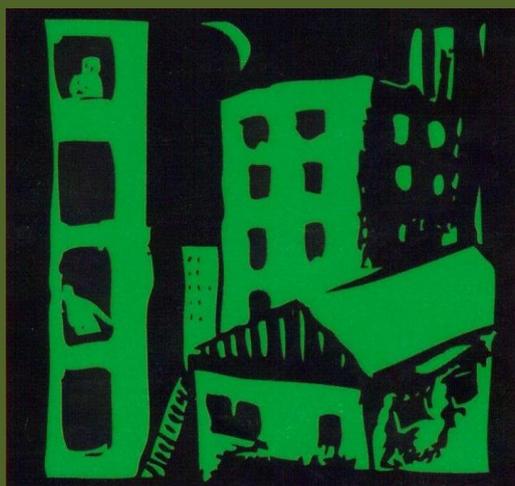


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People want to work, yet most have to labour:¹ Towards decent work in South African supply chains²

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1. INTRODUCTION

In his seminal work, *Global Labour Flexibility: Seeking Distributive Justice*, Guy Standing distinguishes between work, labour and employment. He defines work as an activity that encompasses “creative, conceptual and analytic thinking and use of manual aptitudes”. Labour he describes as:

¹ Based on the opening lines of Guy Standing’s book, *Global Labour Flexibility: Seeking Distributive Justice* (1999), which are a paraphrase of Rousseau’s famous line.

² I would like to thank the participants of the IGLP’s Pro-Seminar on “Transnational Social Policy and Labor Regulation: Crisis and Change” held at Harvard Law School in June 2011, at which I presented an outline of this paper. It was helpful to me to locate these arguments within a larger discourse on the limitations of labour law in addressing distributional issues in the context of the global informalisation of work relations. My thanks too to Shane Godfrey for his helpful comments.

“arduous – perhaps *alienated work* – and epistemologically it conveys a sense of pain – *animal laborans*. We may define labour as activity done under some duress, and some form of *control* by others or by institutions or by technology, or more likely by a combination of all three.”³

Standing argues that the rights of labour are “claims of reciprocity for the reality of *being labour*”, which neither challenge the social conditions that produce the particular relations of production, nor the particular form of control exercised over people who labour. All that is conjured up, he argues, is that the employment relationship is governed by fairness, a normative concept, which translates into normative rights.⁴

To the over 12 million unemployed South Africans,⁵ even the possibility of labour is denied. And, like their counterparts in other developing countries, those who labour informally⁶ increasingly enjoy limited “claims of reciprocity”. In South Africa, this is despite wide-reaching labour and employment laws and the inclusion of justiciable labour rights in the Constitution.

This article is concerned with a particular category of informal workers, namely informal craft producers who access formal markets through intermediaries. Intermediaries – not-for-profit organisations as well as for-profit enterprises – source contracts, design products, negotiate contracts, train informal producers to make the products, purchase the raw materials and pay producers for products made. Most producers work on the intermediary’s premises, are paid by the piece and are denied benefits and protection.⁷ An unreflective response invokes the suite of employment rights potentially triggered by the rebuttable presumptions contained in section 200A of the Labour Relations Act 66 of 1995 (“LRA”). Producers earning below the stipulated minimum⁸ are likely to be able to invoke at least one of the seven rebuttable presumptions that they are employees, which then trigger employee rights and benefits

³ Standing, G *Global Labour Flexibility: Seeking Distributive Justice* (1999) at 4.

⁴ See Santos, A “Three Transnational Discourses of Labor Law in Domestic Reforms” *University of Pennsylvania Journal of Economic Law* (2010) for an exposition of the origins of labour law, which he argues has its intellectual roots in 18th century social law, as workers’ rights could not be advanced by private or public law.

⁵ Using the narrow, official definition of unemployment, the 2005 Labour Force Survey finds that 25.3 per cent of South Africans are unemployed. The official definition of unemployment in South Africa is as follows: “Persons aged 15-65 years who did not have a job or business in the seven days prior to the survey interview but had looked for work or taken steps to start a business in the four weeks prior to the interview and were able to take up work within two weeks of the interview.” See Stats SA *Quarterly Labour Force Survey* Quarter 2 (April to June) 2010.

⁶ In September 2005 total employment in the informal sector was 2 801 000, representing a 22, 8 per cent share of total employment, excluding domestic workers (Development Policy Research Unit, University of Cape Town, 2007).

⁷ Von Broembsen, M “Mediating from the margins: the role of intermediaries in facilitating participation in formal markets by poor producers and users” Paper for TIPS (2011).

⁸ The section does not apply to persons earning in excess of an amount determined by the Minister of Labour: s 200A(2). The amount is currently R172 000. – *Editor*.

contained in the LRA, the Basic Conditions of Employment Act 75 of 1997 (“BCEA”) and other employment laws.

But, as this article will argue, establishing and enforcing producers’ rights as employees is likely to result in the “employers”, namely the intermediaries, restructuring their relationship with producers to fall outside the purview of section 200A. Alternatively, intermediaries may close down if they cannot afford the cost of providing the benefits and protections prescribed by employment laws. And, given the structural impediments for the vast majority of producers to participate in formal markets without intermediaries, either strategy on the part of intermediaries would render producers’ livelihoods more precarious.⁹

This paper is not animated by a libertarian commitment to free markets and thus is not advancing these arguments in support of a “flexible labour regime”. Rather, the article hopes to contribute to a growing recognition of the need for inter-disciplinary exchange on unemployment and labour markets. By drawing on a small empirical study of informal producers and the intermediaries that facilitate their participation in the labour market, it also hopes to offer some thoughts to labour law scholars engaged in the task of re-envisioning labour law.

In the context of craft producers, the article questions the relevance of the traditional labour law lens to this context, a lens that seeks to frame the relationship between the intermediary and the craft producer as one of employer and employee. The craft sector,¹⁰ along with the agri-business sector, has low barriers to entry, and is thus “one of the few entry points available to South Africans presently excluded from the formal economy”.¹¹ If one discounts outliers, it is argued that marginalised producers can only participate if their participation is mediated by intermediaries. The argument is for a broader lens than the binary employer/employee or triangular firm/broker/worker lens. It is suggested that value chain analysis, which focuses on the entire supply chain, better captures the complexity of the relations of work and, more importantly, the extent of the power relations at play.

The article argues further that voluntary codes, state regulation or self-governance of supply chains seldom have re-distributional effects and it thus explores the re-distributional potential of commercial incentives. Specifically, the article explores whether the Broad-Based Black Economic Empowerment (B-BBEE) framework could be used by intermediaries and producers as a re-distributive leverage.

Currently, firms (in this context, retailers) earn points for facilitating the participation of black-owned small, medium and micro enterprises (SMMEs) in their supply chains. Such participation in the craft sector is predominantly on adverse

⁹ Von Broembsen (2011) (n 7 above).

¹⁰ See Department of Arts, Science, Culture and Technology “The South African craft industry report” (1998) for the different categories that constitute “craft”.

¹¹ Ibid.

terms.¹² But, as the article will argue, when a retailer buys a pair of beaded sandals from a black community-owned firm, it is not only buying the labour or the sandals; it is buying B-BBEE scorecard points. These points translate into commercial advantages for the firm. Given that, in another commercial context, these B-BBEE points have been accorded a commercial value, the article explores whether and how these points could be used as leverage to forge an entitlement¹³ to monetary or other compensation for marginalised producers.

