [who] develop a reflex for acting in a concerted multifaceted manner to address major economic and social policy issues by seeking consensus.[344]

This will allow these workers to negotiate with reference to social protection measures and infrastructure in respect of informal trading and waste picking and creates a

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339 Wilderman "From flexible work to mass uprising" 92.
340 ILO *Social dialogue* 5
341 ILO *Social dialogue* 12.
342 These challenges included inadequate childcare services and lack of a safe working environment, sanitation, access to basic services and a working environment free of harassment,
343 A perturbing trend concern that has been reported in Africa is that street traders are banned and purchasing from these vendors is categorised as a crime. This has been reported in Malawi, Nigeria, Indonesia and Zimbabwe (Roever 2016 *Env&Urb* 5).
344 ILO *Social dialogue*. See also Sehapi-Kulehile 2012 *ILJ* 2293.

framework that is responsive to the needs of these workers.[345] However, this will require the political will of state parties. The result of these negotiations can include a social pact or agreement in the place of a collective agreement that provides for targets and objectives with reference to a regulatory framework applicable to these workers. A new framework is required, as the traditional regulatory and institutional framework, based on a formal employment relationship, is not effective to regulate the large number of workers in the informal economy. This approach is innovative and responsive to the distinctive nature of the informal economy, and creates a new paradigm to accommodate the realities of different categories of workers and their conditions in the informal economy.

Through mobilisation and organisation these workers can gain institutional recognition, thereby increasing their bargaining power with role players and ultimately changing their lives.[346] Through these activities these workers are recognised as bargaining partners, and this recognition is also an important factor in the achievement of substantive equality. Women must be recognised and respected at various levels, including at a personal level, as a worker and at community level.[347]

The starting point of mobilisation will often be the recognition of injustices.[348] For many informal economy workers there is no distinct employee- employer relationship, such as own-account workers, informal traders and waste pickers. The source of injustices can then include various public and governmental role players.

Successful strategies for mobilisation of vulnerable women workers include close social networks at workplace level.[349] For domestic workers, due to the nature of their workplace, this will include a social network at community level, that supports the characteristics of that specific community and which is similar to the characteristic of categories of workers.

Research conducted in respect of organisations representing women in the informal economy has indicated that initial voluntary self-organisation is very limited among these women and this can be ascribed to lack of recognition in respect of their work and also to stereotyping, discriminatory practices and patriarchal societies.[350] Solidarity is also often a foreign concept among these workers, increasing the difficulties with initial

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345 Sehapi-Kulehile 2012 *ILJ* 2293.
346 Hill *Women identity, agency and economic development* 93.
347 Hill *Women identity, agency and economic development* 103.
348 Blyton and Jenkins 2012 *SocRev* 27.
349 Blyton and Jenkins 2012 *SocRev* 25.
350 Kabeer, Milward and Sudarshan "Beyond the weapons of the weak" 9.

voluntary mobilisation. Trade unions organise according to established goals, but organisations in the informal economy have to allow the workers to determine their own goals according to their needs and priorities.[351] In order for these organisations to be successful, they must address the specific needs of categories of workers. Many studies also indicate that the initial actors are often "middle-class" role players associated with various NGOs.[352]

An important strategy for these organisations is to establish a shared identity and shared interests, including common interests and cultural appropriations, among their members.[353] The challenges that must be overcome to achieve this include the isolation of many of these workers and the widespread and remote nature of their workplaces. By addressing common problems these organisations created an awareness and realisation of solidarity and an understanding of the value of a collective.[354] If one considers sustainable solutions and both the legal and economic empowerment of these workers, it is important for organisations to train their members and develop them as leaders within the organisations.[355]

One of the first challenges that organisations face is the lack of a worker identity, or a shared worker identity displayed by these workers.[356] Domestic workers often see their work as an extension of their domestic duties and their work is unrecognised and undervalued. Other self-employed categories of informal workers, such as street traders, home workers and waste pickers, will rather affiliate with other business associations.[357] The exclusion of these workers by the labour legislation exacerbates the lack of a worker identity.

In the imbalance of power in the employment relationship, the union always has the right to strike as an economic weapon during negotiations. Women workers in the informal economy are often too poor to strike and lose their wages.[358] Systemic structures within society that support gender inequality and patriarchal norms often mean that actions such

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351 Kabeer, Milward and Sudarshan "Beyond the weapons of the weak" 9.
352 Kabeer, Milward and Sudarshan "Beyond the weapons of the weak" 8.
353 Kabeer, Milward and Sudarshan "Beyond the weapons of the weak" 12.
354 The WFP in South Africa offered support to these women through a Women's Rights Group around pertinent issues that these farm workers face, namely gender-based violence in the household (Solomon "Understanding the dynamics of an NGO/MBO partnership" 81).
355 In Brazil, this was the strategy of an existing trade union, CONTAG (Selwyn "Women and rural trade unions in North-East Brazil" 49).
356 Bonner and Spooner *The only school we have* 26.
357 Bonner and Spooner *The only school we have* 26.
358 The SEWA found that Kohl workers (patchwork quilt home workers) were too poor to lose their wages through industrial action (Hill *Women identity, agency and economic development* 74).

as strike actions are foreign to these women and result in harassment and victimisation within their societies.[359]

Women workers are particularly vulnerable as they often face discrimination on multiple grounds within their societies and places of work. Any organisation that endeavours to organise these workers successfully must include strategies aimed at both "economic injustices"[360] in the immediate workplace as well as cultural and societal injustices in the wider notion of societies and communities.[361] Negotiating and engaging with role players does not come naturally to poor women workers in the informal economy, due to their status in patriarchal societies and their lack of identity as workers. These skills must be developed by organisations representing these women, and this must include recognition on various levels and respect as women and as workers in the immediate society and at a wider public level.[362] The successful organisation of women in the informal economy will often require organisations to also address various social issues pertinent to lives of these women, such as harassment, gender inequalities, domestic violence and child labour.[363] When considering the empowerment of these workers, recognition is of the utmost importance. Recognition is also an important component of substantive equality, together with respect[364] and access to resources.[365] At a macrolevel, in respect of their work, this would include advocacy programmes with various government and other public authorities to recognise the value of their work in the informal economy and campaigns for the extension of labour and social protection to achieve decent work.[366] This recognition must translate into the inclusion of the informal economy in all policies and programmes, and should be based on accurate statistical information and evaluations.[367]

International awareness campaigns by international institutions such as the ILO and UN Women can play an important role in the achievement of recognition of these women by

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359 The Kohl workers in India were Muslim workers and had never before resorted to industrial action, and when they did they were harassed and victimised by contractors (Hill *Women identity, agency and economic development* 74).

360 Hill *Women identity, agency and economic development* 77.

361 Hill *Women identity, agency and economic development* 77.

362 Hill *Women identity, agency and economic development women's empowerment in the Indian informal economy* 128.

363 Narayan and Chikarmane "Power at the bottom of the heap" 218.

364 In any quest for equality, respect remains pertinent. In order to achieve this for women workers in the informal economy measures must be implemented that addresses stereotyping, discrimination and stigmatisation within societies (UN Women http://progress. unwomen.org/en/2015).

365 Resources in this respect refers to the redressing of social-economic disadvantages that these women face, such as lack of access to education.

366 Hill *Women identity, agency and economic development* 77.

367 Hill *Women identity, agency and economic development* 77.

states. At the macrolevel, social and cultural recognition will include campaigns to increase the visibility of these often invisible workers and the recognition of their contribution to the GDP of a country and the value thereof.[368] At the mesolevel, combating injustices at workplace level can include the establishment of alternative organisations to represent the interests of these workers, such as cooperatives, including social security cooperatives. Social and cultural recognition will include vocational training and the participation and recognition of these women in the wider public sphere.[369] Recognition at microlevel represents the immediate struggle against any injustices at workplace level, the lack of labour and social protection as well as victimisation, harassment and discrimination. At a societal level this would include education and training and the development of leadership among these workers. This holistic approach includes social, economic and political aspects which must all be seen as interrelated. This integrated approach enables these workers to influence wider policies and hence take control of their lives and have the freedom to live a life with dignity.

Sustainability of these organisations depends on strong leadership from within. The development of leadership links closely with the legal and economic empowerment of these women. A sense of self-worth and confidence must be instilled in these workers through a shared collective identity. This will enable these workers to take part in social dialogue on various levels and to be involved in decision making and influencing wider policies to improve their lives.[370] Studies have indicated that the motivation for joining

368 Hill *Women identity, agency and economic development* 77.

369 Hill *Women identity, agency and economic development* 77.

370 Narayan and Chikarmane "Power at the bottom of the heap" 216. HomeNet Thailand has been instrumental in advocacy campaigns to extend protection to workers in the informal economy. One of these campaigns included the extension of healthcare. Thailand has a Universal Healthcare Coverage Scheme that provides health coverage to all informal workers and which is financed through taxes. It focuses on primary care. Civil Society, including informal workers' organisations, were instrumental in the policy drafting and also in the implementation and monitoring (Alfers and Lund *Participatory policy making* 1). This illustrates the "participatory parity" principle Fraser refers to and highlights the notion of public participation through social dialogue with various role players allowing for inclusive representation, redistribution and recognition (Fraser *Scales of justice* 58-60). In terms of this principle, justice requires social arrangements that allow all to take part in social life on an equal footing. This is particularly valuable for women in the informal economy, as they are often excluded due to discrimination and inequalities at various levels within their communities. These women are not just excluded from taking part in social life, but also at another level, namely social dialogue with various role players. Women workers are often excluded through economic structures, cultural and institutional barriers and political barriers that deny them an equal voice. This universal scheme thus allows for women in the informal economy not to be excluded from coverage. The universal coverage is funded through taxation. This coverage has led to a major improvement in maternal and infant mortality (Alfers and Lund *Participatory policy making* 1).

trade unions by these workers includes formal and institutional recognition as workers, an increase in wages, and solidarity.[371]

In order to appeal to and successfully organise women workers in the informal economy, existing trade unions must consider innovative and tailor-made organisational strategies, innovative communication methods and appropriate contribution methods that take cognisance of the irregular and low income of these workers.[372]

7.11 Conclusions

Despite the many challenges that women workers in the informal economy face with reference to organisation and mobilisation, this chapter highlights numerous examples of women workers organising to improve their conditions. These examples exist despite the various barriers created by conventional collective bargaining models and conventional models designed to accommodate only those in formal employment. Although various role players are instrumental in the representation of these workers, ultimately it remains the responsibility of governments to create an enabling framework to ensure the adequate representation of these workers.[373] This enabling framework must be specifically designed for those in the informal economy, taking into consideration the diverse needs of the various categories of workers. In the design of such a framework, traditional concepts and institutions of organisation, mobilisation and representation, might not be suited towards the needs of these workers.

Various organisations are responsible for organising women in the informal economy. Organisations such as MBOs,[374] NGOs, civil society, national and international networks and cooperatives are examples of organisations that are successfully representing these workers. It is submitted that governments must adopt simplified registration procedures for organisations such as cooperatives, to allow for easy access.[375] The structures of cooperatives that allow for democratic governance and self-determination promote gender equality and the empowerment of women.[376]

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371 Hill *Women identity, agency and economic development* 73.

372 Fourie 2016 *ILJ* 842.

373 ILO Resolution concerning Decent Work and the Informal Economy, Conclusion 24.

374 These organisations are defined as "those in which members elect their leaders and which operate on democratic principles that hold the elected office accountable to the general membership (Bonner and Spooner *The only school we have*). These organisations are characterised by democracy, accountability and transparency.

375 Kerbage and Abdo *Cooperation among workers in the informal economy* xi.

376 Cooperatives, for example, allow for flexibility and self-determination with reference to working hours to accommodate the specific needs and challenges of women workers.

One of the most important aspects of the organisation of and giving a voice to these workers is the recognition of a worker identity. This recognition must include an identity as a worker that is recognised at workplace level and also includes social and self-recognition.[377]

In South Africa the objectives of the *LRA* should include other workers' organisations and should not be limited to trade unions, specifically in respect of bargaining and the formulation of industrial policies.[378] Governments should consider the empowerment of such organisations by creating a framework within which they can be supported, specifically in social dialogue structures and processes.[379] This means that workers in the informal economy must have the freedom to choose their own organisations in respect of representation, without fear of discrimination or harassment.[380] A framework that supports the organisational rights of these workers will reduce their vulnerability. In order to change their precarious position, it is extremely important that they are able to organise and mobilise and that their voices are heard. Women in the informal economy can be empowered through mobilisation and representation and this will improve gender justice and equality for women and can free them from patriarchal constraints and stereotyping in their societies.[381] Providing these workers with voice through various organisations will ensure that they can influence policy makers and improve their lives through sustainable policies and solutions.[382]

An analysis of these organisations indicates that initially these women often unite because of a common interest of priority, such as childcare or education for their children.[383] However, as the notions of solidarity and agency[384] become more familiar to them, these priorities often develop to include their own empowerment and education. In respect of these workers, agency must be developed through these organisations together with their collective and individual identity.[385] These workers then develop their identities as workers, as women in the immediate society and community and also as women seen as

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377 Kerbage and Abdo *Cooperation among workers in the informal economy* xiv.

378 Section 1 of the *LRA* provides the framework where employees, trade unions and employers' organisations can formulate industrial policies. Industrial policies can have an impact on women workers in the informal economy and it is of paramount importance that they are represented through their chosen organisations.

