

DEVELOPMENTAL ENFORCEMENT?

Challenges to public and private enforcement of labour standards in the South African and Lesotho garment sectors

EXECUTIVE SUMMARY

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1. Introduction

UN Sustainable Development Goal 8 calls for inclusive and sustainable economic growth, full and productive employment and decent work for all. **Effective labour regulation** is crucial to meet these objectives. Yet the regulatory strategies that can achieve decent work, especially in Low- and Middle-Income Countries (LMICs), are underdeveloped.

This report investigates a key dimension of effective regulation: the **enforcement of labour standards**. A contribution to the Project on **Decent Work Regulation in Africa (DWR-Africa)** (see Box 1), this study investigates enforcement systems in South Africa and Lesotho with a particular focus on the garment sector. It examines the effectiveness of these systems in the context of the contemporary challenges and explores the potential for a more coordinated approach that is informed by hybrid models of enforcement.

Decent Work Regulation in Africa (DWR-Africa)

The Project on Decent Work Regulation in Africa (DWR-Africa) (2018-19) was funded by the Higher Education Funding Council for England (HEFCE) through the UK Global Challenges Research Fund (GCRF).[1]



The Project built upon the broader Decent Work Regulation Project and the ESRC/GCRF Strategic Network on Legal Regulation of Unacceptable Forms of Work (2017), which has established a global network of more than 60 research and policy bodies across 20 countries.[2]

DWR-Africa supported a set of linked research and policy activities towards understanding and improving labour market regulation in sub-Saharan Africa.

Box 1. The *Decent Work Regulation in Africa (DWR-Africa)* Project

2. DWR-Africa: a global multi-scalar dialogue

DWR-Africa supported a novel **global multi-scalar model** of interdisciplinary research and stakeholder engagement. In this process, stakeholders were directly involved in determining priorities for policy intervention and research design.

The project encompassed **stakeholder engagement** at international, regional, and national levels (Figure 1).



Figure 1. Stakeholder engagement in *DWR-Africa*

Stakeholders and researchers from a range of disciplines were assembled through the ESRC/GCRF Strategic Network on *Legal Regulation of Unacceptable Forms of Work*.¹ This **international-level dialogue** endorsed a set of *Global Regulatory Challenges* (GRCs) that included the **effective enforcement of labour laws**.² It also identified Lesotho and South Africa as countries in which enforcement of labour standards is worth investigating, and the garment sector as of particular significance. A team of researchers and stakeholders proposed a research/impact agenda on ***Enforcing Labour Laws***.³ Stakeholder engagement at the **regional and local levels** followed, including a Regional Meeting on *Decent Work Regulation in Africa* (Cape Town, June 2018),⁴ and national-level trade union dialogues and participation a labour code reform process in Lesotho.⁵

¹ See the list of DWR Project stakeholders at <dur.ac.uk/law/policyengagement/ufw/researcher/projectpartners/>.

² The GRCs are: 1) casual work; 2) extending forced labour initiatives; 3) recruitment in global value chains; 4) enforcing labour laws; 5) labour rights in 'the precarious economy'; 6) law's dynamic effects; 7) innovative collective representation; 8) violence and harassment in the care economy; and 9) informal work and labour regulation (McCann, 2018).

³ Godfrey, S., Pike, K., Pinheiro, M. and Posthuma, A. (2017). *Enforcing Labour Laws. Research Agenda for the ESRC Strategic Network on Legal Regulation of Unacceptable Work*. Team members were from Brazil, Canada, Lesotho and South Africa. See further <https://www.dur.ac.uk/law/policyengagement/ufw/challenges/enforcing/>.

⁴ The Regional Meeting generated a set of *Findings and Recommendations*, available at <dur.ac.uk/law/policyengagement/ufw/regionalmeeting/>.

⁵ See 'September 2018: DWR-Africa Lesotho Trade Unions Workshop' (28 September 2018) and 'December 2018: National-Level Meeting on Decent Work Regulation in Lesotho' (6-7 December 2018), available at <<https://www.dur.ac.uk/law/policyengagement/ufw/news/>>.

3. Labour law enforcement in Sub-Saharan Africa

The **main development challenge** facing sub-Saharan African (SSA) countries is to rapidly expand and diversify their manufacturing sectors. Effective enforcement of labour standards is crucial in this objective, although it tends to receive far less attention from researchers and policy-makers than substantive labour standards.