The article is structured as follows: first, the producer/intermediary/retailer relationship is situated within the global context (see section 2). The implications for labour of the shift in relations of production over the last 30 years are analysed together with the accompanying discourses that challenge the norm of reciprocity. How labour law scholars are framing and responding to the prevalence of non-standard, atypical and precarious work both globally and in South Africa, is outlined.

Next (in section 3), in order to illustrate the potentially adverse implications of the regulatory framework (that has sought to extend the notion of “employee” to marginalised producers), there is a discussion on intermediaries who facilitate the participation of marginalised producers in craft value chains and the concomitant limitations of labour law’s analytical lens.

This is followed (in section 4) by a discussion of value chain analysis (VCA) as an alternative conceptual lens to the employment relationship. The article argues that VCA better captures the complexity of the relationship between retailers, intermediaries and producers and, by focusing on the power of the lead firm (in this case, the retailer) as opposed to the responsibilities of the intermediary only, VCA is a lens that holds more potential than the employee/employer lens to realise decent work for marginalised craft producers.

The article then (in section 5) argues that in certain political economies, such as South Africa, institutions in the form of commercial incentives potentially constitute leverages to shift dominant (or lead firm) behaviour. Specifically (in section 6), the article explores whether and how the B-BBEE framework could be used by intermediaries as a re-distributive lever to benefit producers..

2. THE GLOBAL CONTEXT

The past thirty years have seen fundamental shifts in global economic realities and policies. The liberalisation of economies has led to a substantial shift in the nature and form of work relations. Global economic restructuring has led to increasing informalisation and insecurity of labour, and poses challenges for the future of labour law itself. So as to more fully understand the constraints under which the

¹² Von Broembsen, M (2011) (n 7 above).

¹³ Sen’s (1999) distinction between “just” or “moral” entitlements and legal entitlements is helpful, particularly since just or moral entitlements often prefigure their realisation as legal entitlements.

intermediaries and producers of the article's focus operate, the global context is discussed in more depth below.

2.1 The new global order and the de-regulation of product and labour markets

The new global economic order has incrementally undermined the reciprocal "fairness" framework that historically governed the employer/employee relationship. The "market reform agenda"¹⁴ of the global financial institutions (GFIs) – specifically the World Bank (WB),¹⁵ the International Monetary Fund (IMF) and the World Trade Organisation (WTO) – has undermined the collective bargaining power of labour, which is critical to undergird the reciprocal agreement, and which thereby creates an enabling environment for multi-nationals to deny norms of reciprocity.¹⁶ Two aspects of the market reform agenda are relevant to this article – the deregulation and/or liberalisation of product markets ("non-protectionism") and the deregulation of labour markets ("labour flexibility").

Supra-national free-trade agreements facilitated by the WTO have led to a radical restructure of global product markets. Signatories to these agreements have de-regulated their national product markets, mostly by abolishing measures that protect local industries (such as import duties and subsidies) or by adopting a privatisation approach.¹⁷ This de-regulation or liberalisation of product markets has paved the way for a restructuring of the international division of labour by enabling multi-national firms (MNFs) to establish global supply chains and production networks¹⁸ in de-regulated developing economies.

Another key tenet of the GFIs' reform agenda – a flexible labour regime – provides MNFs with an incentive to move production to developing countries which tend to have weak or poorly enforced regulation and tend to lack strong labour movements.

¹⁴ Rittich, K "Global labour policy as social policy" *Canadian Labour and Employment Law Journal* (2008).

¹⁵ See The World Bank "Development report 1995: workers in an integrating world" (1995); The World Bank "Doing business: understanding regulation" (2004); and The World Bank "Doing business: creating jobs" (2006).

¹⁶ Santos (2010) at 145) argues that even the European Court of Human Rights is influenced by the tenets of this new order as its decisions have eroded union security rules that enabled "workers to organise and bargain collectively".

¹⁷ Bosch, G, Mayhem, K & Gautie, J "Industrial relations, legal regulations and wage setting" in Gautie J (ed) *Low wage work in the wealthy world* (2010).

¹⁸ Supply chains and production networks represent two different analytical perspectives. *Value chain* analysis follows a product from inception until it is sold. It analyses the linkages between firms with the objective of ascertaining who supplies what to whom and the value that is added at each stage of the process. It analyses the power relations between firms in the value chain. *Production network* analysis looks at the relationship of firms to "wider institutional actors", including other firms in the network and the social and institutional context within which the chains operate. See Barrientos, S "Global production systems and decent work" (2007) and Navdi, K "Globalisation and poverty: how can global value chain research inform the policy debate?" *Institute of Development Studies Bulletin* (2004).

Standing details different aspects of a flexible labour regime. First he describes “production or organisational flexibility”, which references the global trend of large-scale enterprises to downsize by outsourcing or subcontracting their non-core functions, and by creating production/supply chains in which a series of firms produce different components of the product that the dominant enterprise previously produced in-house. The dominant or lead firms thus “contract out their employment function”, thereby retaining flexibility to respond to variable market demand. The lead firm thus shifts the risk of low demand to firms down its supply chain.

The second aspect of labour flexibility is “wage system flexibility”. Labour costs comprise wage and “non-wage” costs. Wage costs include money and benefits (such as bonuses, health insurance and pensions) while “non-wage” costs reflect the percentage of overheads attributable to each employee. Arguments for wage system flexibility target the money component of the wage cost. The orthodox view is that the money component has to be flexible (that is, reducible) in order for firms to remain competitive. Proponents of wage system flexibility oppose minimum wage regulations and collective bargaining, arguing that they undermine flexibility.¹⁹ As firms contract out employment, they transfer the benefit component of wages down the chain. Another pillar of the market reform architecture is a reduction in government social spending, so not only are workers’ wages decreasing in real terms but their social wage (state expenditure on services such as health and education) is decreasing too.

The third aspect of labour flexibility is “labour cost flexibility” which focuses on the non-wage component of labour, such as training costs, and protection costs imposed by legislation (such as unemployment insurance and compensation for injuries at work, which involve administrative costs) and supervision costs.²⁰ “Globalisation and pursuit of labour flexibility have produced extensive debate on how to reduce such costs and on their effects”,²¹ and have resulted in diverse forms of “non-standard” labour, such as casual labour, temporary labour and agency labour, as a means to reduce some of these costs. These new employment relations have “informalised” workers in that their rights to security, protection, benefits and to organise have been eroded.

The fourth aspect of labour flexibility is “numerical flexibility”, which enables firms to hire when the market demand is high and fire when demand is low.²² Thus, uncertainty and risk concomitant with fluctuating demand is no longer carried by firms but by workers, whether casual, part-time or so-called independent contractors.

The aggregate implications of the shift in employment relations for unskilled or semi-skilled people is that the risk, benefits and protection previously carried by large enterprises has shifted either to workers themselves, or to firms further down the chain. In developing countries characterised by weak or unenforced regulatory regimes and

¹⁹ Standing, G (1999).

²⁰ Ibid.

²¹ Ibid at 100.

²² Standing, G (1999).

which are subject to the GFIs' policy prescriptions, this insecurity is concomitant with "poverty, precariousness and persistent informality"²³.