379 ILO Resolution concerning Decent Work and the Informal Economy, Conclusion 24.

380 ILO Resolution concerning Decent Work and the Informal Economy, Conclusion 24.

381 Kabeer, Milward and Sudarshan "Beyond the weapons of the weak"" 3.

382 Selwyn "Women and rural trade unions in North-East Brazil" 49.

383 Pande "Organising for life and livelihoods in the mountains of Uttarakhand" 104.

384 Agency is defined as "the capacity for reasoned and responsible action in response to a variety of external structures" (Hill *Women identity, agency and economic development* 113).

385 Hill *Women identity, agency and economic development* 116.

citizens in the wider framework.[386] The development of agency is thus closely linked to the recognition of an identity at various levels.[387] Organisational strategies must endeavour to increase the visibility and recognition of these women as workers. In support of a sustainable approach, they must empower these women and provide support when they negotiate with other role players, including employers and public authorities. Organisations and organisational strategies in different jurisdictions, for different categories of informal workers, vary according to the specific social, economic and political framework.[388] Accordingly, strategies to organise workers cannot always be transplanted to another context.[389] This means that whilst the existing legislative framework in a specific context influences the approaches to organising in that context, the mobilisation and organising of the workers can influence policy and legislative reforms.[390] On the one hand a legislative and policy context can determine the organisational response by workers, and on the other, as a result of these collaborative efforts through organising, workers can influence the necessary reforms.[391] The organisation of these women workers can be described as a process where:

> … development" is not seen as a series of short-run, results-orientated projects but as a longer-term process that may take unpredictable turns in which the most important role for external actors – funders, as well as facilitators – is that of supportive accompaniment. The gains we see here are the fruits of long difficult processes through which workers' organizations have evolved their own ways of working, their own strategies and their own goals. These modes of organization are practical as well as political, engaging tangible as well as symbolic resources in the process of building movements that slowly, softly, move from small acts that reclaim the right to have rights to bigger, more assertive actions. At the heart of these processes lies the struggle not just for better working conditions and workers' rights, but above all for recognition as human beings: for dignity and for citizenship.[392]

The large number of women in the informal economy requires policies to adopt a gender focus.[393] Sustainable poverty reduction strategies must be found to design programmes to address the development of skills of workers in the informal economy.[394] Governments must support basic education and can promote a market for skills useful in the informal

386 Hill *Women identity, agency and economic development* 116.
387 This development includes the enhancement of self-confidence, self-respect and self-esteem (Hill *Women identity, agency and economic development* 117).
388 Kerbage and Abdo *Cooperation among workers in the informal economy* 24.
389 Kerbage and Abdo *Cooperation among workers in the informal economy* 24.
390 Kerbage and Abdo *Cooperation among workers in the informal economy* 24.
391 Kerbage and Abdo *Cooperation among workers in the informal economy* 24.
392 Kabeer, Milward and Sudarshan "Beyond the weapons of the weak" xi.
393 Adams, De Silva and Razmara *Improving skills development in the informal sector* 8.
394 Adams, De Silva and Razmara *Improving skills development in the informal sector* 12.

economy, and private role players must be encouraged to be responsive to the needs of the informal economy.[395]

Trade unions must expand their membership base to include non-standard workers such as workers in the informal economy, including own-account workers, and provide assistance and support to workers' associations representing these workers. Trade unions must be more accessible in this regard. It can be argued that trade unions should provide some social protection measures to their members, and SEWA in India can be used as a model.[396] Le Roux proposes:

> … that agencies such as trade unions and other work-based communities should develop the capacity to be the custodians of at least some forms of social security.[397]

Despite numerous legislative and policy reforms by women through mobilisation and organisation, women in the informal economy continue to face major challenges.

Myrtle Witbooi, President of the International Domestic Workers Federation (IDWF) concludes:

> Our voices, our campaigns, take place day after day around the world. We will not, and cannot stop our work until all are free. We have shown the world that if women stand together and are united we can overcome all obstacles. Victory will be ours.[398]

395 Adams, De Silva and Razmara *Improving skills development in the informal sector* 14.
396 Le Roux 2014 *ILJ* 40.
397 Le Roux 2014 *ILJ* 40.
398 International Domestic Workers Federation 2016 http://www.idwfed.org/en/about-us-1/annual-report.

CHAPTER 8
CONCLUDING REMARKS AND RECOMMENDATIONS

8.1 General background

The world of work has changed and this includes the fundamental design, purpose and coverage of employment. New forms of work have emerged and non-standard work is increasing. The inability of labour law to protect the most vulnerable workers, including workers in the informal economy, led to debates about the function of labour law and the re-evaluation of its purpose. Davidov and Langille describe this as follows:

> The laws regulating and protecting people at work are in crisis. One dimension and cause of this dramatic situation is changes in the empirical reality of the world of work which results in millions of workers finding themselves outside the scope of labour law.[1]

Work in the informal economy is characterised by its heterogeneity, but despite this these workers share common challenges: they are not protected by labour and social protection measures or not adequately protected; they face many barriers to organise themselves and in many instances have no voice or representation; they are therefore extremely vulnerable.[2] It is of the utmost importance to find innovative solutions to extend labour and social protection measures to these workers.

Workers in the informal economy represent the majority of the "world's economically active population in the global south",[3] and they contribute to households, communities, and economies, and therefore must be afforded labour and social protection. It was also shown in this study that in many developing countries, work in the informal economy is the norm.[4]

When one considers the extension of labour and social protection to these workers an integrated approach is of paramount importance and this approach must include a realisation that the informal and formal economies are "mutually constituted and constitutive of one another". Work arrangements are often fluid in nature and workers

1 Davidov and Langille "Introduction: Goals and means in the regulation of work" 1.
2 Fudge "Blurring legal boundaries" 8. See para 1.1 above for the definitional scope of the informal economy based on the definition in the ILO Recommendation concerning the Transition from the Informal Economy to the Formal Economy 204 (2015).
3 Alfers, Lund and Moussié "Informal workers and the future of social protection" 7.
4 See para 1.1 above.

may move across boundaries between the formal and informal economy. A continuum of employment relations exists and highlights these linkages.[5]

Within the informal economy an employment pyramid with an identifiable hierarchy illustrates persistent occupational gender segregation, with women representative in more vulnerable work.[6] This research has shown that work in the informal economy is gendered and it poses a challenge to existing labour laws, norms and regulating frameworks. Women workers in the informal economy are particularly vulnerable. The times when their work was not seen as "real work" has now definitely passed and their contribution must be recognised and valued.

This thesis specifically focused on three categories of vulnerable women workers in the informal economy, namely domestic workers, waste pickers and informal traders.[7] Domestic workers, waste pickers and informal traders are vulnerable with reference to their social location as in most countries the interaction between the local political economy and social relations of subordination are linked, based on race, gender and caste. A combination of factors can thus contribute to the exploitation, marginalisation and vulnerabilities of these women.[8] Vulnerable employment, including work in the informal economy, has a distinct gendered element. Moreover, certain characteristics are persistent, such as irregular and low wages, inadequate labour and social protection and a lack of worker's identity, including the non-recognition of the worker's status.[9]

In South Africa, extending labour and social protection to workers in the informal economy is of paramount importance. Stats SA reports that one out of every two South Africans live in poverty.[10] This report indicates furthermore that African women,[11] children, people residing in rural areas, and people with low or no education are the most vulnerable.[12] According to the report women experience poverty more intensely than men, and female, child- and elderly headed households are also more disadvantaged.[13] Inequality in South

5 Fudge "Blurring legal boundaries" 8.
6 See also para 1.2 above.
7 See para 1.2.1 above.
8 See Chapters 4, 5, 6 and 7.
9 Fudge and Owens *Precarious work, women and the new economy* 8.
10 Stats SA *Poverty trends in South Africa* 16.
11 Stats SA *Poverty trends in South Africa* 7, 8. The number of women who live below the lower bound poverty level (this poverty line includes a non-food component) increased from 38,1% in 2011 to 41,7 % in 2015 (last report provided by Stats SA).
12 Stats SA *Poverty trends in South Africa* 34.
13 Stats SA *Poverty trends in South Africa* 30, 90, 91.

Africa persists despite a legal framework that promotes equality and prohibits discrimination.

8.2 Revisiting the research question

The focus of the thesis was identified in Chapter 1. It is against the above background that the primary research question required consideration: How can labour law and social protection measures provide vulnerable women workers in the informal economy with the appropriate protection to ultimately give effect to decent work?

The research highlights several opportunities and challenges in this regard, which in the next paragraphs will be reflected on to proceed to relevant conclusions and recommendations.

8.3 The function and future of labour law

The traditional focus of labour law on the archetypical worker in the traditional employment relationship is no longer sustainable and as the world of work changes, labour law faces fundamental challenges. Chapter 2 of this thesis considered the function and future of labour law. The current crisis that labour law faces is both conceptual and normative.[14]

In finding innovative solutions to extend labour protection to vulnerable women workers, the very idea of labour law must change and extend beyond the notion of the traditional employment relationship. The challenges in extending protection require an inclusive concept of labour law that at the same time embraces the concept of an overarching informal economy, but recognises the different types of activities and diverse nature of protection required. This requires innovative development and conceptual change to extend protection to these workers, in other words to apply the same values to new realities. This development will also require the adoption of new institutional frameworks to provide these workers with a voice and adequate protection. Moreover, what is required is conformation between the legal framework and the objectives that are to be promoted.[15] This requires an understanding of past, present and future goals of labour law.

In support of Kahn-Freund's notion that labour law is "a countervailing force" to oppose the inequalities in bargaining power inherent to the employment relationship, Weiss

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14 See para 2.6 above.
15 See para 2.6 above.

confirms that the principal objective of labour law is to compensate for the inequalities in bargaining power.[16] This paradigm must now be reworked, as this objective is challenged when workers are unable to mobilise or organise when excluded from existing labour laws and therefore marginalised and vulnerable. In this regard women workers are in a particularly precarious position, as their exclusion and marginalisation are exacerbated by stereotyping and gender discrimination. The traditional notion of collective bargaining requires an employer; however, for informal traders and waste pickers, bargaining partners extend beyond this paradigm to include state parties. The objective of labour law to act as a countervailing force to the inequalities of the employment relationship is not obsolete, but it needs to be reworked. This will require a new conceptual framework to provide for the realities of the new world of work. This new framework must recognise other bargaining partners and provide for worker organisations appropriate to workers outside the scope of those in formal employment. In many instances, the aim and subject matter of collective bargaining for workers may be wider than wages and can include recognition as workers, social protection measures, access to public spaces[17] as well as inclusion in public contracts.[18] A wider notion of outcomes can align the aims of collective bargaining with wider policy objectives. Innovative and tailor-made regulation will develop collective bargaining processes. In this regard labour law can play an enabling role[19] Although the main objective remains to balance the inequality in the work relationship and extending protection to all workers, collective bargaining must be reworked to accommodate the realities of the new world of work in respect of parties, topics for collective bargaining, and agreements and enforcement.

Sen's capabilities approach allows for the various vulnerabilities of women workers in the informal economy to be measured through the theory of capabilities deprivation.[20] Once the reasons for this deprivation and how they contribute to the vulnerabilities of women have been considered, we can design tailor-made approaches to target protection within a context specific framework. Identification of deprivations in a specific context, such as unrelenting gender roles, rigid cultural norms and stereotyping that contributes to the limited access of women to resources, can influence the design of a framework to empower women, prohibit discrimination and promote gender equality. An appropriate framework in this regard must recognise the importance of substantive equality while

16 Weiss "Re-inventing labour law" 44.
17 Informal traders require access to public spaces to earn a livelihood.
18 Waste pickers require inclusions in tender processes to obtain public contracts from local authorities to provide waste management services.
19 Du Toit 2007 *ILJ* 1409.
20 See para 2.2.3 above.

regard must also be had to the socio-economic circumstances of vulnerable women. This approach requires a paradigm shift from the traditional role of women as primary caregivers to one of shared responsibilities between role players. To adequately address the multifaceted position of women, various branches of the law must be considered that can include an interplay between family law and labour law with specific consideration to the traditional responsibilities of women as primary caregivers. Sen's approach must be supported by policy makers to design empowerment programmes that ensure sustainability and gender equality.

Sen's capabilities approach is context specific and highlights the notion of agency.[21] However, various shortcomings in this approach can be identified, such as the disregard for exploitation within social relations and organised collective capabilities. Without voice and mobilisation women workers will not achieve decent work and therefore Sen's approach cannot suffice in isolation. The expansion of freedoms and capabilities allows labour law to act as a developmental agent and through this the human dignity of workers is promoted.[22]

Finding innovative solutions requires the consideration of a human rights approach to extend protection to vulnerable women workers. In South Africa, India and Brazil, labour rights are protected in the respective constitutions of these countries. First, human dignity is found in various labour law and social protection texts, including international and regional instruments.[23] Although human rights are universal, the specific content may vary according to national jurisdictions. Human rights can only afford the necessary protection if these rights are justiciable and supported by an institutional framework that ensures compliances and enforcement. The right to human dignity has played an important role in the extension of protection to workers in the informal economy. In *South African Informal Traders Forum v City of Johannesburg*[24] the Constitutional Court directly linked the ability of informal traders to earn a livelihood to support themselves and their families to the right to human dignity. It is interesting to note that the court in Brazil, as in South Africa, linked the unlawful conduct of local authorities to the principle of human dignity and that their conduct denied traders and their families an income.[25] This illustrates the important link between work and human dignity as integrated components of decent work for all. Moreover, equality and specifically substantive equality must now be seen as an

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21 See para 2.2.3 above; see also Fudge "Labour as a 'fictive commodity'" 129.
22 See para 2.2.3 above.
23 See para 2.2.4 above.
24 2014 4 SA 371 (CC).
25 See para 6.3.2 above.

overarching value and a special function of labour law, providing protection to vulnerable workers, including women.[26] A human rights approach to the extension of protection to these women will increase their dignity and capabilities and can provide an outcome of legal and economic empowerment. Substantive equality and social justice requires consideration of their specific socio-economic circumstances as well as recognition of these women as workers, and this must include representation, participation and the promotion of a voice.

