DEVELOPMENTAL ENFORCEMENT?

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A study by the Project on Decent Work Regulation in Africa, funded by the UK Global Challenges Research Fund (GCRF)

Decent Work Regulation in Africa

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TABLE OF CONTENTS

EXECUTIVE SUMMARY

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]

Decent Work Regulation in Africa

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).

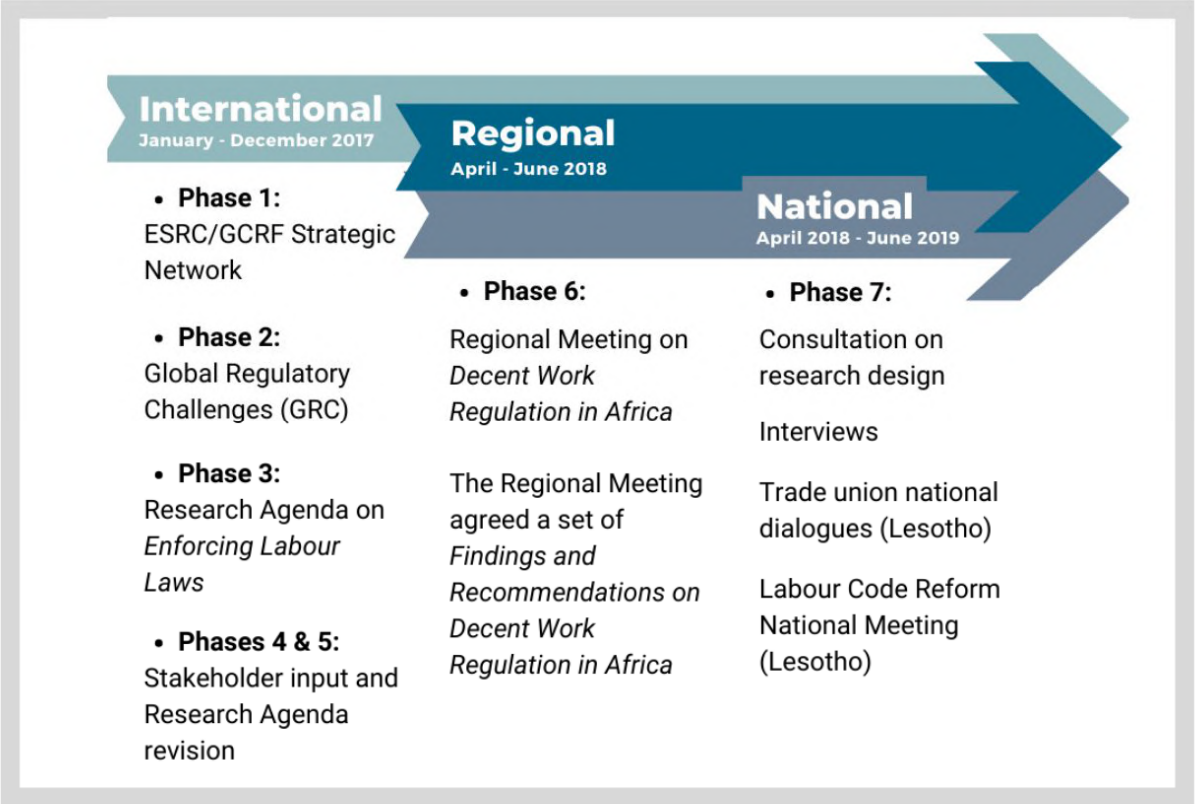

Figure 1. Stakeholder engagement in *DWR-Africa*

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 a proposed a research/impact agenda on ***Enforcing Labour Laws*** (Godfrey et al, 2017).[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] 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 mangers 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 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 (Pike and Godfrey 2015), 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 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 (Piore and Shank 2006). 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.

- **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 (see further e.g. Burger et al 2013, Slunge et al 2017, Hoolohan et al 2018).

- **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.

INTRODUCTION

The Project on Decent Work Regulation in Africa (DWR-Africa)

The Project on Decent Work Regulation in Africa (DWR-Africa) responds to UN Sustainable Development Goal 8 (SDG 8): towards inclusive and sustainable economic growth, employment and decent work for all. To achieve SDG 8, effective labour regulation is crucial. In other words, strong labour laws are a vital component of development policies, capable of supporting inclusive growth, sustainable prosperity, and the wellbeing of workers and their families. Yet the regulatory strategies that can effectively achieve decent work – especially in Low- and Middle-Income Countries (LMICs) – are under-developed. In response to this knowledge-gap, the DWR-Africa Project has supported a set of linked research and policy activities towards understanding and improving labour market regulation in sub-Saharan 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 builds on the work of the broader Decent Work Regulation (DWR) project, led from Durham University, and the Economic and Social Research Council (ESRC)/GCRF Strategic Network on Legal Regulation of Unacceptable Forms of Work (2017), which established a global network that now extends to more than 60 research and policy bodies in 20 countries and generated a set of research agendas on regulatory challenges that are shared between the global North and South.[2]

The central aims of the Project were to establish a regional network of researchers and stakeholders in southern Africa, conduct research on challenges to labour law enforcement in the region, and generate recommendations for research and regulatory policy. This study reports on the research dimension of the project - an evaluation of the enforcement systems of South Africa and Lesotho with a particular focus on the garment sector. The study presents a socio-legal analysis of the public and private regulatory frameworks in both countries and draws on field work conducted during 2018 that involved interviews with a range of key stakeholders.

The study first describes the international, multi-scalar process of researcher- and stakeholder-engagement adopted in the project, which shaped the focus and design of the study (Chapter 1). It then examines the key pressures that are shaping enforcement of labour standards – public and private – in sub-Saharan Africa; highlights the merits of comparing South Africa and Lesotho; outlines the research methodology; and reviews the international literature on enforcement (Chapter 2). The study next investigates the framework of and contemporary challenges to enforcement in South Africa (Chapter 3) and Lesotho (Chapter 4). It concludes with a set of recommendations on strategies

[1] DWR-Africa is a collaboration between the University of Durham, UK, University of Cape Town, South Africa, and York University, Canada. See further on the project at <https://www.ukri.org/research/global-challenges-research-fund/>.
[2] Strategic Network on Legal Regulation of Unacceptable Forms of Work [Grant Number ES/P007465/1]. See further at <https://www.dur.ac.uk/law/policyengagement/ufw/ufw/>.

for effective enforcement in South Africa, Lesotho and, potentially, in other countries in sub-Saharan Africa and other regions (Chapter 5).

CHAPTER 1

DWR-Africa: A Global Multi-Scalar Dialogue

1. Introduction

DWR-Africa was the first project to test a novel global multi-scalar model of research design through interdisciplinary research dialogue and stakeholder engagement.

The project adopted a process of stakeholder engagement that was extensive, multi-scalar, and geographically-diverse. In contrast to stakeholder involvement of a conventional kind - confined primarily to prior consultation and sharing of outcomes - stakeholders were included in the process from the outset as co-producers of knowledge, contributing to both the design and implementation of the research. This process was akin to what Lawrence and Depres (2004) have characterised as 'transdisciplinary' research: encompassing researchers from multiple disciplines and a wide range of non-academic stakeholders (see also DEFRA, 2011; Harris and Lyon, 2013). Most significantly, the stakeholders contributed to the core process of determining priorities for intervention and, subsequently, to research design, including by identifying research and interview questions.