Three models of enforcement can be identified:

- **Public enforcement.** Labour rights have traditionally been enforced through a public model - via dispute resolution in tribunals or courts or by government inspectorates.
- **Private enforcement.** In the past few decades a model of private governance has expanded rapidly. In this model, large buyers require that their suppliers comply with labour standards. The standards are usually set out in a code of conduct and enforcement is through audits conducted by the buyer, the code body or a third-party auditor.
- **Hybrid enforcement.** The potential to leverage synergies between public and private enforcement systems has led to the emergence of hybrid enforcement models. These take a variety of forms but generally involve some combination or coordination of public and private enforcement systems with participation of a range of stakeholders. The intention is to optimise scarce resources by combining the strongest aspects of both public and private enforcement systems.

4. South Africa

The public enforcement framework

In South Africa, public enforcement is well-developed. A comprehensive regulatory framework specifies labour rights and establishes frameworks for enforcement of these rights:

- **Labour statutes** that set out key standards include the Basic Conditions of Employment Act (BCEA), National Minimum Wage Act (NMWA), Employment Equity Act (EEA), and Occupational Health and Safety Act (OHSA). The **National Bargaining Council for the Clothing Manufacturing Industry** also concludes collective agreements that provide for minimum wages, a wide range of minimum working conditions and, in certain regions, contributions to social benefit funds.
- The primary enforcement institutions are:
 - The **Department of Labour** Division of Inspection and Enforcement Services is responsible for enforcement in respect of the National Minimum Wage, conditions of employment, health and safety and affirmative action.
 - The **National Bargaining Council for the Clothing Manufacturing Industry** has power to enforce its agreements. Its expansive inspection and enforcement system is extended by the Minister of Labour to all employers and employees in the clothing sector.

Challenges to public enforcement

Key challenges to the functioning of the enforcement system include:

- Constraints on the **Department of Labour**:
 - The **Labour Inspectorate** is not well staffed (1,312 labour inspectors in 2017).⁶
 - In recent years, the Department has **recruited many more highly-skilled staff and provides training**. Yet there is a perception within the Department that this training needs to be improved so that labour inspectors are better equipped.
 - A **quantitative orientation in monitoring and evaluation** of enforcement has led to poor practices. For example, requiring managers to monitor only one dimension of inspection has been to the detriment of a more holistic approach that would incorporate depth and quality of inspection.

⁶ Department of Labour 2017 Annual Report at 102.

- Inspections are conducted within a **relatively rigid framework** and there appears, in general, to be little leeway for inspectors to exercise discretion. The main form of flexibility in the LRA and BCEA is exemptions, which give an inspector or agent some leeway when encountering a non-compliant employer who pleads that he/she cannot comply and remain in business. In such instances, the inspector can allow the employer the opportunity to apply for an exemption in respect of areas of non-compliance.
- **The regional dimension.** In the Western Cape province, the main challenge is posed by the many **home-based operations**, which are difficult for inspectors to access. In KwaZulu-Natal, the legitimacy of the Bargaining Council is challenged and there is a **'culture of non-compliance.'** Very high unemployment rates, especially for black African women, allow manufacturers to argue that attempts to enforce the Bargaining Council agreement, particularly the minimum wage rate, will impede job creation.
- **Co-operatives: a loophole for non-compliance.** The Cooperatives Act 2005 excludes worker cooperatives from compliance with the LRA and BCEA (see above). The Act allowed co-operatives to be easily established with little verification of whether they were genuine or shams. This abuse led to the adoption of amending legislation in early 2013 that was not brought into force until April 2019.

Promising developments

- The **DoL Inspectorate has undergone restructuring** in recent years to make it more effective. The Inspectorate has three divisions responsible, respectively, for enforcement of the UIA and COIDA, BCEA and EEA, and OHSA. The Inspectorate has made efforts to avoid these specialist divisions becoming 'silos,' with close collaboration between inspectors in each. These efforts have improved effectiveness, although they are demanding in terms of coordination and resources.
- To address **inflexibility** in inspections, a new approach is being tested by the DoL in the Western Cape. Inspectors are being encouraged to go to areas or sectors that are seldom inspected. This approach appears to be making the inspectorate more effective, although it comes at a cost of inspectors being spread more thinly.
- The **National Bargaining Council** has developed a flexible approach to enforcement termed 'Level B compliance.' An employer who pays 80% or more of the prescribed minimum wage but less than 100%, is classified as Level B compliant. Such employers are given 18 months to achieve compliance with the Minimum Wage. If this does not happen, the employer will face enforcement of full compliance.
- The **Bargaining Council monitors atypical, outsourced and sub-contracted work.** Sub-contracting to non-compliant employers is not

permitted. If an employer is found to have sub-contracted to a non-compliant company, the principle of joint and several liability applies i.e. the contracting and sub-contracting employers are both held liable for the non-compliance.