The livelihoods of these workers are dependent on regulatory frameworks of local authorities. Human rights enforced through litigation can be a tool through which these workers can gain protection as illustrated by the various judgments considered in this thesis.[27]

8.4 A conceptual framework

The exclusion of these workers from labour law and social protection measures often results from restricted conceptual frameworks. When these workers fall outside the ambit of the definitional framework of "employee" they do not enjoy significant protection. Although extensive coverage through legislative provisions will ensure uniformity and certainty, it is often left to the courts to determine the status of workers within a regulatory framework.

The new realities of the world of work require courts to purposively consider the definitional scope of labour regulation and often to extend protection to vulnerable workers.[28] Through the various court decisions, it became clear that two important factors play a role in the determination of the status of workers, namely control and the provision of tools.[29] For example, waste pickers often work under the control of local authorities with reference to waste management and in certain instances they were provided with protective clothing and trolleys (tools of the trade) to transport waste. Where contracts were concluded with authorities, waste pickers were provided with remuneration (fees) for their services. These factors may then be indicative of an "employment relationship" between these workers and the local authorities. In terms of section 200A of the *LRA*; (i) the fact that local authorities dictate the manner in which waste pickers must collect waste

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26 See para 2.2.4 above; Hepple 1996 *CLLPJ* 644.

27 See *Makwickana v eThekwini Municipality* 2015 3 SA 165 (KZD); *South African Informal Traders Forum v City of Johannesburg* 2014 4 SA 371 (CC); *Almitra H P Patel v Union of India* 15/02/2002; *Gainda Rum vs M.C.D.* (2010) 10 SCC 715; *Maharashtra Ekta Hawkers Union Municipal Corpn., Greater Mumbai* (2014) 1 SCC 490.

28 See para 2.5 above.

29 See para 2.5 above.

and provide for recycling, (ii) that waste pickers are economically dependent of the authorities as they are provided with remuneration for their services, and (iii) that they are provided with tools, leads to a finding that they may be presumed employees and enjoy protection under the *LRA* and the *BCEA*.[30]

8.5 The international and regional framework

The impact of the international and regional framework on women workers in the informal economy has been analysed in Chapter 3. International and regional instruments have had an impact on these women in various ways, including the promotion of equality and decent work. The technical support provided by the ILO has assisted developing countries in progressively implementing international standards. The importance of international law within the South African framework was also highlighted in Chapter 3.

8.5.1 The United Nations

The United Nations framework, including applicable instruments, is analysed in Chapter 3.[31] UN Women plays an important role in the promotion of gender equality for women and endeavours to realise the Sustainable Development Goals in this respect, specifically in respect of gender equality, the empowerment of women and decent work for all.[32] These goals reflect a sustainable, holistic and integrated approach as economic, social and environmental dimensions are reflected. Poverty is highlighted as the biggest challenge and through these goals the UN attempts to reach the poorest and most vulnerable in societies. UN Women has adopted a number of important strategies such as a participatory and integrated approach that allows for representation from various stakeholders.[33] UN Women strengthens these linkages with stakeholders at various levels through advocacy campaigns that highlight the challenges women face across the world and create an awareness of the plight of women. Important features of UN advocacy campaigns include the recognition that structural inequalities must be addressed as well as inherent gender norms.[34] The overarching theme of UN Women is gender equality and this is a precondition for all other goals.

The UN recognises that developing countries need assistance in the realisation of these goals and accepts the value of national and regional frameworks as supporting structures. The advocacy campaigns promote a notion of global solidarity. India, in its endeavours to

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30 Section 83A of the *BCEA*.
31 See para 3.2 above.
32 See para 3.2.2 above.
33 See para 3.2.2 above.
34 See para 3.2.2 above.

reach the Sustainable Developmental Goals, has ratified the ILO Minimum Age Convention (183) and the Worst Forms of Child Labour Convention (182) to enter into force in June 2018 and has amended legislative provisions to comply with these international standards.[35] This illustrates the impact of these goals and the various campaigns and programmes established by UN Women.

The actual achievement, realisation and implementation of these goals are important. The UN's strategy builds around the notion of global partnerships that include all stakeholders, such as the private sector, civil societies, interaction institutions and state parties, which allows for the mobilisation of resources and global support. This notion of global partnership is commendable and an improvement on the tripartite structure of the ILO.[36] At national level concrete policies and programmes must be designed and implemented. Countries must set realistic targets for the progressive achievement of these goals. It is important to monitor country progress and provide assistance when required.

8.5.2 The International Labour Organization

Although there have been more than 7900 ratifications of ILO conventions worldwide, the effectiveness of these instruments depends largely on the implementation of these standards into the national legislative framework of countries.

Although the eight core conventions were not specifically designed with the informal economy in mind, the use of wide conceptual notions such as "all workers without distinction" extends the scope to workers in the informal economy.[37] However, national policies and legal frameworks often still exclude informal economy workers from the scope of protection. It is recommended that countries review their conceptual framework to better align with such a wider and more generous scope. However, the general coverage of these workers through wide conceptual frameworks may not always be the most appropriate manner in which to extend protection to workers in the informal economy. The diverse nature of their employment as well as contextual vulnerabilities require instruments that are specifically designed for categories of workers in the informal economy.

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35 See para 3.3.2 above.

36 Women workers in the informal economy are often supported by organisations other than trade unions, such as civil societies and NGOs. It is therefore important that these organisations are involved in social dialogue and other participatory processes.

37 See para 3.3.2 above.

ILO conventions specifically designed for women workers in the informal economy include the Homework Convention[38] and the Domestic Workers Convention.[39] The Domestic Workers Convention addresses the specific challenges faced by these workers, including the importance of their recognition as workers. The impact of specific international instruments designed to protect workers in the informal economy such as the Domestic Workers Convention is evident. Various countries have used this convention as a benchmark to extend protection through national legislation.

Another international instrument specifically designed for the informal economy is the Recommendation concerning the Transition from the Informal to the Formal Economy.[40] The Recommendation contains guiding principles and the scope includes own-account workers such as waste pickers, members of cooperatives and informal traders. For developing countries, a progressive approach is recommended. Apart from the adoption of this recommendation by the ILO, the actual implementation of principles will be vital. Countries could identify a group of informal workers, such as domestic workers, waste pickers,[41] or informal traders, and initiate the transition through policies and strategies containing the above principles. Based on the Recommendation, member states need to design a policy framework to support the transition. The extension of labour and social protection to domestic workers in South Africa illustrates how the progressive transition can be facilitated through the identification of a group of workers. Although they still do not enjoy adequate protection,[42] they are in a better position than waste pickers and informal traders.

One of the most important principles in this recommendation highlights the necessity to address diversity through targeted approaches.

It is important that endeavours to facilitate the transition from the informal economy to the formal economy focus on sector- or category-specific demands around formalisation.[43]

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38 See para 3.3.6.3 above.

39 See para 3.3.6.4 above.

40 See para 3.3.6.8 above.

41 A transition for waste pickers from informality to formality can include monthly payments by local authorities for waste collection, transport and recycling by local authorities. This approach formalises the recognition and remuneration of waste pickers as categories of workers deserving of protection.

42 They remain excluded from the scope of the *Compensation for Occupational Injuries and Diseases Act* (*COIDA*) 130 of 1993. See Chapter 4 in respect of the regulation of protection for domestic workers in South Africa.

43 The value of work and the contribution to the economy by all women workers in the informal economy must be recognised (WIEGO Network Platform *Transitioning from the informal to the formal economy*).

This will require an analysis of the different sectors, for example, domestic workers, informal traders and waste pickers, and an identification of vulnerabilities and capability deprivations to ensure that tailor-made designs address the contextual framework of each category.

Unfortunately the recommendation has merely adopted the tripartite structure of the ILO without considering other role players involved in the informal economy. In addition to the facilitation of this transition, the ILO should also strive to promote decent work within the informal economy as a long-term goal, thus the transition should be seen as a continuous process of strengthening the rights and protection of these workers.

The adoption of this recommendation is important in the pursuit of decent work for those in the informal economy, but a better approach would support the abandonment of concepts such as informality and formality and focus on the underlying nature of work and the economic activities of vulnerable workers.[44]

Various challenges within the international regulatory framework exist. With reference to social protection measures, particularly social security standards, the ratification rate of developing countries remains low.[45] Although social security instruments are wide enough in coverage to include workers in the informal economy, they were not designed specifically for these workers. An extension to these workers remains challenging as contributions to schemes are problematic as a result of low or irregular income received by these workers. The lack of and employee-employer relationship that characterises own-account workers, such as waste pickers and informal traders, also poses challenges to the contributory framework of social security schemes. The focus of ILO instruments with reference to social security measures is based on the formal employment relationship, and this contributes to the marginalisation of women workers in the informal economy. The low contributory capacity of workers and their incompatible priority needs are not recognised.[46]

A better approach by the ILO in respect of the extension of social protection measures to women workers in the informal economy and specifically for developing countries, is the Social Protection Floors Recommendation 202 (2012). The recommendation allows countries with limited resources to progressively establish tailor-made lower cost schemes for those without adequate protection, including women workers in the informal economy.

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44 See para 3.3.6.8 above.
45 See para 3.3.7.1 above.
46 See para 3.3.7.1 above.

Furthermore an integrated approach is required and this will require empowerment and skills development programmes to be established to also develop skills and enhance women's opportunities for access to labour markets.[47] This approach thus addresses structural gender inequalities by recognising that women do not have access to resources and face various barriers to entry into the labour market. Social protection instruments must be engendered to ensure sustainable outcomes. The impact of this Recommendation is clear and various developing and middle-income countries, including India, are currently designing basic social security guarantees for those previously excluded.[48]

The principles of good governance listed in the Recommendation, including just administration, often remain a major challenge with reference to social security schemes.[49]

The tripartite structure of the ILO remains largely representative of the formal economy. This study established that various worker organisations other that trade unions are often better equipped to represent these women. These organisations include MBOs, NGOs, civil society and cooperatives. Often these organisations have strong links with international networks. The ILO must reconsider its tripartite structure to accommodate informal workers and their various representative organisations to form a platform where the voices of these women can be heard.

The concept of decent work could be used to provide impetus to the improvement of the precarious position of workers in the informal economy and decent work programmes of the ILO specifically target vulnerable women. The conceptual framework of decent work extends wider in scope than just the notion of "employee" and includes "worker". To create a new paradigm for workers in the informal economy, the notion of decent work must be even more clearly defined with clear content. The concept of decent work and the framework of transformative constitutionalism may form the basis for vulnerable workers in the informal economy in South Africa to be empowered to challenge the injustices of poverty that they face.[50]

8.5.3 Regional framework

Regional instruments do not function in isolation; they highlight the importance of international standards and support the implementation of these standards in national

47 See para 3.3.7 above.
48 See para 3.3.7 above.
49 Dijkhoff "Principles for national social protection floors" 34.
50 Le Roux "Advancing domestic workers' rights in a context of transformative constitutionalism" 56.

legislation. The empowerment of women is a key theme in most regional instruments, which support an integrated approach to the provision of labour and social protection for these vulnerable women workers. Regional instruments have been discussed in Chapter 3.[51]

These instruments address the specific challenges faced by women in the region,[52] whereas international instruments are often not as clear and precise with reference to distinct challenges and vulnerabilities experienced by women in specific regions. Regional regulation also supports "a shift from the universal to the local/contextual/ embedded" approach.[53] A number of these instruments highlight the importance of assisting women with family responsibilities as well as the recognition of the value of their contribution to the economy in respect of care work and domestic work. This is of particular importance in regions characterised by patriarchal societies. These instruments endeavour to change societal norms by highlighting these principles.

Implementation and enforcement in the region remain problematic due to regional instruments not being binding and effective. The AU faces many challenges in respect of the realisation of human rights, such as inadequate resources, lack of political support, and appropriate enforcement mechanisms.[54]

An important question is how international and regional standards are viewed by countries and why regional standards are developed. Regional standards may be better designed to extend tailor-made labour and social protection, considering common characteristics typical of a region.[55] However, the technical assistance provided by the ILO to developing countries in respect of labour and social protection has on numerous occasions resulted in the extension of protection to women workers in the informal economy.

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51 See para 3.4 above.

52 Such as HIV and AIDS. See also article 14 of the Protocol to the African Charter on Human and People's Rights on the Rights of Women in Africa.