The method tested in the project was novel in that, rather than centring on a single discrete scalar focus, it involved intersecting multi-scalar engagement that encompassed the international-, regional-, and national-levels (see Figure 1). As Hoolohan et al (2018) have observed, scale-selection inevitably influences the identification of challenges and potential solutions. In DWR-Africa, the international-level component advanced the overarching objective of the DWR project: to support an international dialogue that can identify solutions to complex and globally shared challenges to effective labour regulation. In particular, the expectation was that an inter-regional dialogue between the global North and South would be revealing. This scaling innovation in stakeholder engagement was also intended to advance the project's understanding of multi-scalar interactions – for example by involving international organisations and buyers at the apex of global value chains– and to illuminate the potential for upscaling of research findings on southern Africa.

2. International dialogue: Global Regulatory Challenges (GRC)

Global stakeholders and researchers from a range of disciplines were assembled through a ESRC/GCRF-funded Strategic Network (Phase 1).[1] The objective was to involve stakeholders who represent a broad range of interests and experience and who are drawn from different regions. The notion of 'stakeholder' was broadly defined to encompass actors with involvement, experience, or interest in labour market regulation, including government ministries and agencies, trade unions,

[1] The *Strategic Network on Legal Regulation of Unacceptable Work* was supported by the Economic and Social Research Council through the Global Challenges Research Fund [grant number ES/P007465/1; 2017].

employers' associations, buyers, the International Labour Organization and other United Nations agencies, national development institutes, compliance auditors, international and local NGOs, and industry bodies.[2]

Figure 1. Stakeholder engagement in *DWR-Africa*

An international-level dialogue involving international, regional, and country-level actors endorsed a set of nine 'global regulatory challenges' (GRCs): urgent and complex challenges to ensuring effective labour regulation that are shared among countries at a range of income-levels (Phase 2).[3]

3. The global regulatory challenge: enforcing labour laws

The GRCs included the effective enforcement of labour laws (*Enforcing Labour Laws*). The international-level dialogue also identified Lesotho and South Africa among countries in which constraints on enforcement of labour standards was worth investigating and in which solutions might be identified (Godfrey et al,

[2] See the list of DWR project stakeholders at <https://www.dur.ac.uk/law/policyengagement/ufw/researcher/projectpartners/>.
[3] 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. See further McCann, 2018.

2017).[4] The garment sector was identified to be of particular significance in southern Africa, as among the most significant sources of formal manufacturing employment in sub-Saharan Africa, core to national development strategies across the region (see e.g. Hardy and Hauge, 2019), and substantially female-dominated (e.g. 80% of garment sector workers in Lesotho are women – see further Chapter 2).

Network Teams were then assembled to propose linked research/impact agendas on each of the GRCs (Phase 3). To investigate the *Enforcing Labour Laws* GRC, a team of researchers and stakeholders was assembled from Brazil, Canada, Lesotho and South Africa.[5] The Team designed a *Research Agenda on Enforcing Labour Laws* that proposed a methodology for investigating enforcement with a focus on lower-income countries (Godfrey et al, 2017).[6]

The *Research Agenda on Enforcing Labour Laws* has a focus on a particular mode of regulation, namely 'hybrid' models (Godfrey et al, 2017). Hybrid enforcement can be defined broadly as varying degrees of co-ordination or collaboration between labour market actors towards the implementation of formal legal norms, public or private. As elaborated in Chapter 2, an evolving theme of the literatures on both the regulation of global value chains and state enforcement is the potential of integrating non-state actors – trade unions, employers' organizations, NGOs, buyers – into state-led enforcement in order to strengthen labour standards compliance. These lines of research have had a particular focus on the garment sectors of low-income countries (see e.g. Graham and Woods, 2006; Weil and Mallo, 2007; Amengual, 2010; Chapter 2 of this study).

The Research Agenda also clarified the selection of South Africa and Lesotho as providing a useful comparison of two countries identified on the OECD DAC List as a developing (upper middle income) country (South Africa) and a least developed (low income) country (Lesotho).[7] This comparison also provides contrasting illustrations of a country that has participated in the ILO/World Bank Better Work programme (Lesotho), and one that has not participated and therefore relies much more on public enforcement by a government inspectorate and bilateral bargaining institution (South Africa) (see Chapters 3 and 4).

The international-level stakeholders met in cross-regional groupings to consider the *Research Agendas* – including on *Enforcing Labour Laws* - and contribute

[4] The others were Brazil and Cambodia.
[5] The Network Team members are listed in the Annex, List 1.
[6] A summary of the *Research Agenda* is available at <https://www.dur.ac.uk/law/policyengagement/ufw/challenges/enforcing/>.
[7] OECD, Development Assistance Committee (DAC) List of Official Development Assistance (ODA) Recipients (1 January 2018), available at <http://www.oecd.org/dac/financing-sustainable-development/development-finance-standards/DAC_List_ODA_Recipients2018to2020_flows_En.pdf>.

ideas on research and policy reform activities[8] (Phase 4) and the Agendas were revised to incorporate their suggestions (Phase 5).

4. Regional/local dialogue: decent work regulation in sub-Saharan Africa

The stakeholder-engagement process then shifted to the regional- and local-levels. Planning meetings were organised by the research team in April 2018 in Cape Town. A meeting was convened with South African clothing manufacturers, employers' associations, and officials of the bargaining council and the South African Clothing and Textile Workers Union (SACTWU). A separate meeting was held with Lesotho employer representatives, officials of Lesotho garment unions, and a senior official in the Ministry of Labour and Employment (MoLE).[9] The scope of the research and its objectives were presented to both meetings and comment was sought from the various stakeholders. This led to a discussion of key challenges facing the South African and Lesotho garment sectors with particular attention being focused on labour standards and compliance. This discussion subsequently informed the design of the research and selection of interviewees.

Preliminary research began soon after the April meetings and was presented, together with the Research Agenda and the research design, to stakeholders from across southern Africa at a Regional Meeting on *Decent Work Regulation in Africa* held in Cape Town in June 2018 (Phase 6).[10] The Regional Meeting generated a set of *Findings and Recommendations* that were an input to the research, covering pressures on the garment sector, concerns about conditions of work in the region, the key challenges to effective regulation, and the benefits and limitations of enforcement models.[11] The research team also consulted with national stakeholders in both countries to refine the research objectives, questions, and survey design of the research project. Semi-structured interviews were then conducted with stakeholders in each country (see further Chapter 2 Section 1.4) and, in Lesotho, dialogue with stakeholders was conducted as part of two national-level trade union dialogues and through participation by a member of the research team in a Labour Code Reform National Meeting (Phase 7). [12]

[8] Global Dialogues were held in the United Nations Conference Centre (UNCC), Bangkok, Thailand (3-4 August 2017) (participants from Australia, Asia and UK) and Durham University, Durham, UK (14-15 September 2017) (participants from Europe, Latin America, North America, and Africa). The Research Agenda on *Enforcing Labour Laws* was considered at the Durham event – see the participating stakeholders in the Annex, List 2.