- **Cooperation between DoL and Bargaining Council.** An opportunity exists for cooperation between the Department of Labour and the Bargaining Council, which is promising although under-developed.

Opportunities for improving enforcement

- **A new type of hybrid?** Two quite different options were proposed by interviewees:
 - **Developmental enforcement.** It was generally believed that a more collaborative and cooperative approach to enforcement would improve levels of compliance over time.
 - **Criminalisation of non-compliance.** It was also suggested that criminalisation of certain forms of non-compliance should be seriously considered.
- **Private enforcement: taking it slow in the absence of consumer pressure.** The major South African retailers are moving cautiously and slowly towards private enforcement. There are signs of interest in private governance of supply chains, however, which seem to be attributable to the influence of heightened international exposure of the sector and efforts by the South African Clothing and Textile Workers' Union (SACTWU). The most notable example is the ethical sourcing initiatives being pursued by the South African retailer *Mr Price* through its membership of the *Ethical Trading Initiative*.

5. Lesotho

Enforcement in the clothing and textile sector

- In Lesotho, the **clothing and textile sector** is a vital employer and the main growth- driver of the economy:
 - **Employment** in the sector comprises 50% of all formal employment and 80% of employment in the manufacturing sector.
 - A **labour-intensive sector**, it employs approximately 40,000 workers (of whom about 80% are female).
 - The sector is largely **foreign-owned** and at least half the sector is entirely dependent on the **trade preference to the United States market** provided by the African Growth Opportunity Act (AGOA).
- Public enforcement is governed primarily by the **Labour Code**, which also created a **Wages Advisory Board** to set minimum wages. Lesotho

has had a **Labour Inspectorate** since 1986 and ratified the ILO Labour Inspection Convention, 1947 (No 81) in 2001.

- **Private enforcement** of labour standards required by major garment sector buyers and retailers as an element of supply chain governance, is a prominent element of the labour regulatory landscape.



Enforcement challenges

- **Labour Inspection.** The effectiveness of the public labour inspection system has long been a matter of concern. The **Ministry of Labour and Employment** is one of the most resource-poor agencies in the Government of Lesotho:
 - **Insufficient inspectors and scarce equipment and transportation resources** make factory inspections difficult and infrequent e.g. the inspectorate of 40 inspectors has the use of only three vehicles.
 - The Ministry encounters challenges in **recruiting, developing and retaining highly-skilled staff**, including labor inspectors.
 - **Job training** is insufficient.
 - **Tools for inspection visits** are outdated and do not cover all of the necessary labour standards.
- **Political instability.** There has been instability in Lesotho since the May 2012 general election, despite interventions e.g. the UN Development Programme *Lesotho National Dialogue and Stabilisation Project* (June 2018-). This instability has impacted on labour market developments and therefore on the enforcement of labour standards.
- **Responsive and accountable public administration.** Shortcomings within government include deficits in planning and co-ordination

between ministries and between the public and private sectors. Policy-making is highly-politicised with little role for technocratic expertise. As a result, there is limited investment in local firms and little effort to integrate these firms into the garment value chains. The fact that most factories are foreign-owned also exposes a lack of necessary co-operation between public agencies e.g. the Ministry of Labour and Employment and the Lesotho National Development Corporation.

- **The demise of *Better Work*.** The ILO/World Bank *Better Work* programme was launched in Lesotho in December 2010 with aim of establishing Lesotho as an ethical sourcing destination. *Better Work* had a positive impact on working conditions,⁷ but funding to support it was not forthcoming and it was terminated in 2016. *Better Work's* exit has been detrimental to labour standards and the loss of an important platform for dialogue between workers, trade unions and employers that has not been replaced.
- **Trade union fragmentation.** Effective enforcement requires strong collaboration with trade unions. The Lesotho union movement, however, is fragmented, undermining trade union representativity and effectiveness.
- **Lack of co-ordination between enforcement systems.** Duplication of public and private inspections, where retailers require their own auditing, involves increased costs, lowered productivity and 'audit fatigue.'