53 Langille 2010 *CLLPJ* 542. The African Charter on Human and People's Rights provides for contextualisation within the region and this includes provisions such as the individual's duty to preserve and strengthen the African cultural values and the promotion of African unity. In line with this local, contextual approach, the section on harmful practices in the Protocol provides for legislative prohibitions on female genital mutilation (article 5(b)).

54 Mpedi and Nyenti *Key international, regional and national instruments regulating social security in the SADC* 113.

55 Pennings "Different levels of standard setting: Introduction" 42.

8.6 The contemporary national legal framework

8.6.1 Domestic workers

The majority of domestic workers in South Africa are women from a previously disadvantaged group. Their position within the South African regulatory framework has been discussed in Chapter 4. Domestic workers in South Africa enjoy more labour and social protection than waste pickers and informal traders. Nevertheless, they remain vulnerable and their work conditions precarious due to many challenges in respect of the enforcement of rights, and are still *de facto* not covered or insufficiently covered by formal arrangements.[56] The fact that they are "in law or in practice not covered or insufficiently covered" means that they fall within the scope of the definition of "informal economy" as provided for in ILO Recommendation 204 of 2015. The inclusion of domestic workers in the scope of the definition of "employee" in the labour law framework afforded them protection, including in terms of the *LRA*, *BCEA* and *EEA*. Sectoral Determination 7 provides for specific terms and conditions for these workers. Moreover, they also enjoy constitutional protection.

The inclusion of domestic workers within the conceptual framework of labour legislation is an example of extending protection to workers in the informal economy through existing provisions. Although such widened scope of application is welcomed, the unique and intimate nature of domestic work requires tailor-made provisions and many challenges remain because the focal point of labour legislation in South Africa remains those in formal employment.

An example of challenges experienced with the mere extension of existing provisions is the regulation of severance pay.[57] Current provisions disregard the intimate and unique nature of domestic work, as it provides for the loss of severance pay when alternative employment is unreasonably refused. It is recommended that the courts must consider the nature of domestic work when determining an unreasonable refusal. Moreover, the *BCEA* and the Sectoral Determination should be amended to provide for consideration of the nature of domestic work in this regard. The success of the extension of existing provisions depends on the degree of consideration given to the contextual framework of the category of workers it aims to protect. The intimate nature of the domestic work relationship requires specifically designed remedies.[58]

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56 See for example Chapter 4; *Majola v Moonsamy* (2004) 25 *ILJ* 153 (CCMA).
57 See clause 27(3) of Sectoral Determination 7 and s 41(4) of the *BCEA*.
58 See para 4.3.3.1 above.

The viability of remedies such as reinstatement or re-employment for domestic workers must be considered and provision should be made for mediation to accompany these remedies to establish their viability. The impact of a dismissal that may result in the worker losing her accommodation must also be discounted.[59]

The referral of automatically unfair dismissal disputes to the Labour Court remains problematic, as these workers often do not have the financial resources associated with litigation.[60] The precarious position of women workers in the informal economy, including the fact that they are continually exposed to discriminatory practices, means that section 187(1)(e) and (f) of the *LRA* are important provisions for them as they provide protection against discrimination on grounds such as pregnancy, race, gender , sex, marital status and family responsibilities. The mere extension of this provision to domestic workers did not, however, consider their specific barriers in respect of access to resources. In the absence of tailor-made provisions, it is recommended that the *LRA* is amended to incorporate provisions for the category of domestic workers to provide a choice to employees to refer the matter either to the CCMA of the Labour Court (similar to the provision in section 191(12)). The unfair labour practice framework in the *LRA* was designed for those in formal employment relationships and are in many instances not appropriate or suited to domestic work.[61]

Domestic workers are included in the scope of the *EEA*.[62] An important provision of the *EEA* is the prohibition of both direct and indirect discrimination on grounds listed in section 6(1) or on other arbitrary grounds.[63] Harassment is one of the biggest challenges that domestic workers face and therefore section 6(3) provides important protection against harassment. In line with the international obligations with reference to access of justice for these workers, section 10 provides that these disputes can now be referred to the CCMA.

It is recommended that domestic workers are included within the scope of the *Domestic Violence Act* 116 of 1998.[64] Specific provisions that allow the South African Police Service to provide assistance, shelter and medical treatment are important provisions for domestic workers, because of their intimate employment relationship and in instances where they also reside at their place of worker, the provision of shelter can be of particular

59 See para 4.3.3.1 above.
60 See para 4.3.3.1 above.
61 See para 4.3.3.1 above.
62 See para 4.3.6 above.
63 See s 6(1).
64 See para 4.3.6 above.

importance. In India, when harassment is alleged, a criminal case is also opened, allowing an innovative provision for the domestic work relationship.[65]

Regulation of harassment as a form of discrimination on any of the listed grounds in the workplace is dependent on an enabling framework both for the prevention and for addressing harassment in the workplace.[66] Unions and other worker organisations can play an important role in national and international advocacy campaigns against violence and harassment at work. Remote and isolated workplaces of many women workers in the informal economy pose major challenges in this regard.[67] International organisations are campaigning for publicising of data in respect of violence and harassment at work, to raise awareness in this regard.[68] It is important that harassment is made a key issue within any health and safety policy designs, initiatives and programmes, including HIV and AIDS strategies and programmes.[69] Governments must ensure that labour inspectors play a vital role in the prevention of harassment in the workplace. This can be attained through training and awareness campaigns. Studies indicate that collective bargaining and social dialogue [70] within this framework are important tools in combating violence and harassment, through collective agreements that provide for measures to address this in the workplace. [71] Collective agreements can provide measures on how to address harassment and violence in the workplace and this can lead to the development of policies and good practices.[72] However, for workers in the informal economy who are mostly without collective bargaining structures this is not a possibility. Waste pickers and informal traders are often harassed by local authorities, and without an employee-employer relationship collective agreements are not an appropriate tool to address harassment.[73] A regulatory legislative framework applicable to these workers will be more suitable considering the nature of their work. [74] In the case of domestic workers, existing

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65 See para 6.3.1.1 above.

66 Pillinger *Violence and harassment against women and men in the world of work* xii.

67 Pillinger *Violence and harassment against women and men in the world of work* xiii.

68 Pillinger *Violence and harassment against women and men in the world of work* xiv.

69 Pillinger *Violence and harassment against women and men in the world of work* 3.

70 Pillinger *Violence and harassment against women and men in the world of work* xii.

71 Pillinger *Violence and harassment against women and men in the world of work* xii, 25.

72 The South African Commercial Catering and Allied workers Union (SACCAWU) concluded a collective bargaining agreement on gender-based violence and this agreement focuses on an integrated approach and addresses this issue in HIV and AIDS policies and includes the impact of domestic violence at work. In Brazil an agreement between São Paulo, Osasco and the Regional Bank workers Union concluded a collective agreement that provides for the prevention of violence and bullying of workers (Pillinger *Violence and harassment against women and men in the world of work* 29, 30).

73 See Chapter 7 with reference to alternative bargaining structures for waste pickers and informal traders.

74 See Chapter 5 with reference to a regulatory framework for waste pickers and informal traders.

bargaining structures remain a major challenge and harassment must be addressed through an appropriate legislative and regulatory framework, such as section 6(3) of the *EEA*. Affordable and easily accessible fora to hear these disputes are important to vulnerable women workers with reference to harassment disputes.[75] Violence and harassment in the workplace are core health and safety issues and these forms of abuse impair the human dignity of workers and must be addressed. A better approach towards women workers in the informal economy can include the training of health and safety representatives in cooperation with the Department of Labour and Health to play an active role in the prevention of harassment in the workplace.[76]

The sectoral determination is perhaps hybrid in nature as it endeavours to extend existing provisions of the *BCEA* to provide for the domestic work relationship and at the same time endeavours to regulate the unique challenges associated with this work relationship.[77] The conceptual framework of the sectoral determination extends coverage to independent contractors, unlike the *BCEA*, and this prevents exploitation by employers by way of disguised employment of domestic workers.[78] The inclusion of independent contractors reflects on the tailor-made nature of the sectoral determination to widen the scope of coverage, specifically to protect those most vulnerable in domestic work. If we consider a sectoral determination as a tool for the extension of protection to vulnerable workers such as informal traders and waste pickers, their distinct work situation immediately poses challenges as there is no employer and they are in most instances own-account workers.

The provisions in the determination with reference to accommodation costs payable by the workers appear unconstitutional, with specific reference to section 23(1).[79] The sectoral determination does not provide adequate consideration for the socio-economic circumstance of these workers. Substantive equality requires an analysis of their circumstances and it is recommended that if employers require these workers to reside on their premises, accommodation must be provided without charge. This promotes human dignity, fair labour practices and decent work for a particularly vulnerable group of workers.

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75 See s 10 of the *EEA*.

76 Currently such a project has been established by the International Union of Food and Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Association (IUF) and the Department of Labour. The representatives have been provide with access to farms and other workplaces (Pillinger *Violence and harassment against women and men in the world of work* 34).

77 See para 4.3.4 above. Provisions are made with reference to food and accommodation.

78 See para 4.3.4 above.

79 See para 4.3.4 above.

The remaining nature of informality with reference to domestic workers in South Africa can to a large extent be contributed to an inadequate and inappropriate regulatory framework. Their work thus remains informal as legal compliance in practice is negligible and non-compliance is tolerated through ineffective monitoring. The labour inspection framework as an enforcement and compliance mechanism for domestic workers is currently inadequate. Although provisions provide specifically for access to private homes, other tailor-made provisions are absent. In order for labour inspectors in South Africa to provide appropriate enforcement, additional training must be provided to ensure an understanding of the unique challenges associated with domestic work. Social dialogue through a participatory approach must be promoted to include all role players, including representatives of the Unemployment Insurance Fund.

It is recommended that a number of inspectors are specifically allocated to and trained for the domestic sector. Instead of a punitive approach to compliance, for example with contributions to the Unemployment Insurance fund, a reward approach may be more effective. It is recommended that employers that contribute to the Unemployment Insurance Fund for domestic workers receive a tax incentive to encourage compliance. With specific reference to the intimate nature of this relationship, and in support of a more sustainable approach, it is also recommended that labour inspectors adopt a supportive role with reference to compliance that includes conciliation and mediation between the parties. The regulation of domestic workers in South Africa is perhaps an indication that the relevant decision makers are not sensitive to the specific contextual framework of these workers. When regulating domestic workers it is necessary to recognise them as workers and to promote an understanding of the value of their work within households, communities and at national level. Labour inspectors can also play an important role in combatting harassment through awareness and advocacy campaigns.

In order to ensure adequate protection through enforcement, the systemic non-compliance experienced at present must be identified and addressed.[80] If one considers the purpose of a regulatory framework and the dimension of substantive equality as supported by our Constitution, it is submitted that women workers in the informal economy require a tailor-made innovative institutional framework to ensure adequate labour and social protection, including effective enforcement of compliance with provisions.[81]

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80 Du Toit *Informal Workers Study Group* (email conversation 4 July 2017).
81 Du Toit *Informal Workers Study Group* (email conversation 4 July 2017).

8.6.2 Waste pickers and informal traders: a general overview

Both these categories of informal workers are excluded from labour legislation in South Africa as they do not fall within the traditional conceptual framework of the definition of "employee". The position of these workers in South Africa is analysed in Chapter 5. Being classified as own-account workers, they are reliant on other branches of the law, often outside the labour law framework, such as constitutional and administrative law, for protection against the inequalities of their work relationship. Comprehensive uniform regulation is lacking and their regulatory framework is fragmented, consisting of *ad hoc* policies and by-laws, issued by different local authorities. With reference to informal traders, policies and by-laws are characterised by punitive and criminalising approaches, rather than by enabling frameworks that promote the constitutional objectives of social and economic development.[82] The result of the current regulatory framework is that informality is frequently linked with criminalisation and punitive measures.

Within the constitutional framework, the objectives of local authorities include social and economic development, as well as the promotion of social dialogue within communities. Both these objectives are applicable to the regulatory framework of informal traders and waste pickers.[83] The fragmented approach followed at present contributes to inequalities in respect of enforcement of regulations. Without overarching comprehensive national regulation, informal traders and waste pickers operate within a conflicting legal environment.

The constitutional framework plays an important role with reference to the duties and responsibilities of local authorities.[84] Local authorities are bound by the Constitution and their conduct and laws must be constitutional. Constitutional rights are an important tool within a rights-based framework, to protect vulnerable workers against unconstitutional state conduct. Through recourse to the courts, workers can enforce their rights. To ensure access to justice and enable these vulnerable workers to enforce their rights, they are often reliant on legal assistance from various legal aid sources. Through litigation these workers are then able to protect their livelihoods.[85] In *Makwickana v eThekwini Municipality,*[86] the High Court extended protection to informal traders and highlighted

82 See s 152(c) of the Constitution.
83 See s 152(c) and (e) of the Constitution.
84 See para 5.2 above.
85 *Makwickana v eThekwini Municipality* 2015 3 SA 165 (KZD); *South African Informal Traders Forum v City of Johannesburg* 2014 4 SA 371 (CC).
86 2015 3 SA 165 (KZD).

important factors that have an impact on vulnerable workers.[87] In *South African Informal Traders Forum v City of Johannesburg*[88] the Constitutional Court directly linked unconstitutional conduct by the city to the right to human dignity and its interrelationship with the ability to earn money and support families.[89] This judgment resulted in a paradigm shift in the policy framework in Johannesburg with reference to the regulation of informal traders, and the city, in line with its obligations, had to provide shelter, storage and access to basic services such as sanitation. These judgments provided remedies for the poorest and most vulnerable members of society, and highlighted the obligations of local authorities to ensure accountability and transparency in line with the Constitution.