[9] On both sets of stakeholders, see Annex, List 3.

[10] See Annex, List 4.

[11] The *Findings and Recommendations* are available at <https://www.dur.ac.uk/law/policyengagement/ufw/regionalmeeting/>.

[12] See Annex, List 5 and '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/>.

5. Benefits of stakeholder involvement

The intense stakeholder involvement in the DWR-project was targeted at benefits that have been identified in the literature: recognising the value of stakeholders' knowledge and experience, improving research quality, eliciting trust in research findings, responding to stakeholder needs, supporting effective communication of research findings, and heightening the potential for influence on regulatory policy (see further e.g. Burger et al, 2013; Slunge et al, 2017; Hoolohan et al, 2018). Combined with analyses of the available data on working life, stakeholder-input allowed the project to identify enforcement as a global challenge; southern Africa, in particular in relation to the garment sector and with the resulting impacts on women, as a fruitful site of enquiry and recommendations for reform of policy and practice; and hybrid regulation as a promising mode for effective regulatory reform.

The benefits of stakeholder involvement were confirmed at the stage of research design, at which stakeholder-input revealed research topics that might otherwise have been overlooked. These were issues that are rapidly evolving or subordinate in the policy debates and regulation research on southern Africa. They included pressures from the latest shifts of the garment industry into low-wage environments; the evolutions of the trading environment; the prominence of work/life issues; widespread concern about risks encountered beyond the workplace, notably unsafe or unreliable transport; the myriad intersections of the formal and informal economies; the challenges posed by fragmented regulatory frameworks; the use of cooperative legal forms to circumvent labour laws; and complexities that stem from the presence of multiple public and private standards, including uncertainty on the role of, and relationships between, public and private enforcement actors such as compliance auditors (see further on Chapters 3 and 4). The process also generated significant collaborations and continuing dialogue among stakeholders in the region, including creating new pairings of stakeholders, such as dialogue between buyers and trade union representatives.

CHAPTER 2

Enforcing Labour Laws in Sub-Saharan Africa

1. Introduction

1.1. Conceptual background

The main development challenge facing sub-Saharan African (SSA) countries is to rapidly expand and diversify their manufacturing sectors. The challenge differs from country to country but, at the risk of over-generalisation, two broad categories can be identified. First, the challenge in countries with established extractive sectors is to develop upstream support industries and downstream beneficiation chains, while also seeking to further diversify their manufacturing profile. Second, in countries without extractive sectors the challenge is to establish manufacturing sectors virtually from scratch. These new sectors will usually be predominantly labour intensive and use low-level technology (agri-processing and garment assembly), but they provide a base from which countries can gain manufacturing experience and begin to diversify.

Foreign direct investment (FDI) is critical to meeting the development challenge. Existing extractive sectors are dominated by foreign firms, whereas those countries without extractive sectors are largely dependent on foreign investment to start manufacturing sectors. This dependency on FDI by developing countries means that investors are able to 'regime shop', requiring incentives and exemptions to locate their factories in a particular country. Labour standards are an important consideration in this equation. In some cases this results in labour rights being explicitly lowered, usually through the establishment of export processing zones, but often the lowering of standards is provided *de facto* through weak enforcement (Godfrey *et al*, 2017). While a key development challenge is to increasingly involve national capital in the growth and diversification of manufacturing sectors, it is not clear whether local investment will lead to greater commitment to compliance with labour standards or will place even greater downward pressure on standards. Local investors face the same competitive challenges in liberalised local markets as foreign investors face in international markets.

The vast majority of jobs in most SSA countries are informal (unregulated). Formal employment is usually limited to the commercial agriculture sector, the extractive sector, and the public service. In some countries a high proportion of informal employment is also accompanied by high unemployment rates. Development, i.e. the expansion and diversification of manufacturing sectors, therefore poses a challenge for regulation. It is often claimed that the creation of formal jobs in manufacturing can only happen with low labour standards. But low labour standards are often politically unpalatable. One solution is better standards in the statute books but poor enforcement of the rights. In short, weak enforcement provides investors in manufacturing with the incentive they require to set up operations and create jobs. For this reason, the effective enforcement of labour standards was

identified as a Global Regulatory Challenge by the ESRC/GCRF Strategic Network on Unacceptable Forms of Work (see Chapter 1).

Enforcement is as much a part of labour regulation as legislation but has generally received far less attention from scholars and researchers. There are broadly two main ways in which labour rights have traditionally been enforced. The one is usually classified as dispute resolution and its path either goes via tribunals or courts, or through to power play, i.e. industrial action within a regulatory framework (or there might be a combination of both). The facts in relation to the rights involved in this type of enforcement are not easily verified or involve a legal question that must be ventilated before an adjudicator for determination. Alternatively, such disputes involve interests that do not lend themselves to adjudication and are best dealt with through power play. This form of enforcement is generally termed dispute resolution in labour law texts.

The other route that enforcement takes is where the issue in dispute is much more easily verified and is usually quantifiable. A government inspectorate has traditionally been the main mechanism for this form of enforcement.[1] If non-compliance is identified but is not remedied, the inspectorate initiates the next stage in the enforcement process which might ultimately lead in subsequent steps to tribunals and courts. Sanctions for non-compliance usually take the form of compensation or fines and/or criminal prosecution. The inspectorate and procedures to redress non-compliance are generally referred to as 'enforcement'. It is usually dealt with quite separately to dispute resolution in labour law texts, if it is dealt with at all.

In the past few decades a third route to enforce labour standards has emerged and expanded rapidly. This is termed private governance and is generally initiated by large buyers of products, usually based in developed countries, which require their suppliers in developing countries to comply with labour standards. The primary motivation for private governance is a concern by large buyers (or 'brands') to protect their reputations in their major markets from scandals regarding working conditions in their suppliers' factories. Self-interest is therefore the main reason why they want their suppliers to comply with decent labour standards, but the outcome can be beneficial for workers and trade unions in developing countries.

Private governance usually takes the form of a code of conduct with which suppliers must comply. The code of conduct is either developed by the buyer itself or the buyer 'signs up' with an existing code body. Enforcement of compliance with the code is through audits (i.e. inspections) conducted by the buyer itself or the code body or a contracted third-party auditor. There is a lot

[1] The inspection can be initiated by the inspectorate or can be in response to a complaint by one or more workers (or, as is often the case, ex-workers) who allege non-compliance by an employer.

of similarity between the many codes currently in use because they all draw on core International Labour Organization (ILO) conventions. There is also usually an overlap of codes with national legislation, in part because legislation usually draws on the same core ILO conventions, but also because a key requirement of most codes of conduct is that the supplier must comply with national labour legislation. The latter overlap effectively means that private audits either duplicate or become a substitute for monitoring and enforcement by a government inspectorate. The sanctions for non-compliance with private codes rely on the economic power of buyers, i.e. further orders are contingent on issues of non-compliance being attended to by the supplier, with follow-up audits to monitor progress. The ultimate sanction for continued non-compliance is the cessation of the relationship with the supplier.