2.2 The implications of product market de-regulation and labour market flexibility: discourses in labour law

Labour law scholars are concerned with the implications of de-regulation and flexibility for "labour" (workers who have "standard" employment contracts) and for the future of collective bargaining, given that increasingly outsourcing, subcontracting and casualisation of labour mean that a significant number of workers are informalised.²⁴ They are also concerned for the future of labour law itself.²⁵

Canadian labour law scholar Harry Arthurs²⁶ argues that the "constitutive narrative" of labour law as "the law of collective labour relations" has meant that collective bargaining at the level of the workplace has been privileged by labour lawyers as the dominant scholastic enterprise over other legal sub-fields such as workers' compensation, health and safety, and pension law, which affect "workers' rights, wealth, power, and dignity no less than collective labor law".²⁷ Moreover, labour law's limited purview has meant that it has failed to take into account that market forces, and a state's trade and monetary policies as well as social welfare and educational policies are more likely to be the key determinants of whether labour enjoys decent labour standards, than labour legislation or collective bargaining. The worldwide decline in union membership, argues Arthurs, means that the law of collective bargaining relations is increasingly irrelevant to workers, laying labour law open to the charge that it is increasingly "politically irrelevant and intellectually ossified".²⁸ He is joined by Fischl²⁹ in arguing for a new "constitutive narrative" for labour law.

Some of these debates are echoed by South African labour scholars. Benjamin argues:

²³ Chen, M "Re-thinking the informal economy: From enterprise characteristics to employment relations" in Kudva & Beneria *Rethinking informalisation* (2005) and Beneria, L "Shifting the risk" *International Journal of Politics, Culture and Society* (2001).

²⁴ See Theron J "Prisoners of a paradigm" IDLL Working Paper (2011) where he argues that the outsourcing of functions that previously were considered part of manufacturing, such as industrial cleaning and driving, has meant that employees who were previously classified as part of the manufacturing sector are now classified as part of the services or transport sector. This has adverse implications for collective bargaining, he argues, in that collective bargaining takes place sectorally and organising takes place at the workplace. Thus workers in the same workplace, previously represented by the same union, now fall under different sectors.

²⁵ Arthurs H "Labour Law after Labour" Osgoode CLPE Research Paper (2011).

²⁶ Arthurs was elected a Corresponding Fellow of the British Academy in 2003 in recognition of his international standing as a labour law scholar.

²⁷ Arthurs (2001) at 17.

²⁸ Estlund in Arthurs (2001) at 17.

²⁹ Fischl M "Running the government like a business" (2011).

“The starting point of many of the new theoretical constructs that have been developed to ‘re-invent’ labour law has been the attempt to identify a defining principle that is not confined to the conventional contract of employment.”³⁰

South African labour law scholars are engaging with how to extend labour rights and protections to informal workers,³¹ for example by redefining the concept of “workplace”,³² and by trying to create legal space to support activists’ attempts to mobilise informal workers for collective bargaining. Particular attention has been paid to exploring innovative ways to extend social protection to informal workers.³³

While legal discourse on the informal labour market acknowledges that casualisation and externalisation (in the form of subcontracting and outsourcing) are not the only drivers of informality,³⁴ the phenomena of externalisation and casualisation nevertheless tend to frame the debate. In South Africa, informality is not only a result of the *shift in employment relations* but is also a historical legacy of apartheid. The perpetuation of informality is owing, in part, to least three forms of *structural inequality* inherited from the past: spatial inequality, educational inequality and the unequal structure of the economy.³⁵

Altman³⁶ argues that industrial policy during the apartheid era sought to create two separate economies – an urban economy driven by capital-intensive growth strategies drawing on skilled white labour, and a rural economy which was to absorb “lower skilled black labour”. This vision of two economies was enabled by a series of racist laws that controlled the mobility of black South Africans, both physically and within the economy.

Three pieces of legislation, known as “influx control” laws,³⁷ restricted the movement of black people by establishing criteria in terms of which black people qualified to live in an urban area (so-called “section 10 rights”). Black people who did not qualify for a permit were not permitted into an urban area for longer than 72 hours. The influx control laws were repealed by the Abolition of Influx Control Act 68 of 1986.

³⁰ Benjamin P “Informal work and labour rights in South Africa” *DPRU Conference Paper* (2008a) at 11

³¹ See Le Roux, R “The world of work: forms of engagement in South Africa” IDLL monograph (2009) and Benjamin, P “Informal work and labour rights in South Africa” (2008) 29 *ILJ* 1579 (2008b).

³² See Theron (2011).

³³ See Kalula, E, Okoafor, N & Bamu, P “Towards an effective regulatory framework for labour rights and social protection in Southern Africa” in Banik *The legal empowerment agenda: poverty, labour and the informal economy in Africa* (2011); Thompson C “The changing nature of employment” (2003) 24 *ILJ* 1793; and Benjamin, P (2008b).

³⁴ Le Roux (2009).

³⁵ Philip K “Inequality and economic marginalisation: how the structure of the economy impacts on opportunities on the margins” *LDD* (2010).

³⁶ Altman M “Formal-informal economy linkages” (2008).

³⁷ The Native (Black) Urban Areas Act 21 of 1923, The Black (Natives) Laws Amendment Act 54 of 1952 and the Native (Urban Areas) Consolidation Act 25 of 1954.

The Group Areas Act 41 of 1950 prohibited black Africans from living in areas that were not zoned as black areas unless they had a reference (“pass”) book. They were also prohibited from owning a home-based business or from acquiring immovable property.

One of the cornerstones of apartheid was differentiated education for different population groups. An education curriculum was designed to educate black Africans for manual labour. The Bantu Education Act 43 of 1953 was promulgated to give effect to this racist ideology.

The apartheid government’s systematic exclusion of black people from participating in the “formal” economy means that informality and race are inextricably linked in South Africa. While racist laws have been repealed, the historical legacy of apartheid is that the majority of poor, unemployed people are still black and are still excluded from participating in the highly sophisticated, capital intensive formal economy other than as consumers, whether for household or micro-enterprise consumption.³⁸

The focus on “reducing the level of informality of inadequately protected workers”³⁹ by regulatory governance, then, risks conflating the two processes – informalisation because of a shift in labour relations and informalisation because of structural exclusion.⁴⁰ This conflation means that the very arguments that are aimed at redressing erosion of rights of certain workers are likely to result in the livelihoods of others, who are only able to sell their products to formal markets through intermediaries, becoming more precarious. These arguments are expanded on in the next section.

3. INTERMEDIARIES’ ROLE IN FACILITATING PARTICIPATION OF POOR PRODUCERS IN SUPPLY CHAINS

In 2010 the author was commissioned by the Trade and Industrial Policy Strategies (TIPs) to analyse the role of intermediaries in facilitating the participation of marginalised producers in craft and agri-business supply chains.⁴¹

The objective of the study was to understand the legal and institutional nature of the relationship between intermediaries and producers and to explore the implications

³⁸ See Philip (2010) for a discussion on structural exclusion of poor producers and retailers. The article refers to spatial and educational drivers and includes a detailed discussion on the structure of the South African economy, which encourages the structural exclusion of micro businesses. See also Altman (2008).

³⁹ Benjamin, P (2008b) at 1601.