The administrative law framework can also provide remedies to these workers with specific reference to all matters that have an impact on the regulation of licenses, the allocation of public spaces and the confiscation and impoundment of goods.[90] Informal traders thus enjoy remedies as workers outside the labour framework; however, this is not adequate and comprehensive regulation will provide better protection. An inadequate regulatory framework contributes to the vulnerability of these workers. This also means that in the extension of protection to these workers they must often rely on the enforcement of their rights through court structures. This is problematic as access to courts is dependent on financial resources that these workers do not have.

An appropriate regulatory framework, adequate enforcement mechanisms and a responsive regulatory institutional framework that promotes social dialogue and participatory approaches offer more sustainable solutions than punitive and criminalising approaches in respect of the extension of protection to these workers.

The *Employment Services Act* 4 of 2014 includes within its conceptual framework the self-employed. Section 6 of the Act may provide opportunities for both waste pickers an informal traders, and through this provision, the state can establish schemes that provide opportunities of self-employment. It is recommended that local authorities, through this enabling provision, must therefore design waste management schemes that include waste pickers in local waste management. Municipalities can also provide informal traders with opportunities of self-employment. With specific reference to waste management systems and self-employment schemes as provided for in section 6, an important provision is that the employment of any person in terms of schemes contemplated above, is subjected to

87 See paras 5.2 and 5.5 above.
88 2014 4 SA 371 (CC).
89 See para 5.2 and 5.5 above.
90 See para 5.5 above.

minimum terms and conditions as established by the *BCEA* (section 6(2)). This will allow waste pickers who are employed through these schemes, within the waste management systems of local authorities, to enjoy minimum terms and conditions of employment. In line with a sustainable approach, access to education and training for vulnerable work seekers must be facilitated. It is recommended that this provision be used to train vulnerable work seekers with reference to occupational health and safety measures within various workplaces.

One of the biggest challenges that women traders and waste pickers face, is harassment by authorities. As informal traders and waste pickers are excluded from the scope of the *EEA*, in particular section 6, it is recommended that remedies can be provided for by *PEPUDA*. This Act specifically provides for unfair discrimination based on gender – an important provision for vulnerable women workers – and includes limitations with reference to access to social protection measures, including lack of social security, the denial of access to opportunities and systemic inequalities to opportunities as a result of gender divisions of labour.[91] It is recommended that women waste pickers who are unfairly denied opportunities by local authorities to provide waste management services may find remedies within the scope of *PEPUDA*, based on the specific gender discrimination provisions in section 8.[92] Women street traders also enjoy protection under this Act and relevant discriminatory practices may include harassment by local authorities and the unlawful removal of their goods. Another important aspect of *PEPUDA* is that it provides easy access to courts and this is important for vulnerable workers.[93]

Any regulatory framework, including policies and strategies, must recognise both waste pickers and informal traders as workers and promote inclusiveness and social dialogue whilst addressing gender inequalities. Once they have been recognised as workers, tailor-made measures must address the specific challenges associated with each category and decent work deficits must be reduced. Any policy framework for waste pickers and informal traders must promote inclusiveness in participatory processes through social dialogue. Fora must be established where these workers and their organisations are represented to provide them with a voice. To promote gender equality women must be included in social dialogue, and provisions must address mandatory representation of women on various platforms. For policies to be successful, gender-related concerns must be addressed in the design, implementation and enforcement.

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91 See para 5.3 above.
92 See para 5.3 above.
93 See para 5.3 above.

Responsive regulation must target categories of workers and make regulations according to their specific challenges. Waste pickers can be identified as a group and analysed according to their challenges. A regulatory framework must then be designed to address challenges specific to this category in the informal economy. This can entail specific regulation with reference to occupational health and safety, including protective clothing, training and empowerment programmes. Childcare facilities must be considered as their workplace, for example landfill sites, is not safe for children to accompany their mothers, and care responsibilities can hamper their ability to earn a livelihood. Local authorities can enter into arrangements for waste management services with waste pickers, either individually or through organisations such as cooperatives. Such agreements could include provision of designated spaces for sorting and storage of materials.

A paradigm shift in urban policies is required. Policies and by-laws must aim to create enabling frameworks to allow these workers to take part in economies within cities. A participatory approach that includes all stakeholders must be promoted. Through engagement processes local authorities can establish consultative meetings within their jurisdictions to involve these workers in decision-making processes that affect their livelihoods. Transparency is of the utmost importance with reference to the regulatory framework as well as the balance of rights and responsibilities between informal traders, waste pickers and the state.[94]

Strategies that inform policies must promote sustainable development, including empowerment objectives with reference to skills training, access to education and development to support women participation rates in the labour market. Strategies must also address wider issues such as economic growth, the creation of decent jobs in the formal economy and promotion of entrepreneurship, cooperatives and all other social and solidarity economic units.

8.6.2.1 Informal traders

The *Business Act* 71 of 1991 regulates licensing and issues pertaining to informal trading.[95] Various limitations can be identified with reference to the act, namely its punitive and criminalising approach towards the regulation of informal trading and the lack of promotion of participatory approaches through social dialogue with all role players. It is recommended that any regulatory framework must shift from a punitive framework

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94 Rogan and Roever *Creating "cities for all"*.
95 See para 5.1 above.

to a responsive paradigm that recognises these traders as workers and promotes the value of their contribution to urban and city lives.

It is recommended that comprehensive national legislation to regulate informal traders in South Africa (as is found in Brazil) is enacted. Within the jurisdictions of the various local authorities, specific factors may impact on the regulatory framework and apart from an overarching legal framework, local authorities may enact by-laws to address specific challenges within their specific areas. By-laws can function as supplementary regulation to national legislation and provide for specific challenges, such as access to public spaces within local authority jurisdictions. This will require an analysis of the activities of informal traders and the consideration of sustainable solutions and the facilitation of a transitioning process from informality to formality through the extension of adequate protection to these workers. It is submitted that social protection measures such as access to healthcare, including maternity benefits, occupational health and safety, unemployment protection and adequate childcare provisions are important factors that must be considered when extending protection to these workers. Any transition from informality must address the root causes of their vulnerabilities to promote sustainability.

It is recommended that national legislation is enacted to provide tailor-made provisions for the regulation of informal traders in South Africa based on the Brazilian example.

It is further recommended that legislation at national level provides for the following in its preamble as national objectives with which local authorities must comply:

(a) the promotion of facilitation of informal trade;
(b) a paradigm shift from restrictive conditions to an enabling framework;[96]
(c) the promotion of vulnerable groups, such as women;
(d) an integration of economic and social goals; and
(e) recognition of traders as "workers" in the applicable conceptual framework (this must be supported by the recognition of their value and contribution to economies and this impact on the alleviation of poverty).[97]

At national level the legislation must provide for:

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96 Access to permits must not be expensive or dependent on complicated procedures.

97 See para 5.5.1 above, as well as the City of Cape Town's Informal Trading Policy 2013 10. This recognition by the city confirms the legitimacy of the informal economy with reference to employment and economic growth. The role of the informal economy in sustaining livelihoods and therefore its social and economic role is highlighted. This also represents a shift from criminalising the activities in the informal economy.

(a) uniform registration procedures that are speedy, easy and inexpensive, and verification methods such as smartcard systems to prevent harassment of registered traders;
(b) facilitation of training programmes and access to education by local authorities to ensure sustainability, and empowerment of vulnerable women;[98]
(c) promotion of social dialogue and participatory approaches, and a representative structure that allows for worker representation through various applicable worker organisations, including NGOs and civil society where applicable;[99]
(d) specific provisions must provide for a mandatory percentage of women to be on representative structures
(e) the establishment of a dispute resolution forum that provides easy access and promotes representivity among role players and allows for representation by women workers;[100]
(f) responsibilities of local authorities and informal traders must be clearly defined; and
(g) to place an obligation on local authorities to provide certain basic social protection measures for informal traders, including access to water and sanitation and including childcare facilities for women.[101]

It is recommended that by-laws and policies can function as supplementary regulation to national legislation and to provide for specific challenges, such as access to public spaces within local authority jurisdictions. Moreover, policies must address structural gender inequalities and reflect a gendered approach.[102] By-laws and policies can give content to the national laws and can provide for the regulation of allocation for specific trading spaces as this will be determined by area of the local authority. Once the obligation of social protection measures is placed on the local authorities, by-laws and policies can provide specifications according to local authority jurisdiction and contextual framework. Specific

98 See paras 5.5 and 5.5.2.1 above. The Informal Trade Policy of the City of Johannesburg now provides for training and mentorship programmes. Mentorship programmes include the development of basic business and entrepreneurial skills and training programmes promote both legal and economy empowerment.
99 See para 5.5.2.3 above. The Warwick Junction project in Durban highlights the value and importance of social dialogue, responsive regulation and "meaningful participation".
100 See para 5.5.2.1 above for the Informal Trade Policy of the City of Johannesburg part F para 17.
101 See para 8.7 below.
102 This can be achieved through specific training and empowerment programmes for women to allow easier access into labour markets as well as access to resources. An approach that promotes equality is in line with the Constitution and provides opportunities to women as envisaged by s 8 of *PEPUDA*.

training and empowerment programmes can also be established through a local regulatory framework to provide specific provisions according to the contextual framework of workers within the local authorities' jurisdiction.

8.6.2.2 Waste pickers

Women waste pickers represent one of the most vulnerable categories of workers in the informal economy, and regulation in South Africa in respect of these workers is characterised by fragmentation and inequalities.[103] Similar to informal traders, comprehensive national legislation is lacking. For women workers in South Africa, waste picking is often a survivalist activity.

With reference to the integration of waste pickers in the waste management system, the Expanded Public Works Programme includes waste management as a public works programme and this can be an important tool to integrate waste pickers into local waste management systems and formalise their arrangements with local authorities. South Africa, similar to Brazil and India, has established a waste integration programme.[104] Important principles in this programme focus on the empowerment of waste pickers and training programmes provide for information on city policies with reference to waste management and the enhancement of skills, including negotiation skills. The appointment of private waste management service providers affects the ability of these workers to earn a living and these decisions are often made without consultation with relevant role players.

It is recommended that, similar to the case of informal traders, overarching national legislation is enacted to extend targeted protection to these waste pickers. National legislation must provide for objectives such as the following:

(a) the recognition of waste pickers as workers and recognition of their contribution to the environment and the contribution of these activities to the alleviation of poverty;[105]
(b) the promotion of constitutional values such as equality, human dignity and freedom;
(c) the promotion and facilitation of an integrated and enabling framework;

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103 See para 5.6 above.
104 See para 5.6 above.
105 The importance of the use of "worker" with reference to own-account workers such as informal traders and waste pickers is that it "implies that the pursuit of an income is a key activity in which the person or people being discussed are involved" (Alfers, Lund and Moussié "Informal workers and the future of social protection" 15).

(d) the promotion of vulnerable groups, such as women; and
(e) an integration of economic and social goals.

Moreover, provisions in national legislation must allow for the following:

(a) a registration system of waste pickers by local authorities and the issue of identification cards (smartcards) which will promote their legitimacy as workers and provide for a more secure environment;
(b) the provision of storage space at local waste sites, equipment and protective clothing and access to basic services such as water and sanitation to promote health and safety;
(c) an obligation on local authorities to provide policies that focus on an engendered approach to promote substantive equality through tailor-made provisions that address the specific challenges women face (challenges include various forms of harassment, lack of access to health services and lack of childcare facilities);
(d) adequate social protection measures such as childcare facilities and access to basic health services;
(e) representation of all role players and promotion of a participatory approach through social dialogue (narrow conceptual frameworks must be avoided in any regulation that allows for representation and participation;)
(f) empowerment provisions that specifically target vulnerable women with reference to training and education; and
(g) good governance must be promoted and this must include transparency and participatory frameworks that encourage social dialogs and allow representation of all stakeholders.

It is recommended that by-laws and policies be enacted to give content to the above within the jurisdictional framework of the different local authorities. These provisions can regulate storage facilities at various waste management sites and specific provisions with reference to protective clothing and tools.

8.6.3 Social protection measures

Women workers in the informal economy do not enjoy adequate social protection measures, as has been discussed in Chapters 4, 5 and 6. For these vulnerable women workers these exclusions render them unable to protect themselves against risks such as

unemployment and maternity and therefore they remain in poverty.[106] Challenges must be addressed and vulnerable women workers must be provided with adequate social protection measures to ensure a life and work with human dignity and to ensure decent work.

One of the biggest challenges faced by women workers in the informal economy is maternity protection and adequate childcare facilities.[107] Currently the provision of childcare facilities is categorised as a function of local authorities and this is listed in schedule 4 part B of the Constitution.[108]

It is recommended that state parties in South Africa consider the provision of adequate public childcare facilities to vulnerable women. If one considers the challenges that women face in respect of gender inequalities and gender discrimination, quality childcare is of the utmost importance for women.[109] This also has an impact on the role of women as primary caregivers in many countries and links directly to unpaid care duties and the impact of care giving on earning a living. The provisions in Brazil for childcare facilities for waste pickers are an example to consider.[110] Public childcare facilities should be established, with the support and political will from state parties (reference can be made once again to the approach of SEWA in India).[111] Childcare programmes must also be established and integrated with the childcare facilities to provide for health services, such as vaccinations, educational programmes in respect of nutrition and health challenges. Programmes must also focus on creating an awareness of shared responsibilities between men and women in respect of care and domestic duties. It is submitted that without adequate childcare, substantive equality will never be realised in respect of women workers. The provision of childcare will allow these women to earn a regular income and improve their livelihoods. It is recommended that legislation must obligate local authorities to provide childcare facilities to vulnerable women workers.