This third route to enforcement of labour standards has some important attributes that the traditional method of enforcement does not possess. First, enforcement via private codes crosses borders, whereas public enforcement applies only within the borders of a country. Second, private codes acknowledge that - in theory at least – economically powerful business entities bear some responsibility for the labour standards in their economically subordinate suppliers. National labour legislation, on the other hand, does not bridge such commercial relationships and is restricted to the parties to the employment relationship.

The two governance systems generally run in parallel with one another. However, the potential to leverage synergies between the two has led to the emergence of what are being termed 'hybrid' enforcement models. Hybrid models are still in their early stages and in practice take a variety of forms, but they will generally involve some combination or coordination of the public and private enforcement systems, usually with participation by a range of stakeholders. The intention is to at least optimise scarce resources and at best combine the strongest aspects of the public and private enforcement systems.

1.2. Empirical focus

The primary aim of this study is to examine the effectiveness of the enforcement systems in the South African and Lesotho garment sectors in the context of various challenges they currently face. An additional aim was to explore the potential for a more coordinated approach to enforcement in the two sectors, one in which – without being prescriptive – the public and private systems would be informed by the concept and examples of hybrid enforcement models. A motivation for addressing these issues in the context of the Lesotho and South African garment sectors, was that the Better Work model (in the concrete shape of Better Work Lesotho), had been

implemented in Lesotho for about six years. Better Work is probably one of the more 'complete' hybrid enforcement systems, and although discontinued in Lesotho it provided something of a conceptual and empirical reference point for the research and potential recommendations. [2]

The research therefore sought to balance an empirical examination of the existing enforcement systems and the challenges they are facing, with a consideration of innovative enforcement models which are emerging in practice and being discussed in academic literature.

1.3. Comparing enforcement in the South African and Lesotho garment sectors

Although the South African and Lesotho clothing sectors provide interesting cases in which to study enforcement, we have not conducted a strict comparative analysis of the two cases, mainly because of the significant differences between them: in terms of their level of industrialisation and development path; the nature of their garment sectors, and the characteristics of their enforcement systems. They therefore constitute parallel case studies that provide some useful points of comparison. This section discusses the differences and commonalities between both countries.

1.3.1. Industrialisation and development

South Africa has been industrialising for over a century, primarily driven by mineral resource extraction, and is classified as a middle-income country. Its manufacturing sector began developing early in the 20th century, was protected by import barriers for many years, and is generally focused on the domestic market. Trade liberalisation since the mid-1990s has seen the manufacturing sector shrink. Free market ideologues have argued that the revamped labour legislation introduced after the democratic elections in 1994 has been the major culprit for the deindustrialisation (and, more broadly, for the intractable level of unemployment).

Lesotho is a small least developed country situated in the middle of South Africa. The majority of its citizens are engaged in subsistence agriculture and its tiny manufacturing sector expanded only late in the 20th century (garment assembly makes up about 80% of the sector). For many years a major source of income was the earnings of male Lesotho migrants to South Africa's mining sector but this has declined sharply over the last three decades. Lesotho has high unemployment and poverty levels.

[2] The focus excludes the 'dispute resolution' component of the enforcement systems in the two countries.

1.3.2. The garment sectors

There are a number of reasons why we chose the garment sector as the focus of our research on enforcement systems. First, there is probably no other sector in which the nexus between price, labour costs and productivity is so explicit. In this context non-compliance with labour standards is an ever-present competitive option. Second, the garment sector is seen as one of the easier ways in which countries can kick-start their industrialisation process, often on the basis of FDI attracted by, amongst other things, abundant labour and low labour costs. This reliance on FDI, however, can 'persuade' governments to offer low labour standards (either *de jure* or achieved through weak enforcement) to attract investment and create jobs, with the hope that the country nets some development benefits. Third, the fact that much of the labour in the garment sector tends to be female (in the region of 80% in both South Africa and Lesotho) has contributed to the low wages and poor working conditions that characterise the industry. Fourth, the weak trade union organisation and fragmented labour movements that characterise many developing countries is a further factor contributing to low labour standards.

The garment sectors in South Africa and Lesotho share certain basic characteristics but are also very different. The garment sector in South Africa emerged early in the 20th century, not as a starting point for development but rather on the back of the burgeoning mining sector and the support industries that sprang up around it. The sector grew steadily behind protective tariffs, has always been predominantly locally owned, has always been primarily focused on the domestic market, is well organised by one large trade union, and collective bargaining takes place in a single forum for the entire sector (i.e. the National Bargaining Council for the Clothing Industry [NBCCI]) (Godfrey, 2015; Von Broembsen and Godfrey, 2016).

Further, its recent trajectory mirrors a developed country rather than a developing country: the steep reduction of tariffs after the Uruguay Round of GATT saw local manufacturers lose over half of the domestic market to cheaper imports, initially from China but subsequently sourced from a variety of countries. What remained of the industry underwent significant restructuring: 'full-package' manufactures split into design houses and cut-make and trim (CMT) operations, and factories became much smaller. Competition from cheap imports and restructuring led to a rise in non-compliance with labour standards as well as informalisation of garment manufacture, in particular via homeworking.

Government eventually responded to the crisis only when the industry had shrunk by about half. In 2009 the Department of Trade and Industry (DTI) implemented the Clothing and Textile Competitiveness Programme (CTCP) to provide grants to enable manufacturers to upgrade equipment, technology

and skills with the aim of improving efficiency and competitiveness.[3] Significantly, a manufacturer needed to be compliant with the minimum wages and working conditions set in the collective agreement reached by the NBCCI to access the programmes. The result has been that the industry has more or less stabilised, although it remains under a lot of pressure (Godfrey, 2015; Von Broembsen and Godfrey, 2016).

The Lesotho garment sector is a much more recent phenomenon.[4] It began only in the early 1990s as a result of Taiwanese investment in order to avoid Multi-Fibre Arrangement (MFA) quota restrictions (so-called quota-hopping). The sector is export oriented: it initially exported all its products to the United States. The introduction of the African Growth Opportunities Act (AGOA) in 2000 sustained the industry through the ending of the MFA/ACT[5] at the end of 2004. From the mid-2000s the sector was boosted by an influx of South African manufacturers, who started to relocate production operations to Lesotho to get the benefit of much lower labour costs and weak trade union organisation. Their market remained their traditional retail customers in South Africa, which they could supply duty-free because South Africa and Lesotho are part of the South African Customs Union (SACU) (Morris, 2013; Godfrey, 2015; Von Broembsen and Godfrey, 2016).

The factories in Lesotho are much bigger than those in South Africa (e.g. many of the Taiwanese and Chinese-owned factories employ over 1,000 employees, with most South African-owned factories at best half that size), but almost all are CMTs, i.e. their holding companies (or head offices) in Taiwan, China or South Africa take the orders, finalise the designs, order and ship the fabric to their factories in Lesotho for cutting and assembly (in some cases just assembly), and deal with the finances.