⁴⁰ The term “informal sector” was coined in 1973 by Keith Hart and describes the informal sector as businesses characterised by seven specific traits, including: low barriers to entry, small-scale, labour intensive, family-owned, reliant on skills acquired outside of formal schooling, and operating in unregulated and competitive markets. More recently the term “informal economy” has gained currency, which has broader connotations. It incorporates all activities that are not recorded by formal labour market data, not only informal businesses. Thus it includes street traders, home-based businesses, casual and contract workers, as well as many domestic workers and farm workers. See Standing (1999) and Chen (2005).

⁴¹ Von Broembsen M (2011).

for producers with respect to ownership, profit share, wages and working conditions (and, more specifically, security, benefits and protection). The study drew on 23 semi-structured interviews with intermediaries, primarily in the craft and agri-business sectors, and with senior managers or directors of two retail giants, namely Pick 'n Pay and Woolworths. Four categories of intermediaries were interviewed:

- *Non-profit organisations (NPOs) active in the small business sector* that mediate for producers to access markets or that act as a membership body for independent businesses or producers to market products or purchase raw materials as a collective.
- *NPOs active in social welfare sectors* such as literacy promotion or HIV-Aids education and treatment. Where it has been realised that that interventions are limited if the beneficiary community has no access to income; the NPO establishes itself as an intermediary that designs products, trains beneficiaries to make products, and sells products to local and overseas markets, often very successfully.
- *For-profit hybrids*, which are for-profit entities (such as companies or, most commonly, close corporations (CCs)) that have as their primary objective a social outcome such as the alleviation of poverty, the empowerment of women, or simply contributing to livelihoods by facilitating the participation of marginalised people (usually women) in value chains. In most cases, the member (of the CC) or the main shareholder does not draw a salary for years and any salary now drawn is modest.
- *Not-for-profit hybrids* that comprise more than one entity, one being a for-profit entity and the other(s) not-for-profit: for example, an NPO, *Afrique du Sud Bidonvilles* (ASB) assists women to establish co-operatives and provides embedded services such as training, pre-cut fabric and a distribution system for the creation of biodegradable bags, cosmetic packaging, fashion and decor. It has also registered a for-profit CC with one member. The CC markets these goods to Pick 'n Pay and overseas retailers, and has recently opened a store in an upmarket retail centre.

Categories three and four illustrate that the lines between for-profit and not-for-profit are blurred, making it difficult to determine whether an organisation is motivated by social outcomes or not.⁴² Arguably, the legal form of an intermediary is less important than whether or not the contract, usually verbal, between the intermediary and the producers/users reflects a progressive realisation of decent work for the producers and users.

Some intermediaries simply facilitate producers' participation in a supply chain. They source contracts, then design items and train producers to make them (either at their homes or at the intermediary's premises), provide the raw materials for the producer, buy the item from the producer and sell it to the retailer. Others shift the distribution of value in the value chains by reducing their members' transaction costs.

⁴² Peredo, A & Mclean, M "Social entrepreneurship" *Journal of World Business* (2006).

For example, by buying inputs collectively for its members an intermediary is able to negotiate discounts from wholesalers and negotiate for goods to be distributed to individual businesses by the wholesalers. Some intermediaries fulfil both functions. Intermediaries that provide access only are often businesses themselves and thus may compete with their producers if they are also providing the market with goods. Others that provide access *and* re-distribute value (whether by providing services that enhance the users' products or by reducing their transaction costs) generally do not compete with their users in the supply chain and may not form part of the supply chain at all.

A number of interesting findings emerged from the interviews with intermediaries and retailers. While the data set is small, the relationship between producers and intermediaries is reflective of practices in the broader craft sector.

1. Marginalised producers, who are mostly women, are unable to participate in supply chains without intermediaries. These producers may be functionally illiterate, have a poor command of English, have no formal sector experience and limited numeracy, and would be unable to manage the complex communications and networking necessary to sell products to the formal economy.⁴³ They are unable to do this because they lack the skill set necessary to manage the negotiation process, the necessary resources (such as transport) and capabilities (such as design expertise⁴⁴ or the ability to manage bulk orders). This finding is echoed in several empirical studies in the craft sector.⁴⁵
2. Most producers (in the study) are not independent contractors in that they generally produce only for the intermediary, using the intermediary's designs and raw materials. They are paid by the piece for every product made and earn between R 1 000 and R 2 000 per month.
3. Intermediaries access global supply chains on behalf of producers. For example, producers make bags and lanyards for international conferences and export craft items. They also supply products to South African retailers which are incentivised to procure products from intermediaries in order to earn B-BBEE scorecard points.
4. Intermediaries for the most part appear to be contravening employment laws. On the face of it, producers may qualify as employees in terms of section 200A of the LRA (discussed below). Yet producers, most of whom work at the premises of the intermediary and use the intermediary's raw materials and tools, are paid by the piece. They are not entitled to any form of paid leave (such as annual, sick or compassionate leave) or any benefits. Intermediaries also generally do not deduct

⁴³ There are structural reasons for these limitations on their capacities, not least the historical legacy of apartheid education and exclusion of black people from labour markets, except as unskilled labour.

⁴⁴ Designers are "typically highly trained individuals with knowledge and access to sophisticated and fast-moving/changing markets. The designer is thus more able than the 'maker' to intervene in the craft production process and innovate, re-invent or re-create products that satisfy First World customers" (Elk E "Accessing Markets from the Margins" Report for TIPS (2010) at 5).

⁴⁵ See Elk (2010) and Hay, D, McKenzie, M & Thompson, C *Bankable craft: putting money into people's pockets* (2010).

unemployment insurance contributions or contribute in terms of the Compensation for Occupational Injuries and Diseases Act 130 of 1993.

In an attempt to provide benefits and protection to “non-standard” or “atypical” work spawned by outsourcing, sub-contracting and casualisation of employment, the LRA was amended in 2002 to broaden the scope of “employee”. Additional amendments are currently under discussion “to ensure decent work by regulating sub-contracting, contract work and outsourcing”. Section 200A of the LRA creates a rebuttable presumption⁴⁶ that someone is an employee if they earn less than a minimum amount stipulated in the BCEA,⁴⁷ if they work for more than 24 hours a month and if just one of seven further factors is present, including whether the person is economically dependent on the other person for whom he or she works or renders services, whether the person is provided with tools of trade or work equipment by the other person, and whether the person only works for or renders services to one person.⁴⁸ Further amendments are currently under discussion “to ensure decent work by regulating subcontracting, contract work and outsourcing”.

Some producers have other sources of income,⁴⁹ but most depend on the work generated by intermediaries for their livelihood and are reliant on the intermediaries to finance the raw materials and tools, such as sewing machines and paper-making machines. The study suggests that intermediaries would have difficulty in rebutting the presumption that producers are in fact employees. If intermediaries fail to discharge the onus and producers thus qualify as employees under section 200A, that would trigger employment rights and protections found in the BCEA and other employment laws.

5. Few of the intermediaries interviewed could absorb the financial implications of compliance with employment laws⁵⁰. Two scenarios then seem likely. In the first scenario, intermediaries would restructure their work relations to avoid the seven presumptions applying to their relationship with producers. The implications for producers would be two-fold. First, producers would be required to work from home and absorb the costs of raw materials and tools, implying a transfer of costs down the value chain from intermediaries to producers. Second, intermediaries

⁴⁶ As Rawling notes: “Reversing the onus of proof has been identified as a method of maximising the effectiveness of legal mechanisms in detecting and resolving failures of compliance”: see Rawling M “A generic model of regulating supply chain outsourcing” *Anu College of Law Social Science Research Network* (2007) at 10.