When we consider the labour and social protection of women in the informal economy the specific place of work and the role players in control or in a regulatory capacity of the workplace are relevant, as this will affect the protection measures. Identifying the workplace of these workers is the start in any identification process and must then be linked to sector, occupation and employment status to ensure that adequate measures

106 Olivier "Gender discrimination in labour law and social security" 235.
107 See paras 4.4 and 5.7 above.
108 See para 5.7 above.
109 See para 5.7 above.
110 See paras 6.3.2.5 and 6.4.1 above.
111 See para 7.9.1 above.

are designed to comprehensively address the labour and social protection of women workers.[112]

Strategies aimed at extending social protection measures to these women must address their specific vulnerabilities and recognise the existing structural inequalities. In a nutshell, these measures must promote substantive equality and redress pervasive imbalances.

It is recommended that developing and middle-income countries follow the approach provided for by the Recommendation on Social Protection Floors and initiate coverage in a progressive manner with a set of basic social security guarantees. This approach allows countries to achieve comparable outcomes within a different contextual framework and, for South Africa, this approach supports substantive equality and a focus on equality as an outcome.[113]

8.7 The South African social security framework

8.7.1 The social insurance framework

8.7.1.1 Occupational health and safety

Domestic workers enjoy coverage with reference to the *Occupational Health and Safety Act* 85 of 1993. All three categories of informal workers are however excluded from the scope of *COIDA*. Domestic workers will have to rely on their common-law remedies to institute action against their employer, but the high costs involved in civil litigation will deter most domestic workers. This exclusion in the current regulatory framework appears to be unconstitutional with reference to section 27(2) that requires the state to take reasonable legislative or other measures in relation to the fundamental right to social security. If we consider that most of these workers are black women, representative of a previously disadvantaged group, their exclusion is discriminatory, based on grounds such as gender and race. The exclusion contravenes our international obligations in terms of the Domestic Workers Convention as these workers are clearly treated less favourably.

It is recommended that barriers to the extension of existing provisions to domestic workers are identified, such as the problematic nature of enforcement and compliance, and that specific provisions are drawn up extending coverage. *COIDA* can specifically provide for domestic workers as is currently the position with the *Unemployment Insurance Act*. This Act now covers domestic workers and there are a number of tailor-

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112 Vanek, Chen and Raveendran *A guide to obtaining data on types of informal workers in official statistics* 2.

113 Van Niekerk *Law@Work* 122; Du Toit *Informal Workers Study Group* (email group discussions 4 July 2017).

made provisions in the Act that are specifically applicable to domestic workers. Specifically designed provisions will be beneficial as specific occupational hazards can be identified and addressed and enforcement and compliance methods can be designed to overcome specific challenges. Inspectors must be trained with specific reference to domestic work and how to be responsive to workers and employers in this sector. It is recommended that in line with article 14 of the ILO Domestic Workers Convention, the Department of Labour should consult with worker organisations, such as SADAWU, to promote responsive regulation and to provide these workers with adequate protection against employment injuries.[114] Challenges with the private home as the place of work or the fact that these workers have multiple employers should be accounted for so that schemes are able to deal with the administrative challenges in this regard.

Awareness campaigns must be established to educate and train both employers and employees with regard to safety in the workplace (especially where this is a private dwelling). Domestic workers are often isolated and support structures must be established to assist these workers with regard to dealing with employment injuries. If coverage is to be extended to include domestic workers, tax incentives are recommended to promote compliance by employers. It should be mentioned that although domestic workers, informal traders and waste pickers are excluded from *COIDA*, they may benefit from the disability grant if they are unable to work due to a mental or physical disability. The result of this is that the costs of employment injuries are transferred from the employer of the domestic worker to the taxpayers.

Occupational health and safety measures for informal traders and waste pickers are problematic. Waste picking poses high occupational health and safety risks. Financial support can be obtained through linkages with industry-based funds or group insurance.[115] Local authorities can play an important role through awareness campaigns, highlighting risks, and through training programmes to minimise risks associated with each category.[116] A redesign of existing measures should also include implementation and enforcement measures.

Provision of healthcare is an important part of social protection for these women. The remoteness of the workplace of many of these workers has been highlighted. Travelling

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114 Malherbe "Implementing domestic workers social security rights in a framework of transformative constitutionalism" 127.

115 See para 5.8 above.

116 See para 8.6.2.1 below and the recommendation with reference to national legislation and the responsibilities placed on local authorities.

long distances to healthcare providers is particularly challenging with reference to travelling costs and time lost. Mobile healthcare providers or clinics can play an important role in the provision of adequate healthcare services to rural workers and workers in remote areas. For women workers a specific focal point must be maternal and post-natal healthcare. An integrated sustainable approach must include healthcare training and educational programmes to empower women.

8.7.1.2 Unemployment insurance

Domestic workers have been covered by unemployment insurance legislation in South Africa since 2003.[117] Waste pickers and informal traders do not enjoy protection in this regard and thus these women are not protected against risks such as unemployment, illness or maternity, contributing to their vulnerability and highlighting decent work deficits. The exclusion of women informal traders and waste pickers from maternity benefits render them particularly vulnerable during this time as they will be unable to work and earn an income. The protection of domestic workers in this regard has been brought about by the extension of existing legislative provisions. However, certain provisions in the *Unemployment Insurance Act* are specifically designed to extend protection to these workers by recognising the specific challenges in this employment relationship.[118] When extending existing legislative provisions to categories of workers in the informal economy, these examples can provide guidelines for responding to the specific challenges experiences by these workers.

Challenges in respect of coverage remain, and the fact that no provision is made for self-employed workers is problematic. It is recommended that provisions must be established to extend coverage to self-employed workers who are vulnerable. This will mean that informal traders and waste pickers can voluntary contribute to the fund and enjoy benefits, as there is no traditional employer. A specific contribution structure must be designed to allow these workers to contribute in the absence of an employer-employee relationship. Contribution structures will have to accommodate the low and irregular wages of these workers and allow for *ad hoc* payments. A tailor-made benefit structure must be implemented and this can entail a fixed benefit rate. In line with a progressive approach, categories of own-account workers, such as informal traders and waste pickers, can be identified for the progressive extension of protection. Incentives must be

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117 See para 4.4.1.2 below.

118 See para 4.4.1.2 below. S 12(1A) recognises that domestic workers can be employed by more than one employer and provides for benefits in instances of dismissal by one employer. Provisions within the Act also allow for benefits to domestic workers in instances where the employment contract is terminated as a result of the death of the employer.

established to encourage these workers to join social insurance schemes such as the unemployment insurance fund. Innovative benefit structures can be designed by identifying an average contribution period and an average contribution amount based on an average income amount. Incentives could include lower contribution rates for own-account workers. For own-account women workers, such as street traders and waste pickers, extension of maternity benefits is important. It is recommended that maternity benefits are extended to these workers in line with a progressive approach and based on social protection floors that include basic social security provisions. It is recommended that until coverage is extended, women that are currently excluded from maternity benefits with reference to the UIF, receive an allowance from the state, subject to a means test.

8.7.2 Social assistance

Most of the grant recipients in South Africa are African women. Domestic workers, informal traders and waste pickers are eligible for social assistance subject to means testing.[119] Most workers in the informal economy are also excluded from private retirement funds, and these workers benefit from the grant for older persons. Currently the Department of Labour is considering a retirement fund for domestic workers and although this represents an innovative and tailor-made approach, waste pickers and informal traders will remain excluded as universal coverage is not planned. Social assistance in South Africa plays a major role in the alleviation of poverty.

8.7.3 General recommendations

It must be noted that social dialogue with relevant role players is a vital component of sustainable social protection measures. In addition to the above observations and recommendations, the following general recommendations are made with reference to the extension of social protection measures:

1. Social justice and constitutional obligations must be integrated in the regulatory framework.

2. Those who profit from work in the informal economy must contribute to the social protection of these workers.[120]

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[119] See para 4.4.1.3 above.
[120] See para 8.7.1.1 above.

3. Collection of contributions is one of the biggest challenges in respect of extending social security measures to workers in the informal economy. A centralised collection system can be proposed and has several advantages such as simplifying procedures, centralising both collections and registration, allowing for detecting irregularities and easy registration of multiple employers.[121] It also increases transparency between systems and reduces costs involved in the various registration and administrative procedures. Successful strategies should also allow for collection points that are easily accessible, such as supermarkets, post offices and pharmacies in certain locations.[122]

4. Infrastructures and strategies must include specifically designed approaches based on the needs of the categories of women workers,[123] including innovative benefit structures. Voluntary coverage is not successful as many employers refuse to register these workers and administrative procedures are cumbersome. These workers are often not aware of their rights in terms of these schemes. Wages are also often irregular and in-kind payments often substitute wages. This contributes to the challenges that these workers face in respect of contribution to various schemes.[124] Challenges in respect of the contributory capacity for these workers can be overcome through governmental subsidies.[125]

5. Additional measures that complement mandatory schemes include: the coordination between social security providers,[126] the strengthening of the voice of these workers, including the empowerment of these workers through organisational strategies and mobilisation. Mandatory coverage can also be accompanied by incentives for employers, such as tax incentives.[127]

6. For women workers in the informal economy, adequate social protection measures also have an essential transformative component, that ensures inclusion, promotes

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121 ILO *Social protection for domestic workers* 33.
122 ILO *Social protection for domestic workers* 34.
123 This requires a focus on both the legal and economic empowerment of women and specific consideration with reference to their needs, such as the provision of adequate childcare, the promotion of gender equality and healthcare according to their needs.
124 ILO *Social protection for domestic workers* ix.
125 ILO *Social protection for domestic workers* 27.
126 Co-operation between various governmental departments is vital and can ensure effective policies that deal with gender equality within these institutions.
127 ILO *Social protection for domestic workers* 27.

equality and contributes to social justice.[128] Social protection measures must therefore include cash transfers where needed, including basic food provisions, empowerment programmes, improved access to resources, and the promotion of gender equality in policy and regulatory frameworks.

7. Registration and other administrative procedures can be costly and cumbersome. Therefore when considering the extension of these measures, simple uncomplicated registration procedures are proposed.[129]

8. Responsive regulation must target categories of workers and regulate according their specific challenges. Waste pickers can be identified as a group and analysed according to their challenges. A regulatory framework must then be designed to address challenges specific to this category in the informal economy. This can entail specific regulation with reference to occupational health and safety, including the provision of protective clothing. Local authorities should endeavour to minimise occupational health and safety risks for waste pickers through training and empowerment programmes.

9. The nature of bargaining approaches, including bargaining partners, is different for various groups of informal economy workers. In instances where there is no distinct employment relationship, rather than demand better wages from an employer, demands can be directed at state parties to provide social benefits, such as housing, education, adequate healthcare, including maternity care and childcare.

Gender mainstreaming must be a key principle of social protection measures, as gender is often the barrier for women to access these measures and studies have indicated that women are more affected by poverty, carry both the reproductive and care burden and are overrepresented in vulnerable employment.[130] Many countries combine methods of universalism and targeting.[131] Through targeting the poorest are identified and provided with resources, whereas a universal approach avoids any discrimination with regard to a specific group and can be citizen based.[132]

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128 UNDP *Social protection for sustainable development* 49.
129 ILO *Social protection for domestic workers* 18.
130 ASSAf *Social protection in Africa* 17. See also Chapters 4, 5 and 6.
131 See for example South Africa. Targeting measures can include a means test or identifying a specific vulnerable group such as women and children (ASSAf *Social protection in Africa* 17).
132 ASSAf *Social protection in Africa* 17.

Social protection measures for women in the informal economy may differ from country to country and between various categories of informal work. It is important for countries to adopt a rights-based approach with reference to social protection, instead of mere policy-based guidelines, to also ensure inclusion of the most vulnerable in societies and the promotion of equality in line with international instruments.[133] Social protection strategies must thus address the specific vulnerabilities of groups such as women.[134]

8.8 Voice and representation

Voice and representation were considered in Chapter 7 with reference to the three categories of women workers in the informal economy.

The normative function of collective bargaining remains that of a countervailing force, an equalisation of the playing field, whereby these women are empowered to exercise agency. Through organising as workers these women are able to establish a collective occupational identity.[135] A bottom-up approach has an impact on the social power of women through the development of agency within organisations. Their vulnerabilities decrease and their empowerment increases.

Organisations representing workers in the informal economy range from formal trade union structures to informal community organisations.[136] The traditional trade union structure might be the archetype for a representative organisation for those in formal employment relationships, but it is not necessary the preferred vehicle for representation for those in the informal economy. A pragmatic approach is required to determine appropriate forms of organisations and successful strategies to organisation for these women workers.