The nationality of owners and different end-markets mean that there are effectively two Lesotho garment sectors, one mainly Taiwanese- and Chinese-owned that is located in Maseru and exports to the US, and the other South African-owned that is based in Maputsoe and produces for the South African market. Both Maseru and Maputsoe are on the border with South Africa, to

[3] The CTCP was launched under the umbrella of the DTI's Customised Sector Programmes and comprises the Productivity Incentive Programme and the Competitiveness Improvement Programme. It is administered by the Industrial Development Corporation (IDC). See further at <http://www.ctcp.co.za>.

[4] A number of studies have been carried out on Lesotho's garment sector over the past couple of decades, in particular with reference to trade and the implications for the treatment of workers (Baylies and Wright, 1993; Gibbon, 2003; Lall, 2005; Morris and Sedowski, 2006; Motlamelle, 2001; Phillips and Xaba, 2002; Pickles and Woods, 1989; Seidman, 2009), labour standards compliance (Pike 2014 and 2016; Pike and Godfrey 2012, 2014, and 2015), labour migration (Chaka, 2011), and the structure and related implications of the two value chains that have emerged (Morris et al, 2011).

[5] ACT is the Agreement for Clothing and Textiles, the name given to the MFA for the period of its phasing-out.

which all product is either exported or through which it is transported for shipping to the US (Morris et al, 2011).

The South African and Lesotho garment sectors are directly integrated with one another in two ways that have implications for compliance. First, as indicated in Section 1.3.2, South African manufacturers have invested in production facilities in Lesotho, primarily because of much lower labour costs. Second, in the last few years growing numbers of workers from Lesotho have migrated to work in clothing factories located in South Africa.[6] The attraction for workers is the higher wages paid in South Africa.

This integration has led to synergies emerging with regard to labour costs and wage levels. Many of the Lesotho workers who migrate to South Africa go to Newcastle, a large town in the KwaZulu-Natal midlands. There they are employed by Taiwanese and Chinese manufacturers who started relocating to South Africa from the mid-1980s. They differ from their Lesotho counterparts in that most appear to have emigrated to South Africa, their factories in Newcastle are the only operations that they own and manage, their factories are much smaller than factories in Lesotho, and their orders come from South African retailers and are for the local market. Newcastle is particularly important because in 2010 it became something of a symbol for non-compliance with the NBCCI agreement. It continues to be a 'non-compliant safe haven' despite being the focus of numerous enforcement initiatives.[7] It is a cruel irony that Lesotho workers migrate to South Africa to earn better wages but take up jobs at factories that are not complying with the minimum wages and other conditions required by the NBCCI agreement.

This dynamic was given a new twist when in September 2018 the Lesotho government increased minimum wages for the garment sector by almost 40%. Apparently, one of the main reasons was to try to stem the flow of workers to factories in South Africa. While this increase somewhat closes the wage gap between Lesotho and South Africa, it has also placed price pressure on the manufacturers in Lesotho that export to the US. They allege they are no longer competitive and some have threatened to relocate their factories elsewhere.[8] Some argue that if any of these manufacturers leave Lesotho it is likely that they will be replaced by non-compliant South African firms, including many of the Newcastle manufacturers. The latter are under growing pressure from the NBCCI and some retailers to become compliant (see further Section 2.2.1). This could effectively transfer non-compliance from South Africa to Lesotho.

[6] There is a special dispensation for Lesotho citizens to get work permits. However, there are both legal and illegal migrants but there is no data on the overall number or how many are legal or illegal.
[7] The term used by a South African stakeholder to refer to Newcastle.
[8] Ethiopia is often mentioned, mainly because it is seeking to attract investors in its nascent clothing sector on the basis of extremely low wages.

1.3.3. Enforcement systems

The third major difference is the enforcement systems in South Africa and Lesotho. These systems differ markedly, with further variation between the predominantly Taiwanese-owned and South African-owned sectors in Lesotho.

The South African public enforcement regime has existed for about 100 years, and is rooted in an inspectorate division based in the Department of Labour (DoL). This inspectorate is authorised by the major labour statutes to conduct inspections and enforce labour rights and standards through prescribed procedures (discussed in more detail on Chapter 3). In many sectors, however, the DoL Inspectorate is effectively replaced by enforcement by bargaining councils.

Bargaining councils are sectoral bargaining structures that were first enabled in legislation in 1924 and continue to be regulated by the 1995 Labour Relations Act. They are established voluntarily by trade unions and employers' organisation, but the collective agreements reached at bargaining councils are generally extended to all employers and employees within the jurisdiction of the council (defined by industrial scope and geographical area). These agreements usually set minimum wages for a range of occupations in the sector as well as other basic conditions of employment: e.g. hours of work, overtime limits and rates of pay, annual leave and sick leave, notice of termination of employment. The bargaining council also polices these agreements, i.e. the council appoints agents (inspectors) to conduct inspections and investigate complaints at all employers covered by its agreements. Non-compliance is addressed via a similar prescribed procedure to that followed by the DoL Inspectorate. Bargaining councils therefore constitute a quasi-public enforcement system (Godfrey, 2018).

Regional bargaining councils have existed in the garment sector from the 1930s.[9] These regional councils merged early this century to form a national bargaining council (i.e. the NBCCI) that produces a number of regional collective agreements that together cover wages and conditions of employment for the garment sector across the entire country. Agents based at the main regional branches of the NBCCI enforce these agreements. The DoL Inspectorate is responsible for enforcement in the garment sector only with regard to the Occupational Health and Safety Act (OHSA), the Compensation for Occupational Injuries and Diseases Act (COIDA), and the Unemployment Insurance Act (UIA) (see further Chapter 3) (Godfrey, 2013).

The South African garment sector has always been very competitive, so enforcement has always faced challenges, but these challenges increased

[9] From 1924 to 1995, these bargaining structures were called 'industrial councils'. They were renamed by the Labour Relations Act of 1995.

exponentially after the import tariff reductions that were phased in from the mid-1990s. In 2009, data provided by the NBCCI showed that 53% of all clothing manufacturers registered with the NBCCI were non-compliant (these employers employed 26% of all registered employees).[10] An attempt in 2010 by the NBCCI to tackle this problem through an 'enforcement campaign' led to a well-publicised stand-off with the immigrant Taiwanese and Chinese manufacturers in Newcastle (see Chapter 2 Section 2.3.1). The stand-off was resolved only when a scheme was negotiated through which non-compliant clothing manufacturers could phase in compliance. The scheme, and subsequent modifications, has only somewhat reduced the level of non-compliance in the sector and has had little impact in Newcastle. Further, the above data does not capture the growing number of unregistered firms, mostly small, operating in the industry illegally. Importantly, empirical research has revealed that these unregistered firms are incorporated into supply chains that lead to the large, formal retailers.[11]

Lesotho has a very weak public enforcement system. The most obvious reasons are that there are too few inspectors in the Ministry of Labour and Employment (MoLE) and they are poorly resourced. However, in recent years a number of programmes run by the United States' Department of Labour and the International Labour Organization to strengthen the MoLE Inspectorate have not produced much improvement, suggesting that there are other factors at play that explain its poor performance.