⁴⁷ See n 8 above.

⁴⁸ NEDLAC’s Code of Good Practice: Who is an Employee (GN 1774 of 1 December 2006) summarises the differences between employees and independent contractors and provides guidelines on the application of the rebuttable presumptions contained in s 200A.

⁴⁹ Intermediaries indicated that some producers owned spazas (little retail outlets) or generated income from sources other than craft products.

⁵⁰ Theron (2011) notes that in the milling sector brokers are also constrained by contractual terms between them and the milling corporation, which undermines their ability to comply with employment laws.

would be likely to choose producers who have other sources of income, such as another survivalist business, or they would choose producers that also sell their products to other buyers. Thus the most marginalised producers currently working with intermediaries would be the most likely to be disqualified. These are illiterate women, many of whom don't speak English, many of whom are HIV-positive, and who are unlikely to be able to finance the cost of raw materials.

A second scenario is also likely: given that few craft intermediaries have the resources, capacity or administrative infrastructure to bear the legislative burden of employing producers, enforcing compliance is likely to result in closure of the businesses. This is likely because in most cases the owner-manager earns little, if anything. Enforcing employment laws in the craft sector is thus likely to have the unintended consequence that many businesses and NPOs' livelihood programmes would close, which would undermine producers' livelihoods.

These findings are reflective of the intermediary/producer relationship in the craft sector, but it is suggested that in many cases they would apply to the agri-business supply chains. Many of the new agri-businesses I interviewed were able to access contracts with retailers because of B-BBEE scorecard pressure on the retailers. But the terms of their inclusion are adverse. One interviewee spoke of how the price was agreed with the retailer's business development officer but unilaterally revised by the buyer. The buyer also decided on the percentage the supplier would pay as a distribution fee, an advertising fee and the credit terms. Others told of how buyers drove such hard bargains that the cost per item did not cover the costs of producing samples or packing. The result was that they simply could not afford to employ people other than on a piecemeal or casual basis.

These findings suggest that shoe-horning the work relationship into either a binary or a triangular relationship in order to establish labour rights fails to capture the complexity of how marginalised producers participate in value chains and to assimilate the power dynamics between lead firms and intermediaries. In Benjamin's words, it still uses the employment relationship as the "defining principle".

This article now turns to a different analytical tool: value chain analysis (VCA), which shifts the focus from intra-firm governance to inter-firm governance. While some labour lawyers have mentioned the value chain as an analytical lens, there is little legal scholarship that describes VCA in any detail or analyses how it could be used by lawyers, besides suggesting that it would involve labour rights for all workers in a supply chain.⁵¹ This article seeks, in part, to establish legitimacy for value chains as an alternative analytical lens with the hope that it will contribute to the debate on the re-envisioning of labour law in South Africa, and specifically of collective organisation.

⁵¹ See Benjamin (2008b); Theron (2011) & Rawling (2007).

Ultimately, this article would posit that both inter- and intra- firm governance are necessary to realise, progressively, decent work for producers.⁵²

4. A DIFFERENT LENS: VALUE CHAIN ANALYSIS

The concept of commodity chains was introduced in 1977 by world systems theory pioneer, Immanuel Wallerstein.⁵³ It was a largely sociological framework that sought to challenge the orthodox understanding of globalisation and economic development and their inter-relationships with the geographical expansion of capitalism.⁵⁴ It was only in 1994 that scholars, most notably Gereffi, began to develop the commodity chains framework by drawing on perspectives offered by international business literature.⁵⁵ Between 2000 and 2004 academic researchers from different countries and disciplines met for a series of workshops to develop a more coherent theoretical framework, given the proliferation of literature, academic researchers and disciplinary discourses that populated the field. This “consensual” framework became known as “global value chains”.⁵⁶ The term is used generically in this article rather than signalling a particular allegiance to global value chains.⁵⁷

VCA is a methodological approach to understanding the international division of labour that is characteristic of the new global economic order, as well as an analytical tool whereby a particular supply or value chain is analysed from the inception of a product until its final destination to map the relationships between 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.

Global value chain (GVC) proponents advocate the “theory of global value chain governance” as “useful for crafting effective policy tools” to facilitate economic development, create jobs and alleviate poverty.⁵⁸ Indeed, development agencies have used it to assess how marginalised producers participate in the particular chain, to identify market failure in the form of barriers to their participation, and to craft

⁵² The South African decent work discourse has tended to reflect a binary construct of “non-decent” versus “decent” work, with decent work being held up as the requisite standard. The ILO’s articulation reflects a different perspective. For the ILO, decent work is not a “standard” but a progressively realisable goal. It envisages informal and formal workers along the same continuum, with those at the bottom of the continuum suffering the most “decent work deficits” and workers further up the continuum suffering fewer deficits.

⁵³ Bair, J “Global capitalism and commodity chains” *Competition and Change* (2005).

⁵⁴ Ibid.

⁵⁵ Gibbon, P, Bair, J & Ponte, S “Governing global value chains” *Economy and Society* (2008).

⁵⁶ Sturgeon, T “From commodity chains to value chains” Industry Studies Association Working Paper (2008).

⁵⁷ See Coe, M, Dicken, P & Hess, M “Introduction: global production networks” *Journal of Economic Geography* (2008) and Blair (2005) for discussion on the differences between world-systems theory, global commodity chains, and production networks.

⁵⁸ Gereffi G, Humphrey J & Sturgeon T “The governance of global value chains” *Review of International Political Economy* (2005)

strategies to overcome such constraints.⁵⁹ “Global” is a descriptor for the spatial character of value chains – links in the chain are frequently spread over the globe – but, it also serves as a reminder that regional and even national supply chains are often embedded in global value chains.⁶⁰

Proponents of VCA have articulated “value” as representing two facets of chains: on the one hand, the *processes* that create value at each link in the chain and, on the other, how this value is *distributed* in the chain⁶¹ – that is, which actors appropriate what share of the value created. The second facet is deeply imbricated within the governance structure of the particular chain and the market power of the respective actors.

“Governance” is a particular focus area for GVC scholarship. In broad terms, value chain governance theory is concerned with analysing the power relationships in chains. These relationships “determine how financial, material, and human resources are allocated and flow within a chain”.⁶² Specifically, it refers to three aspects of the relationship between firms: (1) who decides which products should be produced, the buyer or the producer? (2) how should products be produced – that is, what are the terms of production, including the industry standards or specifications, environmental standards and working conditions that are incorporated into the supply agreement?⁶³ And (3) how the value that is added should be distributed?

Gereffi, Humphrey and Sturgeon⁶⁴ developed a typology of value chains based on the interplay of three variables: (1) the complexity of the product specifications; (2) the degree of supervision required on the part of the buyer;⁶⁵ and (3) the competence of suppliers.⁶⁶ Based on these three variables, Gereffi et al identified four different types of chains, each of which reflect different modes of governance.