Challenges include restricted conceptual frameworks in legislation with reference to trade unions based on formal employment relationship and formal procedures for registration of organisations.[137] The above are also challenges posed by the labour law framework in South Africa. The *LRA* does not recognise any organisations other than trade unions and employer organisations, and therefore existing organisation in the informal economy such as cooperatives and MBOs are excluded from its scope.[138] Although domestic workers,

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133 UNDP *Social protection for sustainable development* 43.
134 UNDP *Social protection for sustainable development* 44.
135 Fudge "Blurring legal boundaries" 8.
136 See para 7.1 above. These organisations include MBOs, NGOs, cooperatives, associations and various networks outside the scope of the traditional trade union concept.
137 See para 7.2 above.
138 See para 7.3 above.

unlike waste pickers and informal traders, are included in the coverage provided by the *LRA* framework, the existing framework is inadequate with reference to the organisation of domestic workers. The shortcomings clearly illustrate the challenges when extending existing legislation based on a formal employment relationship to a category of workers in the informal economy. If we consider the regulation of organisational rights it is clear that it is not suited to the domestic work relationship, hence the restrictions in section 17 of the *LRA*. It is therefore recommended that targeted solutions are established to provide for the unique nature of domestic work; this could be done either through exceptions or by new statutory provisions. Amendments must recognise other worker organisations and provide for easy registration and regulation.[139] It is recommended that the *LRA* should include a wider definition of worker organisations than just trade unions in respect of bargaining and the formulation of industrial policies.[140] This approach is also in line with our international obligations that provide for the elimination of limitations and challenges that restrict the rights of domestic workers to establish and join their chosen organisations.[141]

Cooperatives as worker organisations representing women workers can play an important role.[142] One of the objectives of the *Cooperatives Act*[143] in South Africa includes the promotion of equality and greater participation by black women including those in rural areas.[144] A further objective is focused on the empowerment of women and includes the facilitation of support programmes for emerging cooperatives.[145] These enabling provisions can be important tools for vulnerable women workers, including informal traders and waste pickers, to strengthen their voice and promote representation, specifically in their negotiations with local authorities. Although the registration procedures for cooperatives are uncomplicated, compliance regulation is more problematic. They are more suitable for formal enterprise structures and not appropriate for business enterprises in the informal economy, such as cooperatives for waste picking and informal traders.[146] It is recommended that the Act is amended to make provision for smaller enterprises, including those in the informal economy, with reference to compliance regulation.[147] This amendment must simplify the current provision in section 14 with

139 See para 7.3 above.
140 See para 7.3 above.
141 See para 7.3 above; ILO Recommendation 201 (2011).
142 See para 7.3.1 above.
143 14 of 2005.
144 See para 7.3.1 above.
145 See para 7.3.1 above.
146 See para 7.3.1 above.
147 See para 7.3.1 above.

reference to the withdrawal of membership; and provide simpler procedures for decision making, the adoption of resolutions and the conditions of general meetings to accommodate more informal business structures.[148] The Indian example can be beneficial as the *Multi-State Cooperatives Societies Act* 39 of 2002 allows cooperatives to make their own by-laws to regulate issues such as the withdrawal of membership and the notice proceeding and voting at meetings.[149] This will allow small enterprises in the informal economy, for example for informal traders and waste pickers, to regulate their own procedures that are more suited to their activities. In Brazil provisions are made for worker cooperatives. A relationship is formed between the workers and the recipient of their services and is referred to as the cooperated working relationship.[150] In this relationship, parties function on equal terms and this is certainly a modality that can be used by waste pickers in South Africa, with reference to waste management services rendered to municipalities.

Within the *LRA*, enabling provisions with reference to informal economy workers are found within the bargaining council structure.[151] These provisions can play a role in respect of the empowerment of women workers in the informal economy and the extension of labour and social protection as well as facilitating the transition from the informal to the formal economy. Specifically important to women workers is the power of bargaining councils to establish and administer social insurance schemes, including unemployment and health schemes.[152] It is recommended that bargaining councils identify a category of workers in the informal economy, based on commonalities within a group of workers, to strengthen links and extend services to such a category. Political will plays an important role and it is also recommended that government provides incentives to bargaining councils to include informal economy workers within their scope. The lack of a clearly identifiable employer in the case of informal traders and waste pickers and the large number of individual employers in the case of domestic workers create challenges for the bargaining framework that provides for employer organisations in most instances. However, this can be resolved and with reference to domestic workers it has been recommended that Business Unity South Africa can function as a representative body.[153] It is recommended that for waste

148 See para 7.3.1 above.
149 See para 7.4 above.
150 See para 7.5 above.
151 See para 7.3.2 above. S 28(l) includes in the function of bargaining councils, the extension of their services to informal sector workers and home workers.
152 See para 7.3.2 above.
153 See para 7.3.2 above.

pickers and street traders, national organisations such as StreetNet can also constitute a representative body to participate in this framework.

A revised bargaining structure within the *LRA* framework is recommended to accommodate bargaining partners outside the scope of trade unions and employer organisations to recognise the diverse nature of employment relationships in the informal economy. The notion of bargaining partners may be wide in scope and can include local authorities, suppliers and civil society depending on the role players evident in the specific category of informal work.[154] Extended services by bargaining councils can include dispute resolution, training programmes and submissions to NEDLAC to improve the circumstances of workers in the informal economy.[155] The problematic nature of domestic work, with reference to the large number of individual employers can be addressed here, as many challenges such as the lack of protection in respect of occupational injuries is best suited to be addressed at this level.

A regulatory structure can be an important tool in the extension of social protection measures. Moreover, this structure must accommodate the diverse bargaining partners and role players in the various categories of informal work. For informal traders and waste pickers, bargaining at a council level can influence by-laws and policies aimed at the empowerment of women, including urban policies.[156] The lack of social protection measures for women workers can also be addressed at this level, specifically occupational health and safety and the provision of adequate childcare facilities.

It is submitted that if these recommendations are implemented, it will give effect to the objectives of the *LRA* to advance social justice and economic development. Moreover the extension of services by bargaining councils to vulnerable workers is in line with a transformative constitutional framework, the notion of substantive equality, the promotion of human dignity and the provision of fair labour practices to everyone as envisaged by section 23 of the Constitution.[157]

In addition to the enabling provisions in the *LRA* for the extension of bargaining council services to the informal economy, a new regulatory framework is required to accommodate the diverse needs of these workers. It is recommended that such a framework adopts a responsive regulatory approach, and initiates innovative and tailor-made regulatory interventions to specific contextual circumstances within the informal

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154 See para 7.3.2 above.
155 See para 7.3.2 above.
156 See para 7.3.2 above.
157 See para 7.3.2 above.

economy.[158] The advantage of responsive regulation for the informal economy must be highlighted and must include the supplementation or replacement of top-down regulatory procedures with decentralised structures and processes that are specifically designed within applicable contextual frameworks. This allows for special consideration to be given to women workers in the informal economy with reference to historical, cultural, social, political and economic contextual realities.[159] This approach promotes substantive equality and can address gender inequalities, including structural inequalities. Responsive regulation provides for the development of a regulatory system which has the potential to effectively regulate the informal economy and its specific contextual framework through different mechanisms while achieving similar outcomes. A valuable tool in the establishment of this regulatory framework is a value chain analysis to identify the role players within the contextual framework.[160]

For many organisations in the informal economy initial mobilisation started by addressing various other dimensions of the lives of these workers to form a basis for mobilisation. This initial phase then evolves to engage, mobilise and organise them as workers.[161]

In determining the appropriate organisation module for women workers in the informal economy the following analysis of organisations is required:[162]

(a) the identification of the various organisations currently organising workers in the informal economy to assess best practices;[163]
(b) an identification of the category of workers to determine strategies;[164]
(c) the identification of challenges to organising categories of women workers;[165]

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158 See para 7.3.2 above.
159 See para 7.3.2 above.
160 See para 7.3.2 above.
161 Carré *Defining and categorizing organisations of informal workers in developing and developed countries* 4.
162 See also para 7.6 above.
163 These organisations will often have alliances with social movements, governments and international organisations. See para 7.6 above.
164 South Africa's Women on Farms Project endeavours to organise farm workers as a category of informal workers. See para 7.9.3 above. Specific challenges for women workers in this instance were the paternalism, gender inequalities and stereotyping experienced by these women within the farming committees. The category of worker determined the strategies and in this instance empowerment programmes were established to promote equality and create an awareness of their rights.
165 Categories refer to sector, industry or occupation and also determine the employment status. The challenges that women face may impact on the type of organisations as well as the organisations objectives and strategies. Identifying categories of workers allows the organisation to identify the bargaining partners and the legal framework applicable. See Chapter 7.

(d) the identification of organisations best suited for specific categories within the informal economy;[166]

(e) the applicable legal framework to the worker and the organisation;

(f) an analysis of the various objectives of these organisations and the bargaining partners of categories of workers; and

(g) an analysis of success strategies implemented by the various organisations and the impact on policy and legislative reform.[167]

One of the most important objectives of organisation for women workers is to promote the recognition of these women and given their vulnerabilities experiences on various levels, this recognition must be wide and include recognition as workers, citizens and members of society that must be afforded human dignity on all levels.

8.9 Comparative benchmarking: The Indian and Brazilian experience

Lessons from other jurisdictions can play an important role when considering the challenges workers in the informal economy face. Chapter 1 motivates the decision for the use of the chosen jurisdictions to compare best practices with reference to three categories of workers in the informal economy. Chapter 7 provides a profile of the informal economy in the respective jurisdictions and analyses the position of women workers as domestic workers, informal traders and waste pickers.

8.9.1 Domestic workers

Domestic workers in India are also in most instances excluded from the labour and social security legislative framework and this flows from restricted conceptual notions of "employee".[168] Uniform national regulation of minimum wages is absent and this is regulated by the different states. Domestic work is undervalued, hence the minimum wage is often set below that of other low-skilled work.[169]

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166 Once the organisation has been determined, various other considerations are important, such as the legal framework between the workers and the organisation and the relationship between the organsiation and the applicable legal framework (Carré *Defining and categorizing organisations of informal workers in developing and developed countries* 5).

167 Carré *Defining and categorizing organisations of informal workers in developing and developed countries* 4. See also para 7.10 above. Important strategies include awareness campaigns, collaboration with local authorities on policies and regulatory framework, empowerment of women, the strengthening of bargaining power and a community-based approach rather than employer-based approach.

168 See para 6.3.1.1 above.

169 See para 6.3.1.1 above.

Examples of legislation that has been extended to protect domestic workers include the *Sexual Harassment of Women at Workplace (Prevention, Prohibition and Redressal) Act*.[170] Innovative measures in this Act include the establishment of local internal complaints commissions to deal with complaints of harassment.[171] Although domestic workers in South Africa have access to the CCMA with reference to harassment, the establishment of an internal complaints committee as an initial step towards resolving disputes is to be recommended, based on the Indian example, if one considers the intimate nature of the relationship. Specific assistance can be provided to workers who are illiterate. A local internal complaints committee as an initial step in the dispute resolution process may also be less daunting than formal procedures at other fora. The Act provides for specifically designed procedures in cases of harassment of domestic workers in that a criminal case is opened simultaneously.[172] This strengthens the investigation and enforcement procedures to deal with the intimate nature of the workplace and access to the workplace. The Act effectively addresses the challenges of the intimate nature of these employment relations by providing for a transfer of the domestic worker to another workplace during the investigation, alternatively the worker can be granted additional leave.[173]

It is recommended that the *EEA* should also include provisions specifically for domestic workers in instances where they have lodged a harassment dispute. Specific regulation is required because of the intimate nature of the relationship and the fact that the place of employment is often also the home of the worker. It is recognised that a transfer to an alternative workplace is problematic; however, leave periods can address challenges in this regard. Instead of being transferred to another place of employment, the domestic worker can be provided with leave until the finalisation of the investigation It is also recommended that due to the specific vulnerabilities of these women, they should able to claim unemployment benefits for this period as the enforcement of paid leave by the employer might be problematic and unrealistic. The current *UIA*, although an extension of legislative provisions, does provide for tailor-made measures aimed at domestic workers (for instance in dismissal instances by one of the multiple employers, or benefits in the case of the death of the employer) and therefore could provide for payment during a period of leave in respect of harassment disputes. Apart from the above provisions, domestic workers in South Africa enjoy more labour and social protection than in India.

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170 14 of 2013. See para 6.3.1.1 above.
171 See para 6.3.1.1 above.
172 See para 6.3.1.1 above.
173 See para 6.3.1.1 above.

In Brazil, labour and social protection was extended to domestic workers through a constitutional amendment.[174] The amendment specifically provides a guarantee of rights to domestic workers. Although the South African Constitution provides for fair labour practices under the wide conceptual framework of "everyone", domestic workers are not specifically identified. This constitutional amendment in Brazil required supporting legislation and after various advocacy campaigns these rights have been realised through the *Complementary Act*, Law 150/2015.[175]

In Brazil the domestic worker relationship is regulated through tailor-made legislation, enacted to comply with the constitutional amendment. An interesting provision in the act is that employers who do not formalise the contract of employment face penalties; however, it should be taken into account that compliance is dependent on an effective enforcement framework. It is recommended that in South Africa a penalty framework must include all contraventions with the Sectoral Determination and that a zero tolerance policy is followed in respect of non-compliance. The Brazilian Act provides for health inspectors to inspect workplaces in certain instances.[176] It is recommended that in South Africa specific health inspectors are appointed with reference to domestic workers. Their approach should be based on an empowerment agenda, rather than on punitive function. It is recommended that they provide information about occupational hazards in the home as workplace to employees and employers to prevent accidents. Lacking in the Brazil framework is assistance in respect of childcare and unemployment benefits; however, investigations are currently being conducted to consider this through tailor-made social security provisions.