The public enforcement system has been supplemented by private governance mechanisms imposed by major US buyers. These mechanisms took the form of codes of conduct requiring compliance with the labour legislation in Lesotho as well as various other standards prescribed in the codes. Enforcement of the codes took place through audits (i.e. inspections) conducted by the buyers' own corporate social responsibility (CSR) departments or third-party auditors contracted by the buyers. Importantly, there was no information sharing or interaction between the public inspectorate and the private auditing system.

The private system of codes and audits was on the face of it an important add-on to the inadequate public enforcement system, but various studies point to it as having had only limited impact (Pike, 2014; Seidman, 2009; Gibbon, 2003). It should also be noted that the growing number of South African manufacturers that transferred operations to Lesotho were not required to comply with codes of conduct because their customers (i.e. South African clothing retailers) had not developed CSR systems like the US buyers. This is

[10] Documentation for the Seventh Annual General Meeting of the National Bargaining Council for the Clothing Industry (15 October 2009). The data shows that in 2004 the level of non-compliance was a staggering 71%.
[11] Unpublished research by S Godfrey and M Shapiro commissioned by the Ethical Trading Initiative (ETI).

mainly because they have never faced consumer pressure regarding wages and working conditions in supplier factories.

A significant change took place in Lesotho with the introduction of the ILO/IFC Better Work programme.[12] Better Work Lesotho (BWL), which was launched in December 2010, involved major buyers, manufacturers and government in the enforcement system it introduced. It therefore provides a good example of a multi-stakeholder hybrid model of enforcement. Studies indicate that it had a significant impact on compliance in the garment sector, albeit off a very low base and with respect to certain issues (Pike and Godfrey, 2012, 2014 and 2015). Unfortunately, BWL was discontinued in 2016, in part because almost all the South African manufacturers in Lesotho refused to sign up to the programme. They argued that there was no need for them to do so and it therefore constituted an unnecessary expense, because their South African customers were not putting any pressure on them to join BWL (Pike and Godfrey, 2015). The result has been that a reversion to the earlier parallel public and private enforcement systems has taken place, with the gains made by BWL almost certainly slowly disappearing.

There are marked differences in the enforcement systems in South African and Lesotho as well as the nature of the enforcement challenges being faced in each country. Factories are generally large in Lesotho, they are concentrated in just a few industrial parks or sites in two towns, and wages and other labour standards are relatively low. There is no question of small informal firms evading inspectors or firms openly contesting compliance with the NBCCI as in South Africa. Rather, it is a combination of: very limited public enforcement capacity; weak trade union organisation; and very large foreign employers that are locked into a standard product, low-margin, big volume production model that constantly induces them to 'test' labour standards in the interest of profitability. This is done by deliberately ignoring certain standards or professing ignorance of the standards. The language barrier between mainly Sotho-speaking workers and inspectors (and government more generally) and Taiwanese and Chinese managers facilitates this approach to compliance: what should be straightforward and clear-cut becomes vague and murky. Alternatively, the audit process is gamed, with factories 'preparing' for the audit and then reverting to non-compliant routines when the auditor departs.

But there is one important similarity: in both countries unemployment is high and enforcement is constantly balanced against the potential loss of jobs, whether this is done explicitly or implicitly. The textbook sequence of labour rights enforcement does not hold in this context, i.e. rights in respect of minimum wages and working conditions are legislated or are arrived at

[12] The Better Work programme had been tested through a pilot programme in Cambodia (Better Factories Cambodia) and had been implemented in about seven other countries by the time it was launched in Lesotho.

through a process of collective bargaining that produces binding agreements, compliance with the rights is monitored by inspectors, where non-compliance is identified a procedure is followed to compel compliance and punish the employer for the non-compliance. The flexibility in this system is at the start, in the collective bargaining process or in the tripartite negotiations that legislation goes through in South Africa. On the face of it, the enforcement process is rigid – it should simply be a question of verifying the facts, with the procedure giving employers a chance to defend themselves on the facts. There is no explicit provision for negotiation of compliance. However, in practice what one finds in South Africa and Lesotho is that the enforcement process often opens up a second phase of negotiations against the backdrop of potential job loss.

The problem is that, unlike the Spanish/Latin enforcement model (see further below) this second phase of negotiations is not explicitly recognised: most parties continue to conceive of labour rights enforcement as following the text book sequence and do not acknowledge that enforcement can become a rather messy negotiation. This refusal to acknowledge the reality of enforcement means that the negotiation of enforcement can become ad hoc, unstructured and arbitrary; there are no rules of the game to guide inspectors and they do not necessarily have the required skills to engage in negotiations. It also gives the parties to negotiations a false sense of security: they are reaching collective agreements that might not necessarily have achieved the right balance between employer and worker interests and are ignoring the fact that it is left to flexible enforcement to modify rights to match reality.

1.4. Methodology

The foundation for the study was empirical research in South Africa and Lesotho. In South Africa semi-structured interviews were conducted with eight representatives from parties to the NBCCI as well as NBCCI officials. Further interviews were conducted with the senior manager for enforcement at the Department of Labour (Western Cape). The interviews were conducted in person or via telephone calls/skype link-up and were all recorded with the consent of the interviewees. In addition, a key person was interviewed at a South African retailer that has embarked on a process that could result in a hybrid enforcement model.

The data on Lesotho were also gathered primarily through semi-structured interviews. The interviews in Lesotho were conducted with representatives from the Lesotho National Development Corporation (LNDC) and officials from the Ministry of Labour & Employment, including the office of the Labour Commissioner, the trade union registrar and labour inspectors. In addition, further interviews were conducted with representatives from the trade unions that organise in the clothing sector (UNITE, Lentshoe la Sechaba and IDUL),

and with representatives from two employers' organisations: ALEB and LTEA. Members of Re Mmoho Compliance Solution, a not-for-profit organisation working on compliance assessment, training and advisory services in the sector, were also interviewed.

The study also relied on desk-based research, which included an extensive analysis of primary sources, and, to a more limited extent, relevant secondary resources. In terms of primary sources, the applicable legislation in South Africa and Lesotho was considered in depth, as were various materials relating to ILO engagement in Lesotho to improve enforcement of labour standards and on-going engagement on labour law reform in Lesotho.

2. Literature review

2.1. Public enforcement

As previously noted, public enforcement is a topic that has been neglected by labour law scholars and researchers over the years. The assumption that appears to inform this neglect is either that enforcement is not important or it is functioning unproblematically, both of which are incorrect and dangerous. In recent years, however, a number of studies have signalled increased attention with regard to public enforcement (Piore and Shank, 2006 and 2008; Weil, 2008 and 2009; Howe et al, 2013; Vosko at al, 2014; McCann et al, 2014; Lee and McCann, 2011 and 2014). This has been accompanied by a burgeoning literature on private enforcement or governance, which has probably played a part in stimulating the interest in public enforcement.