1. The first category of chains takes the form of a market transaction based on demand and supply which is governed by an arm’s length contract. This type of relationship is characteristic of transactions where the products being supplied are basic, product specifications are straightforward and the transaction needs little buyer input.
2. The second category, modular value chains, describes transactions where the product specifications are a little more complex but are capable of being codified

⁵⁹ Value chain analysis forms part of a poverty alleviation paradigm known as “Making Markets work for the Poor”.

⁶⁰ Sturgeon (2008).

⁶¹ Gibbon et al (2008).

⁶² Bair (2005).

⁶³ Ibid.

⁶⁴ Gereffi et al (2005).

⁶⁵ If product specifications can be codified (that is, reproduced in written form to form part of the supply agreement) or if the product specifications are very simple, minimal buyer supervision would be required. However, if the product specification is complex and not codifiable, then the buyer would need to monitor compliance and provide specification input.

⁶⁶ See Bair (2005), Gibbon et al (2008) and Sturgeon (2008).

and the suppliers have the necessary capabilities to produce the product with little supervision from the buyer.

3. Relational value chains describe transactions where the product specifications are complex and the requisite capabilities on the part of the supplier are sophisticated. As the specifications cannot easily be codified, the interaction between the buyer and the supplier is frequent but, given the sophisticated capabilities required of the supplier, the interaction is one of mutual dependence in that neither can easily replace the other. This relationship “may be regulated through reputation, social ties and/or spatial proximity”⁶⁷.
4. The fourth type of value chain is a captive value chain, which describes a transaction where the product specification is very simple but the capability of the supplier is limited. As a result the buyer monitors production very closely, which fosters a relationship of dependency by the supplier on the buyer.

Sturgeon⁶⁸ argues that the governance typology enables public and private actors to predict which value chain activities are most vulnerable to relocation (and consequently, which suppliers [producers] are most vulnerable to loss of their livelihood). He would argue that the relational value chain is least vulnerable to relocation, since the transaction costs for both buyer and supplier in finding a new supplier/buyer tend to be high. By contrast, the captive chain is most vulnerable to relocation since the supplier has limited competencies, which means barriers to entry by competition are low.

Key to a discussion of governance is an analysis of power relations. Gereffi et al⁶⁹ argue that if one places the typology on a continuum, with market relations on one end and captive chains on the other, the power asymmetry becomes more marked. In other words, the power between lead firms and suppliers is most equal in chains governed by market relations, and increasingly becomes more asymmetrical in favour of the lead firm, culminating in the lead firm holding the most market power in captive chains.

This conclusion seems to invest “market relations” with a spurious notion of equal contractual power. The author’s study of intermediaries, if analysed in terms of the three variables, suggest that the supplier/buyer nexus comprises either market-based or modular transactions – that is, the chains that Gereffi et al argue are characterised by the most equal power relations. Yet intermediaries’ contractual power is typically highly circumscribed. Given the low barriers to entry, particularly in the craft sector, and the resultant degree of competition, intermediaries have little bargaining power when it comes to negotiating with a retailer or conference organiser on the price for an item of craft or for an agri-business product. As GVC empirical studies show, the market power of the lead firm is often such that it structures the entire value chain and

⁶⁷ Sturgeon (2008) at 27.

⁶⁸ Sturgeon (2008).

⁶⁹ Gereffi et al (2005).

undermines the autonomy of other firms in the value chain, including that of the intermediary⁷⁰. The intermediary's lack of autonomy fundamentally impacts on its ability to increase wages and extend benefits and protection synonymous with decent work. In addition, it impacts on the bargaining power of the producers for improved wages, rights and benefits.⁷¹

Gibbon et al⁷² have critiqued Gereffi et al's typology for failing to incorporate the effect of "extra-transactional structural constraints such as those emanating from dominant regulatory systems" on GVC governance. This article suggests that these "structural constraints" are, firstly, not limited to regulatory systems but include formal and informal norms, such as corporate governance commitments and consumer pressure for ethical trade. In addition, it is argued that a typology of value chains should incorporate not only constraints but also incentives, which may be regulatory or commercial, and which may drive firm behaviour and potentially redistribute power in the chain. These incentives and limitations, regulatory and informal rules and norms constitute different forms of institutions.⁷³

In the next section the dominant institutions that have governed the employment relationship are outlined. Critical discussion follows on the two dominant modes of governance of value chains, namely self-governance and regulatory governance. The section argues that these two modes of governance seldom redistribute value and power in value chains. The article makes a case for exploring the potential of using commercial incentives as leverages to redistribute power, and thus value, among firms in the value chain.

5. INSTITUTIONS THAT INFLUENCE THE PUBLIC REGULATION OF VALUE CHAINS

In the decades preceding global market reform and the concomitant flexible labour market orthodoxy, the hegemonic reciprocity framework that governed relations of production in developed and some developing countries took essentially three forms: (1) governance by means of public regulation; (2) self-governance as unions and employer organisations engaged in collective bargaining and reached collective agreements;⁷⁴ and (3) a hybrid of self-governance and state regulation in that the state extended certain collective agreements to the industry as a whole and/or to non-unionised workers in the sector covered by the collective agreement.⁷⁵

⁷⁰ See Navdi (2004); Humphrey & Schmitz (2000); Gereffi et al (2005); Gibbon et al (2008).

⁷¹ Navidi (2004).

⁷² Gibbon et al (2008) (n 50 above).

⁷³ North, D *Institutions, Institutional Change and Economic Performance* (1999).

⁷⁴ Some authors refer to the enforcement of collective agreements by unions as "regulation from below". See, for example, Theron (2011).

⁷⁵ See Bosch et al (2010) for an analysis of the different forms of labour market regulation in six countries.

Following the global restructuring of labour markets, these forms of governance are increasingly irrelevant to the majority of unskilled or semi-skilled marginalised workers. As illustrated above, the terms of self-governance are increasingly determined by powerful lead firms. The challenge is to identify institutional leverages that challenge the distribution of power in chains with the goal of progressively realising decent work for marginalised producers.

Activist scholars, such as Marty Chen,⁷⁶ enjoin labour and commercial lawyers to rise to the challenge of extending elements of the internal labour market regime that applies between firms and their employees, such as social security, collective bargaining and benefits, to the supply chain as a whole. Other scholars, such as Barrientos,⁷⁷ underline the need to identify commercial leverages to effect redistribution of income and power within value chains.

In the UK and the USA, high-end consumers increasingly demand ethical trade practices. Political pressure from international human rights NGOs and consumer groups has persuaded multinational companies to commit to enforcing codes of conduct across their value chains. In other words, such pressure has resulted in the contractual terms between buyers and suppliers (even in countries that do not enforce labour regulation and are enjoined by the IMF, the WB and WTO to have flexible labour regimes), including an obligation by the supplier to adhere to labour rights contained in a charter. This takes different forms, such as multinationals incorporating fair labour practices into their corporate responsibility codes, adherence to terms incorporated in international framework agreements that are negotiated by global union federations and individual transnational companies, adherence by multinationals to the United Nations' Global Compact, and voluntary membership by multinationals of NGOs such as the Fair Labour Organisation and adherence to its charter of rights.⁷⁸ In the latter instance, NGOs audit suppliers to assess their adherence to the relevant charter and publish the results of their audits.