It is submitted that domestic workers enjoy more labour and social protection in South Africa, but that certain innovative approaches can assist to address challenges specific to the domestic work relationship. These innovative measures include the specific regulation of harassment in India with reference to the Internal Committee, and provision for leave during the investigation and finalisation of the dispute. In Brazil the penalty framework for employers who do not formalise the employment relationship is broader than the South African framework and the introduction of health inspectors for the domestics sector can assist in the promotion of safety and the prevention of accidents at the residential workplace.

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174 See para 6.3.2.2 above.
175 See para 6.3.2.2 above.
176 See para 6.3.2.2 above.

8.9.2 Waste pickers

As in South Africa, waste picking is ranked as one of the lowest categories of work in the informal economy hierarchy and these workers are poor and vulnerable.[177] They are also often own-account workers, without a formal legal employee-employer relationship and their bargaining partners are local authorities, including municipalities.[178] The regulation of waste management in India is closely linked to the promotion of a healthy environment. With reference to the regulatory framework in this regard it is clear that a number of similarities with the South African framework exists. In India, a Supreme Court case ordered the establishment of a comprehensive policy to regulate waste management issues and the court highlighted the link between waste management and a clean and healthy environment.[179] The National Environment Policy of 2006 endeavours to integrate these workers into the system, although this does not have the same force as legislation.[180] For purposes of a uniform regulation of waste pickers in South Africa certain important provisions can be distilled from the Indian policy and these include:

(a) recognition to informal economy systems of waste collection and recycling methods (recognition provides close links to the legitimisation of the activities of these workers); and
(b) the enhancement of access of these workers to institutional finance and technology (this provision is also aimed at the empowerment of these workers).[181]

It is recommended that, as in India, waste pickers in South Africa should be integrated into the waste management system and be paid a "user fee" according to agreement for their services.[182] Moreover, similar to the Indian framework, municipalities should be responsible for protective clothing for these workers that they have identified and concluded agreements with, as well as for tools such as carts. In line with the promotion of gender equality it is recommended that vulnerable women are identified in this regard and their needs prioritised. In India, certain municipalities that have concluded such agreements even contribute to health insurance for these workers. A similar modality can be introduced in South Africa, where municipalities can conclude agreements with waste pickers and can contribute a percentage towards the unemployment insurance fund on

177 See para 5.6 above.
178 See para 5.6 above.
179 See para 6.3.1.2 above; *Almitra H P Patel v Union of India* 15/02/2002.
180 See para 6.3.1.2 above.
181 See para 6.3.1.2 above.
182 See para 6.3.1.2 above.

behalf of these workers. This will also provide women with maternity benefits and promote equality. Health is arguably one of the core elements of decent work.

It is important to note that India promotes a sustainable approach and these workers are continuously empowered through training programmes. This is an important best practice for South Africa to note as these training programmes can also address various health hazards linked to waste picking and promote the prevention thereof. Training programmes must ensure a gendered approach and specific provisions must be aimed at women such as health, maternity and childcare. Another important practice in India is the recognition of various worker organisations that represent waste pickers.[183] Local authorities must contribute to the mobilisation of organisations by providing the necessary financial support. This is an enabling provision that can contribute to decent work and local authorities in South Africa must consider these practices within an available resource framework. This will certainly contribute to the extension of protection to these workers and can be the start of a process of formalisation of waste picking in South Africa. Important principles in India with reference to waste picking include equality, the promotion of human dignity and decent work for all.[184]

In Brazil waste picking is officially recognised as an occupation since 2001.[185] Local authorities are also responsible for waste management as in India and South Africa.[186] Regulation in Brazil is based on legislative interventions at local and national level and an integrative policy framework, although the provisions are more aligned to promote worker organisations than individual workers.[187] Important best practices in Brazil were identified in Chapter 6.[188] It is recommended that South Africa considers these practices to extend protection to waste pickers.

8.9.3 Informal traders

Within the conceptual framework in India, these workers are referred to as street traders or vendors.[189] In contrast with waste pickers in India, street trading is regulated by comprehensive tailor-made national legislation and policies that were the results of various campaigns launched by SEWA and the National Association of Street Vendors.[190]

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183 See para 6.3.1.2 above.
184 See para 6.3.1.2 above; *Centre for Development Communication v Ahmedabad Municipal Corporation* No 4748 of 2017 SCC online GU 360.
185 See para 6.3.2.3 above.
186 See para 6.3.2.3 above.
187 See para 6.3.2 above.
188 See para 6.3.2 above.
189 See para 6.3.1.3 above.
190 See para 6.3.1.3 above.

The uniform national regulation also offers opportunities for South Africa to consider since national uniform regulation in South Africa is absent.

It is recommended that South Africa should design a uniform national policy to provide for issues pertaining to street trading. Such a policy would represent a paradigm shift from a punitive criminalising environment to an enabling one. As the various local authorities face specific challenges policies should (similar to those in in India) allow for variations according to the specific challenges faced within geographical locations.[191] Important issues in the document for consideration in South Africa include the following:

(a) recognition of the value and contribution of traders in cities and the provision of legal status;
(b) the establishment of an enabling and supportive framework without unnecessary restrictions;
(c) a clear indication of trading zones;
(d) good governance, including transparent regulation by local authorities;
(e) the promotion of mobilisation and organisation of these vendors;
(f) the promotion of social dialogue at various levels and fora; and
(g) self-regulation and economic empowerment, including the recognition of women and the constitutional framework that provides for equality between men and women.

The Indian *Street Vendors (Protection on Livelihood and Regulation of Street Vending) Act*, 2014 is an example of innovative tailor-made national legislation specifically enacted to extend protection to vulnerable workers in the informal economy.[192]

Important issues addressed in the Act include the wide conceptual framework to regulate all activities associated with street trading; limitations on evictions; responsibilities of vendors;[193] a dispute resolution framework, and the prevention of harassment of traders.[194] Local authorities must design relevant plans for approval by government.[195]

The regulation of street vendors in India illustrates the benefits of tailor-made regulation as the Act addresses the specific challenges that these workers face, whereas a mere

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191 See para 6.3.1.3 above.
192 See para 6.3.1.3 above.
193 These include the maintenance of their trading places with reference to cleanliness and hygiene. See para 6.3.1.3 above.
194 See para 6.3.1.3 above.
195 See para 6.3.1.3 above.

extension of existing provisions would often be unable to address the diverse nature of work in the informal economy.

In Brazil, the regulation of informal traders (similar to South Africa) is the responsibility of local authorities and comprehensive regulation with reference to licensing is lacking.[196] Like in South Africa, traders had to enforce their rights through litigation. Street traders are poor and litigation is costly, but the public defender in Brazil offers assistance to underprivileged categories of workers. In line with the constitutional framework, the court ordered that urban planning must include a democratic participatory approach through social dialogue.[197] It is interesting to note that the Brazilian court linked the unlawful conduct of local authorities to the principle of human dignity and found that their conduct denies them and their families an income.[198] This is also the case in South Africa.[199]

An innovative program was adopted in Brazil, where workers contribute monthly, through easy registration procedures, and are then eligible for benefits such as retirement, disability and maternity.[200] Government also provides support for business projects through this programme. Traders can register for benefits and business support and this allows them to have access to credit and other financial products.

The establishment of programmes as discussed above could certainly provide protection to informal traders in South Africa as they are currently excluded from social security schemes. Maternity benefits can be beneficial for women workers. It is recommended that this is an appropriate way to extend social protection and to provide access to resources to these disadvantaged women. It is essential that such a programme or fund be supported by government; however, this will require political will.

8.9.4 Social protection

Various innovative and tailor-made modalities exist in India with reference to the extension of social protection measures to workers in the informal economy.[201] India extended protection to the entire informal economy through an overarching national

196 See para 6.3.2.4 above.
197 See para 6.3.2.4 above.
198 See para 6.3.2.4 above.
199 See para 5.5.
200 See para 6.3.2.4 above.
201 See paras 6.3.1.4 and 6.3.1.5 above.

legislative framework, namely the *Unorganised Workers' Social Security Act* 33 of 2008.[202] In line with the Act, the RSBY was established to provide health insurance to the poor.[203]

It is recommended that South Africa considers this approach to extend coverage to these workers. The definition of unorganised workers is wide and includes own-account workers.[204] Another important principle of the Act is that benefits do not encompass a closed list and thus further benefits can be determined by government.[205] It is also recommended that an act that provides benefits to these workers must include programmes to empower women and to promote equality. Moreover, representation must be promoted and must allow for representation by women as a particular vulnerable group. This recommendation is based on the Indian example where the Act makes provision for Social Security Boards that allow representation from all role players and specifically provides for representation by women.[206]

One of the major challenges of extending social protection measures to these women workers is the diverse nature of challenges they face. The Indian draft Labour Code on Social Security and Welfare of 2017 endeavours to overcome this by addressing specific challenges related to different categories. It is recommended that the extension of protection in South Africa must address these challenges in a similar way, by accommodating contributions by these workers through a reduced contribution scheme and a waiver of contributions for time periods where these workers are unable to contribute.[207]

Another important provision in this draft code for the provision of social protection measures is the wide coverage of social protection measures in order to include improvement of sanitation, access to water and transportation for work activities.[208] Coverage of these issues is extremely important for waste pickers and informal traders as these are challenges they face, and it is recommended that any extension of social protection measures in South Africa includes the abovementioned.

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202 See para 3.3.7.1.1 above.
203 See para 3.3.7.1.1 above.
204 See para 3.3.7.1.1 above.
205 See para 3.3.7.1.1 above.
206 See para 3.3.7.1.1 above. See also the Draft Labour Code on Social Security and Welfare 2017 – para 3.3.7.1.1 above. This code or bill also allows for representation by women at the National Council.
207 See para 6.3.1.4.2 above.
208 See para 6.3.1.4.2 above.

The Bolsa Família scheme in Brazil can be compared with the social assistance framework in South Africa and it endeavours to alleviate poverty among the poorest.[209] The integrated approach of the scheme is important as it includes requirements linked to benefits, such as pre- and postnatal health checks, immunisation and mandatory school attendance.[210] Important considerations for South Africa include the benefits provided for pregnant and breastfeeding mothers that can be beneficial for women informal traders and waste pickers as they do not enjoy any maternity protection at present.

The inclusion of own-account workers in the social insurance schemes allows contributors to decide on the percentage of their contribution and this addresses the challenge of irregular wages or low wages.

8.10 Conclusion

The time when the "informal sector" was seen as a sector characterised by low productivity and underdevelopment has long passed.[211] The informal economy now contributes to the economy in most countries, is a source of job creation and plays an important role in poverty alleviation for many households and communities.

Overall findings of this thesis are that the extension of labour and social protection measures to women does exist elsewhere and has often been achieved through the extension of existing legislative provisions or adoption of innovative tailor-made provisions. It is however submitted that the diverse nature of work in the informal economy poses various challenges with reference to the mere extension of existing legislative provisions designed for those in the formal economy. Therefore, this study illustrates that even with the extension of existing provisions, tailor-made adaptions of those provisions within the existing framework are often required to adequately regulate these workers.

In the absence of an adequate labour and social protection framework, the fundamental rights of these workers must be protected and gender inequalities must be eliminated. Policies and legislative frameworks must support institutional structures. Legislation and policies must legitimise the position of women and allow for their representation on various levels, platforms and fora. An integrated approach to ensure gender equality and decent work requires a paradigm of social, economic and political inclusion for these women workers. The vulnerability of these women is increased by social inequalities based

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209 See para 6.3.2.5 above.
210 See para 6.3.2.5 above.
211 Fudge "Blurring legal boundaries" 7.

on intersecting grounds such as race, gender and caste. Challenging gender inequalities requires addressing gender stereotyping and patriarchal systems within societies. For the legislation and policies to impact on the position of these women, wider factors such as social, economic and cultural factors must be considered to address systemic inequalities.

An equal society requires a change in social norms and if we consider care work, this requires responsibilities to be shared between men and women, also between life partners. Regulatory challenges require institutional structures not only to be gender sensitive but also to promote gender equality. Policies must promote sharing of care responsibilities and this must be underpinned by institutional arrangements such as paternity leave provisions. Inclusive and effective labour regulation must promote a shift in gender culture.

Labour market regulation and labour market institutions must function as a developmental agent and promote social and economic development of workers. Labour law must be responsive to the vulnerabilities of workers in the informal economy to be meaningful, and this responsiveness will require an analysis of the categories of workers and their unique differences. The new framework for labour and social protection must entrench values of democracy, freedom, equality, social justice and the promotion of human dignity. In order to combat the structural inequalities experienced by women an integrated strategy that includes legal, political, economic and social factors must be considered when one considers extending protection to these workers. In a country with a progressive Constitution that encompasses both formal and substantive equality, prohibits discrimination and embraces transformative constitutionalism and social justice, it must be a priority to extend labour and social protection to these vulnerable women workers. As Marcelina Bautista said:

> The struggle of one woman is the struggle of all.[212]

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[212] Marcelina Bautista (CONLACTRAHO) 2011, quoted in Fish *Domestic workers of the world unite!* 146.

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