The literature on public enforcement points to two broad models of enforcement (Von Richthoven, 2002; Piore and Shank, 2006 and 2008). One model has French roots and spread to Italy and Spain, and from Spain to Latin America. One of its main features is that it is a 'general, or unified, system: virtually the whole of the labour code is administered by a single agency', which might also be responsible for enforcing provisions in collective agreements (Piore and Shank, 2006: 3). The inspectors in the French/Spanish model are likened to 'street level bureaucrats', i.e. 'the line officers have considerable discretion and decision-making power and are very difficult to control and direct from above' (Piore and Shank, 2006: 3). While such street-level bureaucracies might arise unintentionally due to the complex nature of the regulations that must be administered, significant discretion for inspectors is built into the design of the French/Spanish model. As a result, inspectors have 'the capacity to adapt the system to the exigencies of particular enterprises' (Piore and Shank, 2006: 3). Inspectors are also able:

> … to judge the burden the regulations impose on the enterprise, and where this is excessive, or threatens the enterprise's very solvency, to balance particular regulations against each other and against the

> broader role of the enterprise in providing employment and goods and services. (Piore and Shank, 2006: 3)

A further distinction is that the French/Spanish model aims at achieving compliance rather than punishing non-compliance (although punishment is an option if other methods fail). Piore and Shank state that achieving compliance via the model:

> … is a process, and the inspector is empowered to work out a plan that brings the enterprise into compliance gradually over time. Penalties are viewed as an instrument designed to force compliance. But they are only one instrument, typically invoked when violations are wilful, repeated and deliberate. When they are inadvertent, growing out of ignorance or lack of technical background, or… the attempt to remain competitive in an increasingly inhospitable environment, the inspector operates more as an advisor or consultant than as a policeman. (2006: 3)

The model places inspectors in a very good position to play this role because they visit a large number of enterprises, which allows them to not only investigate compliance but to also compare operations and disseminate information regarding best practices.

The other model can be described as Anglo-Saxon. In this model the inspector has little or no discretion. This means that enforcement follows a set (or rigid) procedure administered by an inspector, rather than becoming a process driven by an inspector. It therefore follows that there is little or no scope for balancing regulations with the sustainability of the enterprise, the jobs it provides and the goods or services it produces. Another feature of the system is that it routinely penalises non-compliance: the means of enforcement following an inspection is punishment via a penalty, after which the employer's obligation is discharged. The Anglo-Saxon model also tends to be associated with more fragmented enforcement systems, with different agencies responsible for enforcing different regulations (Von Richthofen, 2002; Piore and Shank, 2006 and 2008).

Those categorisations are, of course, ideal types. In practice enforcement systems do not fit neatly into one or other category but usually display features of both, although tending to lean towards one of the models.[13]

The above studies have been conducted by researchers who have examined the labour inspectorates, identifying differences and commonalities. Labour economists have been more concerned to investigate how effective enforcement is by labour inspectorates (measured by levels of compliance), as

[13] An apparent contradiction requires more research. The Spanish/Latin model is associated with civil law systems and the Anglo-Saxon model with common law systems. However, the latter are normally seen as more flexible than civil law legal systems, whereas common law enforcement systems appear to be generally much more rigid than civil law enforcement systems.

part of the bigger project to understand the relationship between labour standards and economic performance (particularly growth and job creation).

Bhorat et al (2011), for example, focusing on informing the debate in South Africa about the relationship between minimum wages and unemployment and growth, conducted a quantitative study on compliance with sectoral minimum wages in the country. The study sought to identify the degree of non-compliance with minimum wages (i.e. proportion of employees being paid below the minimum) and the depth of non-compliance (i.e. the average wage of underpaid workers compared to the minimum). The research found that 44% of employees were receiving sub-minimum wages, and that the private security sector was the worst offender with levels of non-compliance reaching 70% in some areas. Further, the 'violated' workers were paid on average 36% below the relevant minimum wage (Bhorat et al, 2011: 8-10).

The authors conclude that non-compliance with minimum wages in South Africa is 'disturbingly high', and that 'occupation as well as the location of employment matters in the level and depth of the violation observed.'(2012: 10) The implication is that those contending that minimum wages are causing unemployment and slow growth must modify their argument in light of the high non-compliance evidenced in the research findings.

Ronconi et al (2016), citing Ronconi (2015), take as their starting point the following conundrum: most developing countries have relatively stringent *de jure* labour standards and weak enforcement, whereas most developed countries have relatively flexible labour market regulation but high levels of enforcement.[14] They argue that, in light of this contradiction one cannot study the relationship between labour standards and economic performance in developing countries without measuring the level of compliance with the standards. They propose certain 'stylized facts' which they confirm using Work Bank Doing Business indicators and household survey data:

- Countries that have protective employment laws tend to enforce less, with such countries predominantly being developing countries (the conundrum);
- Countries with higher levels of enforcement tend to have lower levels of minimum wage violations (suggesting that the higher the risk

[14] The argument is that if a country's de jure standards are high it indicates an intention to protect workers, which implies that the country would want to enforce the standards effectively. The conundrum, i.e. that developing countries enforce standards weakly, is relatively easily explained if one factors in other variables. Weak enforcement in developing countries is primarily a political decision: governments can placate workers (i.e. voters) with progressive *de jure* standards and keep foreign investors happy by rationing the resources made available to the Labour Inspectorate so that non-compliance is relatively risk free. The argument would be that as long as foreign investors are creating jobs and paying some tax, the standard of living in the developing country should rise, partly mitigating the effect on workers of non-compliance with labour standards.

attached to non-compliance the lower the level of non-compliance); and,

- Lower levels of enforcement correspond with big differences in the rate of compliance by small firms compared to big firms (the argument being that if labour inspectorates have limited resources they will focus them on large firms) (Ronconi et al, 2016).

Besides these findings, the study points to differences in the labour market regimes (rights and enforcement) between developing countries and developed countries (an issue not dealt with explicitly in the literature on enforcement 'types' or models).

2.2. Private enforcement

The decentralisation and extension of production processes across borders that began in about the early 1970s and accelerated rapidly thereafter, has seen the emergence of what is generally termed private governance. There is now an extensive literature about private governance that branches from a number of disciplines that have added their own terms to describe the phenomenon: for example, soft law, corporate social responsibility and ethical trade. It has also been taken up as a key issue for study in related approaches such as value chain analysis, which uses the concept of social upgrading or downgrading to understand whether workers at supplier firms in value chains actually benefit from private governance (and public governance) (Barrientos et al, 2011).

Private governance is about regulation of private companies by other private companies; the companies are usually in different jurisdictions and subject to different national laws; and the sanctions used to enforce regulations rely on the economic power of the regulating companies with respect to the regulated companies. This private regulation is a bit like elastic: it stretches across borders in a way national regulation cannot and shapes itself within national jurisdictions in a way that 'complements' national regulation, but often with a narrow focus that represents the interests of the regulating companies. How it 'complements' national regulation varies but often means it seeks not to contradict domestic regulation but without actively seeking to contribute to it. Further, the elastic of private governance stretches only to certain firms, ignoring the wider sector in which they operate, and focusing just on particular areas, such as export processing zones, to the exclusion of the rest of the country (Blackett, 2004: 124).