While voluntary codes improve conditions of work, such as health and safety, Barrientos⁷⁹ argues that the enabling rights – specifically, the right to organise and to bargain collectively – seldom feature. Thus the possibility of workers contesting the distribution of value, or of redistributing bargaining power, is excluded. In addition, adherence to the code is voluntary and usually only adopted by firms that sell to high-end consumers who are concerned with the ethics of how their purchases are sourced. Finally, the code places additional demands on suppliers, with the lead firm often not carrying any costs, while extracting additional value or rent.⁸⁰ Value may be added to the product as it is “ethically sourced” or is certified as a “fair trade” item, which is

⁷⁶ Chen (2005).

⁷⁷ Barrientos (2007)

⁷⁸ Ibid, and Navdi (2004).

⁷⁹ Barrientos (2007).

⁸⁰ Ibid.

reflected in a higher price for the merchandise, but this additional value is appropriated by the lead firm.⁸¹ Thus the codes improve working conditions but fail to have redistributory effects.

Both self-governance (whereby lead firms sign charters and agree with suppliers to adhere to labour standards) and regulatory responses fail to take into account the market power of the lead firm and its propensity to extract as much value as possible. Thus pressure to re-distribute value in favour of producers, when imposed on the supplier or intermediary only, is somewhat misplaced. While the intermediary must rightly take responsibility for workplace conditions if the work is performed on its premises, it seems unreasonable in the face of skewed power relations to expect the supplier intermediary alone to bear responsibility for other aspects of decent work, namely adequate remuneration, social protection, benefits and managing risk (of fluctuating demand).

The question is whether there is a mode of governance of the supply chain that is potentially more likely to redistribute bargaining power from the lead firm to firms further down the chain? The next section explores the redistributory potential of incentives and focuses on a particular South African labour (and product) market institution, namely B-BBEE.

6. THE REDISTRIBUTIVE POTENTIAL OF B-BBEE

Amartya Sen⁸² posits that the realisation of labour rights relies on supportive institutions and that both the rights and institutions need to be embedded within “a societal commitment to work for appropriate functioning of social, political and economic arrangements to facilitate widely recognised rights”,⁸³ which underlines the fact that the realisation of rights and the efficacy of institutions depend on the nature of the political economy.⁸⁴

South Africa’s Constitution, a product of protracted struggle, negotiation and settlement – “a constitutional revolution”⁸⁵ – constitutes in one sense a social compact to transform South Africa from its racist past into a society underpinned by socio-democratic ideals of equality, distribution and redistribution.⁸⁶

Recognising that existing, systemic, race-based inequality would be entrenched by a procedural equality clause, section 9(2) of the Constitution states that “to promote the

⁸¹ See Peredo & Mclean (2006) for a discussion on social enterprises and the predisposition of multinationals to market the fact that goods were sourced ethically or from disadvantaged communities as “cause branding”.

⁸² Sen, A “Work and Rights” *International Labour Review* (2000).

⁸³ *Ibid* at 15.

⁸⁴ Authurs (2011) makes the point that “labour law ... takes its purpose, form, and content from the larger political economy from which it originates and operates”.

⁸⁵ Currie, I & De Waal, J *The Bill of Rights Handbook* (2005) at 2.

⁸⁶ Liebenberg, S *Socio-Economic Rights: adjudication under a transformative Constitution* (2010).

achievement of equality, legislative and other measures designed to protect or advance persons, or categories of persons, disadvantaged by unfair discrimination may be taken”.

The Constitution thus recognises that historical discrimination has structurally advantaged white citizens and that, unless the State uses legislative and other means to shift the embedded power relations, black citizens will not have the capabilities necessary to access and use opportunities in order to fully enjoy “all rights and freedoms” reflective of substantive equality. Section 9(2) thus explicitly endorses legislative and policy measures that target particular persons or categories of persons for special measures in order to level the playing field and facilitate substantive equality. The Broad-Based Black Economic Empowerment Act 53 of 2003 (“B-BBEE Act”) and regulations, in the form of codes of conduct, represent such measures.

The objective of the B-BBEE Act is to facilitate participation of black citizens in the economy. The B-BBEE Act and codes of conduct outline different indices by which companies are measured in respect of the extent to which they facilitate participation by black citizens in the market. The B-BBEE project targets compliance in seven areas, including equity participation by black shareholders, management participation by black employees, economic participation by black-owned enterprises by means of preferential procurement, and assistance to black enterprise development. Indices that measure compliance include the percentage of a company’s black shareholders; the percentage of black managers and directors; the percentage of turnover spent on enterprise development; and the percentage of goods and services it has procured from black-owned enterprises. Results of listed companies’ B-BBEE scorecards are published per industry and government privileges those corporations that have high scorecard points in any commercial transaction with the state, ranging from the allocation of fishing quotas to procurement of its goods and services. This article is concerned with retailers’ procurement from black-owned businesses.

Section 2 of the B-BBEE Act outlines the objectives of the Act and refers to promoting economic transformation in order to enable meaningful participation of black people in the economy. The references to “*effective* participation”, “*equitable* income distribution” and “*meaningful* participation” in the Act give expression to “the constitutional right to equality” and signify that the participation envisaged is not simply procedural, but substantive.

Despite legislative promotion of “effective” and “meaningful” participation and of “equitable redistribution of income”, the state’s B-BBEE Verification Manual promotes procurement compliance audits that measure formal rather than substantial compliance. Verification agencies are required to assess the total firm expenditure on preferential procurement, not whether participation by black-suppliers is “effective” or “meaningful” or whether income is equitably redistributed. Firms score B-BBEE points if they contract with black-owned enterprises irrespective of the terms of the procurement contract. It thus incentivises participation of black-owned enterprises in

value chains but fails to address the exploitative terms that powerful lead firms can impose.

This section argues for B-BBEE to be employed to promote a broader range of social goals than simply participation. As argued above, voluntary codes rely on lead firms to enforce better working conditions by intermediaries or suppliers – that is, the cost of providing better wages and working conditions are carried by the intermediary without the lead firm transferring any value down to the intermediary or supplier. It is submitted that B-BBEE scorecard points should be used as leverage to shift value down the chain – that is, lead firms should contribute to improved working conditions for producers.

The two giant retailers interviewed have both restructured their businesses to identify, mentor and procure from black-owned businesses. Some of these businesses are fully black-owned, others are partially black-owned in that employees are given some equity and still others are co-operatives, non-profit organisations or trusts that benefit historically disadvantaged communities. The majority of these “businesses” employ unskilled workers, mostly as casual labour. The products are predominantly craft, textile, or agri-products such as olive oil, jam, milk, fruit juice and wine. While there is a genuine (commercially-induced) commitment on the part of retailers to procure from black-owned businesses,⁸⁷ and suppliers are audited by the retailers to ensure good working conditions, the value of the contract depends on the bargaining power of the “black-owned company”. Often a verbal agreement is negotiated and concluded by the lead firm’s business development officer (or even a “transformation director”), but is then unilaterally renegotiated by the buyer, as outlined earlier, on terms adverse to the supplier and thus to the producers or employees.

As previously argued, the lead firm (in this case the retailer) is extracting considerable value from producers – more than just their labour or even the value of the products. First, it can leverage marketing value from the fact that the product is sourced “from the community”, termed “cause branding”. Second, if the producers are organised as a co-operative (even if managed by an intermediary) or if they own shares (even as minority shareholders with no control over the business), the South African lead firm scores B-BBEE points for procuring from black-owned businesses.