Opportunities for improving enforcement

- **Labour law reform.** An ongoing labour law reform process envisages revisions to the Labour Code that take into account the concerns outlined above. This process also provides an opportunity for improved alignment/elaboration of standards, to overcome concerns about unclear terminology and reduce duplication. Finalisation of the project is long overdue.
- **Restructuring of the Ministry of Labour and Employment.** Plans to restructure the Ministry, although yet to materialise, are likely to facilitate enforcement by addressing budgetary concerns, supporting great independence of the inspectorate and, ideally, providing a better platform for enabling hybrid/private compliance mechanisms.
- There is potential to help **private enforcement agencies** to establish legitimacy and build relationships with manufacturers/buyers. Personnel previously employed by *Better Work*, for example, have set up a private firm - *Re Mmoho Compliance Solutions* - to provide a range of enforcement-related activities. This firm has the potential to play a

⁷ Pike, K. and Godfrey, S. (2015). Two Sides to Better Work: A Comparative Analysis of Worker and Management Perceptions of the impact of Better Work. *Better Work Discussion Paper No. 20*. Geneva: International Labour Office.

role in the enforcement system, but this would require a level of coordination and planning by all stakeholders.

- **Regional and global developments** are likely to require further reflection. The most significant regional development is the *Agreement Establishing the African Continental Free Trade Area*, which was signed by African Union member states on 21 March 2018. Labour standards and mechanisms for their enforcement will need to be considered in the AFCTFA process.

6. Recommendations

South Africa

- **Emergence of a developmental enforcement system?** The enforcement system in South Africa is relatively effective in the formal parts of the economy. In the context of high unemployment, however, and in sectors that are under extreme pressure from imports, such as the garment sector, there are signs of a shift to what can be termed a developmental enforcement system. This has similarities with the French/Spanish model, in that inspectors have considerable discretion and decision-making power and can adapt the system to the needs of particular enterprises.⁸ Yet this shift is due to necessity and pressure rather than by design: the developmental enforcement system is not being given the recognition and support it requires. The shift needs to become part of a strategy on labour standards, employment retention and efficiency that includes collective bargaining.
- **Lack of data.** The real state of enforcement is undermined by a lack of data, in particular on the number of employers in the economy (formal and informal, registered and unregistered) and within sectors and regions. More research also needs to be done on enforcement, both the nature of enforcement systems and the effectiveness of enforcement.
- **Co-ordination in public enforcement.** South Africa has a dual public enforcement system in many sectors in the garment sector i.e. enforcement by the Department of Labour and by Bargaining Councils. In the garment sector, however, there is no coordination between the two systems and there appears to be almost no communication between the relevant enforcement agencies. A more coordinated approach to enforcement is needed.
- **A focus on inspection quality.** The quantitative measurement of enforcement used by the Department of Labour needs to be tempered by greater concern for the quality of inspections. This requires the delegation of more discretion to inspectors, together with appropriate management systems and support.

⁸ Piore, M. and Shrank, A. (2006). Trading Up: An embryonic Model for Easing the Human Costs of Free Markets, *Boston Review*, 31(5) pp.11-14.

- **Criminalisation.** The issue of criminalising ‘wilful’ non-compliance with labour standards needs to be given serious consideration. The option of exemptions could be an important factor because it allows employers to disclose their financial circumstances. Should employers not take up this option, criminal sanctions should arguably be an option.
- **Cooperatives.** The loophole created by the Cooperatives Act appears to have been addressed by the recent amending legislation. However, the implementation of the legislative amendment should be closely monitored to ensure that it is effective.



Lesotho

- **Reform of public enforcement.** Lesotho has a weak and dysfunctional public enforcement system. In the garment sector has been ‘replaced’ (to a large extent) by private enforcement. However, the impact of *Better Work Lesotho* suggests that the private enforcement system is not fully effective. The reform of the public enforcement system should be a key part of the discussions on the reform of the Lesotho Labour Code.
- **Co-ordination between public and private bodies.** There is overlap in certain respects between the Ministry of Labour and Employment and the Lesotho National Development Corporation as regard compliance with labour standards by investors. This overlap should be coordinated and a private agency, such as *Re Mmoho*, should be incorporated into the coordinated system. The Lesotho government also needs to engage with foreign investors in the garment sector, as well as with buyers, to secure buy-in for a coordinated system of enforcement.
- **Capacity-building.** The capacity-building of trade unions and individual workers is crucial to ensuring that formal labour standards are implemented in practice, from shop-floor level to union leadership.