As lead firms are not just buying products, but also buying B-BBEE scorecard points, there is an argument that they should bear some of the cost of realising decent work for the value that they extract from the producers via intermediaries. The B-BBEE scorecard could thus be used as leverage to re-distribute value in the value chain.

There is precedent for claiming recognition of the value of B-BBEE scorecard points in the form of monetary compensation in the commercial sector. For example, a South African company listed on the stock exchange (“A”) had three large shareholders. One

⁸⁷ Retailers intimated that while they enjoy few opportunities to contract with the state, their B-BBEE scorecard reflects a commitment to transformation which indirectly influences their market share.

shareholder (“B”) had recently completed a black economic empowerment transaction in terms of which a percentage of its shares was acquired by a black-owned entity. At a board meeting of A, the directors representing B argued that B should be compensated because its newly acquired empowerment credentials simultaneously enhanced A’s empowerment credentials, which would translate into quantifiable benefits for A.⁸⁸

The mechanics of how B-BBEE scorecard points could be used to incentivise value re-distribution invite consideration of several options. One argument is for the state to amend the B-BBEE Verification Manual to the effect that accreditation agencies are required to audit the terms of B-BBEE contracts. In other words, the audit should include an audit of the substance of the contract that gives effect to “*effective participation*”, “*equitable income distribution*” and “*meaningful participation*”, however these terms are defined. Assuming contracts are audited, the question arises whether individual producers should benefit directly, or whether employers should pay contributions to a social protection fund to which employees belong. Such a fund could serve as a platform for political voice to represent its members not only as workers but as citizens.⁸⁹

Since producers participate in the economy largely through intermediaries, and given the challenges of organising in the informal economy,⁹⁰ consideration should be given to organising intermediaries. Intermediaries interviewed supported the idea of a membership body of craft intermediaries that would offer shared services, undertake policy research and advocate for and represent the interests of intermediaries (and, this article would argue, also for producers). For example, it could address the need for bridging finance with institutional partners and insurance mechanisms to underwrite risks inherent in global value chain participation where transactions involve large numbers both in terms of money and products. It is submitted that membership in an intermediary body should be subject to a charter that prescribes the criteria for membership and which would focus on progressive realisation of decent work for producers. A tribunal or internal grievance procedure would have to exist for producers to be able to blow the whistle if members failed to comply with any terms. These are broad suggestions that would have to be worked out in consultation with key stakeholders in the sector.

⁸⁸ Conversation with an attorney who represented “A” in July 2011 (given attorney-client confidentiality, the identity of the firms cannot be disclosed). While this is just one example, it does illustrate that the notion of B-BBEE points having commercial value attributed to them is not a far-fetched idea.

⁸⁹ In India SEWA, trade union representing informal women traders, has formed a social protection fund and represents its constituency at state and national level committees on social protection. See Chatterjee M “Social protection in the changing world of work” in Kudva & Beneria *Rethinking informalisation* (2005).

⁹⁰ The ILO's InFocus Programme on Boosting Employment through Small Enterprise Development (SEED) commissioned a series of papers on the challenges of organising in the informal economy. See Theron (2011).

These broad suggestions require further work in consultation with key stakeholders in the sector if they are to offer practical answers to progressively realising decent work for producers.

7. CONCLUSION

Given the structural constraints to participation by producers, caused and sustained by national conditions as well as global processes, intermediaries offer one of the few ways in which informal producers can participate in formal markets. As such, intermediaries make a significant contribution to the livelihoods of those who are otherwise excluded from labour markets.

The challenge is to reach consensus on the scope and content of a reciprocal framework for informal producers, the content of normative rights and how they should be progressively realised. While law may codify the consensus, power relations among the social actors will determine how the consensus is reached and what the terms of the reciprocal framework will be.

History shows that collective organisation is critical to forging entitlements and enforcing rights. In order to shift market power between lead firms and intermediaries/producers, and for intermediaries to be able to successfully negotiate for a commercial value being attributed to B-BBEE scorecard points (whether the attribution of value to B-BBEE points is regulated or not), collective organisation is necessary. Given the challenges of organising in the informal economy, this article argues for organising intermediaries rather than producers, and for their being organised on a sectoral basis.

Given the embeddedness of national supply chains within the global economy, dialogue among all stakeholders in the supply chains is critical to minimise unforeseen consequences of unilateral policy and legislative changes, whether to the B-BBEE Act, employment laws or to the tax regime.

The importance of consensus building between different social actors is well established. Bosch et al argue, on the basis of their study of non-standard work in six countries, that in the process of consensus building shared equity norms may emerge which “can be used to settle distributional issues”.⁹¹ Shared norms lead to the stability of institutions, which is in everyone’s interests. In the same vein, the ILO encourages social dialogue between stakeholders to reach consensus on the implementation of measures to realise decent work.

Perhaps existing fora, such as the retail committee of the National Empowerment Fund, could provide a space for dialogue. However, existing power relations may disempower nascent organisations of intermediaries and/or producers. When parties with embedded power create the participative spaces and “invite” marginalised parties

⁹¹ Bosch et al (2010) at 137.

into these spaces, it is very difficult for the invited group to contest the rules of engagement.⁹² The challenge for marginalised groups is to be able to contest and shape the nature of spaces into ones that enable them to negotiate and recreate the rules of engagement. Williams advocates for developing “political capabilities” which he defines as “the set of navigational skills needed to move through political space and the tools to re-shape these spaces”.⁹³ It is in this context that unions and labour lawyers have a critical role to play in working with collective groups of intermediaries to develop their political capabilities and thereby to realise aspects of decent work for informal producers.

It has been argued that regulatory responses, and in particular orthodox labour law lenses, fail to capture the complexity of the relationship between retailers, intermediaries and producers. More seriously, by focusing on the responsibilities of the intermediaries, the orthodox lens fails to engage with the considerable power of lead firms to shape the conditions of labour for producers working for intermediaries. Value chain analysis, it is argued, provides a more appropriate lens.

The article has argued that commercial leverages potentially have greater distributional potential than regulatory mechanisms on their own. This is not to suggest that regulatory mechanisms are not important or that commercial leverages should not be codified in regulations. Rather, it is to suggest that new forms of collective organisation are critical to creating new reciprocal frameworks to govern these new employment relations, and to enforcing them. Perhaps government’s role should be less about regulating to extend rights or to create new rights for labour and more about identifying, creating and supporting institutional arrangements that will re-distribute bargaining power between capital and contemporary forms of labour.

While the article addresses itself to the situation in South Africa, it has located the discussion within global discourses for two reasons. First, discourses prevalent in the popular press that advocate for a flexible labour regime reflect the hegemonic nature of the neo-liberal “market reform agenda” espoused by the GFIs. As we shape policy to create jobs we need to be mindful of the influence of these powerful ideas, the distributional consequences of our choices, and the tendency for organised capital to pass risk down the value chain and to appropriate value. Second, while the prevalence of atypical, precarious work and the concomitant threat to the “reciprocity framework” is a global problem, many activist scholars⁹⁴ argue that national labour law and enforcement of decent work at a national level are critical to forging global labour standards.

⁹² Gaventia, J “Finding the Spaces for Change: A Power Analysis” *IDS Bulletin* (2006).

⁹³ Williams, G “Evaluating participatory development” *Third World Quarterly* (2004).

⁹⁴ Chen (2005); Mayer et al (2010).

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