South Africa and Lesotho

- **The need for dialogue.** High-level dialogue is needed between the governments of South Africa and Lesotho so that their garment sectors develop together, rather than competing with each other. Such dialogue should include the issue of labour standards and enforcement.
- **Co-operation on enforcement.** The enforcement agencies of the South African Department of Labour and the Lesotho Ministry of Labour and Employment need to engage with one another and share information and expertise. Lesotho can gain much from the Department of Labour in terms of management of enforcement and both can explore ways to achieve better quality of inspections.
- **Union dialogue.** Union leaders in South Africa and Lesotho would also benefit from dialogue on crucial policy-level debates such as development strategies in Southern Africa and labour standards as part of such strategies.



International

- **Pertinence to the global debates.** Effective enforcement of labour standards should be central to the global debates on labour regulation and decent work, including on the 'Future of Work,' employment policies that incorporate the quality of jobs, and efforts to achieve the UN Sustainable Development Goals.
- **Global multi-scalar dialogue.** The process of global multi-scalar dialogue drawn on in this study is valuable in shaping the objectives,

research questions, and design of research. This process generated questions to be investigated that contribute to the international-level debates and to countries in other regions e.g. on the potential and limitations of formal multi-stakeholder programmes, 'escape' from regulatory coverage of a range of working arrangements etc.

- **Regional-level dialogue.** The regional-level dialogue was particularly crucial and could valuably be incorporated into future research projects. The Regional Meeting on *Decent Work Regulation in Africa* (Cape Town, June 2018) provided an opportunity for stakeholders from countries across the region to share ideas and experience and provided valuable input into this study (e.g. the use of cooperative structures to circumvent labour laws and broader limitations in regulatory coverage of 'non-standard' working relationships, multiple labour standards – public and private – causing complexity and 'audit fatigue' at the factory-level, an interest in hybrid models in the region etc.)
- **Stakeholder involvement.** The intense stakeholder involvement that has characterised the *DWR-Africa* project has confirmed the benefits identified in the literature: recognising the value of stakeholders' knowledge and experience, improving research quality, eliciting trust in research findings, responding to stakeholder needs, and supporting effective communication of research findings.⁹
- **Inter-disciplinary research.** The involvement of researchers from a range of disciplines in studies on effective labour regulation can generate novel or neglected themes and approaches. Fully-integrating a wide range of stakeholders into linked-research/policy projects as co-producers of knowledge can help to reveal research topics that might otherwise have been overlooked.
- **Global challenges.** Global multi-scalar dialogue could valuably be extended to other globally-shared problems of contemporary labour market regulation e.g. the rise and endurance of casual work/day labour, workplace/transport-based violence and harassment, the need for new models of collective representation, the protection of workers in the 'informal economy' etc. Multiple scale-selection contributes towards identifying novel challenges and potential solutions and can engender fruitful - and reciprocal - research/policy-dialogues between the global North and South. Cross-regional projects would be particularly valuable, including South-South dialogue and research.

⁹ See further e.g. Burger, J., Gochfeld, M. and Fote, T. (2013). Stakeholder Participation in Research Design and Decisions: Scientists, Fishers, and Mercury in Saltwater Fish. *Ecohealth*, 10(1), pp.21–30; Slunge, D., Drakenberg, O., Ekblom, A., Göthberg, M., Knaggård, Å. and Sahlin, U. (2017). *Stakeholder Interaction in Research Processes – A Guide for Researchers and Research Groups*. Gothenburg: University of Gothenburg; Hoolohan, C., Larkin, A., McLachlan, C., Falconer, R. Soutar, I., Suckling, J., Varga, L., Haltas, I. Druckman, A., Lumbroso, D., Scott, M., Gilmour, D., Ledbetter, R., McGrane, S., Mitchell, C. and Yu, D. (2018). Engaging Stakeholders in Research to Address Water-Energy-Food (WEF) Nexus Challenges. *Sustainability Science*, 13, pp. 1415-1426.

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