The value chain literature emphasises that private governance is part of a wider political economy and that at power is at the heart of both the decentralisation of production and the private governance that has emerged to address certain adverse outcomes of such decentralisation (Gereffi et al,

1994). Initially, the decentralisation of production involved the location by multi-national corporations of production operations in developing countries. This trend has been surpassed, at least in certain sectors, by the sourcing of products (or a wide range of components that make up products) from either local firms or foreign firms (usually from other developing countries) that have based their operations in the country (Gereffi, 1994).[15] In recent years the literature on private governance has probably lagged developments in two respects: first, the extent to which multi-national corporations with roots in the global North are now dealing with multi-national corporations with roots in the global South; and second, the fact that regional value chains are increasingly emerging that start and end in the global South.

The economic power exerted by companies over other companies takes two different forms. First, the regulating company uses its buying power as a customer to ensure that its technical, quality, and delivery specifications are met. In effect, the regulating company wants to exert the sort of power over an independent supplier as it would over a wholly-owned subsidiary. The motivation for the second form of power did not arise within the regulating companies themselves but rather emanates from the markets it supplies. Consumer backlash against stories about the appalling working conditions or environmental standards at distant supplier factories compelled regulating companies to become involved in ensuring compliance with certain minimum labour standards (and increasingly environmental standards). Hence, private governance emerged, largely to protect the reputations of the regulating companies in the global North. A key issue regarding the emergence of regional value chains in the global South is whether firms will feel the same pressure from consumers to regulate their supply chains (Barrientos et al, 2011).

Given the private nature of these governance arrangements it is not surprising that such regulation takes a wide variety of forms (Blackett, 2004: 122). At the core of such arrangements, however, there are generally three instruments: a code of conduct or standards, an auditing (inspection) process, and some form of certification (which might encompass a 'social label'). The intersection of private governance with public governance is illustrated in the private codes of conduct. Whether these are individual corporate codes, or codes created by global NGOs to which companies adhere, at the core are generally the rights enshrined in key ILO Conventions. These same Conventions usually have been ratified by host countries and have informed their labour legislation. Further, the corporate codes often have as a base requirement that the regulated company must comply with national labour legislation, thereby effectively incorporating all the rights in that legislation into the code. The

[15] Gereffi (1994) made the useful distinction between producer-driven value chains and buyer-driven value chains, which identifies where economic power is concentrated in the chain.

introduction of private governance there sees a traversing of scales from international to national to workplace.

Despite this intersection of private and public governance, there is usually little engagement between national governments and code bodies, and there is similarly no cooperation between the public enforcement agencies and corporate auditors (or third-party auditors or auditors of global NGOs.) It is this gap between public and private governance that has been one of the main motivations for the emergence of hybrid models, which seek to coordinate enforcement and involve both public and private stakeholders.

Has private governance been effective? One should probably start by recognising that private enforcement systems frequently are operating in unfriendly environments, i.e. governments that are seeking to create jobs rather than decent jobs, under-resourced enforcement agencies, and fragmented or weak trade unions. Indeed, it is precisely these factors that have made private governance necessary. That said, private enforcement systems have displayed many problems: infrequent and inadequate inspections, coaching employees for interviews, falsification of official work records, egregious violations of health and safety standards that go unnoticed, and thousands of workers losing jobs when buyers simply pull out orders from non-compliant factories.[16] They have been particularly weak with regard to freedom of association.[17]

In addition, there is also concern that private regulation runs the risk of replacing trade unions (Compa, 2004: 210), being used as a union avoidance strategy (Marens, 2010: 748-50), or becoming a crutch for unions which rely on the threat of buyer reprisal rather than active organizing to pressure employers (Koen, 2011: 59). While others argue that private regulation cannot be implemented without the involvement or consideration of labour (Locke et al, 2009; Ruggie, 2011), some recognize that unions are limited to being a 'passive object that needs to be taken into consideration, managed and at best consulted' (Riisgaard, 2009: 326).

[16] See, for example, Baccaro, 2001; Cohen and Sabel, 2006; Elliott and Freeman, 2003; Esbenshade, 2004; Gereffi et al, 2005; Gereffi and Mayer, 2004; Jenkins et al, 2002; Locke et al, 2007; Mamic, 2004; O'Rourke, 2003; Yimprasert and Candland, 2000.
[17] See Blackett (2004) at 126-127 as well as three critiques of regulatory initiatives involving corporate codes of conduct at 122.

CHAPTER 3

Enforcement in South Africa

1. Key statutes and enforcement institutions

In South Africa a comprehensive regulatory framework is in place that provides employees with rights in respect of organising, collective bargaining, unfair dismissals, minimum conditions and sectoral wages, a national minimum wage, employment equity, health and safety, and employment-related social security. The regulatory framework also makes provision for the means to enforce these rights by giving powers to inspectors and setting out procedures through which to address non-compliance. Much of this regulatory framework was significantly revamped just prior to and after the 1994 democratic breakthrough in the country.

The regulatory framework is rooted in the section 23 labour rights provided for in the Constitution, which are given effect in the labour statutes. Other instruments like collective agreements concluded in bargaining councils, the dispute resolution provisions of these councils, and the Commission for Conciliation, Mediation and Arbitration (CCMA), Labour Court and Labour Appeal Court, are further components of the regulatory framework and the enforcement regime. The recent introduction of a national minimum wage (NMW) has seen an interesting innovation that will give the CCMA, which is primarily a dispute resolution body, an important role in enforcing compliance with the NMW.

While not labour legislation *per se*, there are also statutes that seek to promote black economic empowerment and local procurement which include mechanisms that encourage compliance with labour standards. Legislation in respect of co-operatives has, on the other hand, encouraged widespread evasion of labour standards by employers, mainly in the garment sector.[1]

Legislation that gives effect to the workers' rights is as follows:

- Labour Relations Act, 66 of 1995 (LRA)
- Basic Conditions of Employment Act, 75 of 1997 (BCEA)
- National Minimum Wage Act, 9 of 2018 (NMWA)
- Employment Equity Act, 55 of 1998 (EEA)
- Occupational Health and Safety Act, 85 of 1993 (OHSA)
- Compensation for Occupational Injuries and Diseases Act, 130 of 1993 (COIDA)
- Unemployment Insurance Act, 63 of 2001 (UIA) and Unemployment Insurance Contributors Act 4 of 2002 (UICA)
- Skills Development Act, 97 of 1998 (SDA) and Skills Development Levies Act, 9 of 1999 (SDLA).

The public enforcement regime is the overall responsibility of the Department of Labour (DoL), but the skills development legislation became the responsibility of the Department of Higher Education and Training in 2010 (although enforcement

[1] Co-operatives Act, 14 of 2005. Members of a worker co-operative are excluded from the ambit of certain labour statutes (and by implication Bargaining Council agreements). An amendment that removes this exclusion was passed by Parliament in 2013 but not brought into force until April 2019 (see Section 2.3.2).

is still by the Department of Labour). However, as indicated in the introduction, the system of bargaining councils means that in many sectors most of the DoL's enforcement responsibilities have been transferred to bargaining councils. The CCMA and the Labour Court also have a role in enforcement of some of the statutes.

1.1. Basic Conditions of Employment Act (BCEA) and National Minimum Wage Act (NMWA)

The Basic Conditions of Employment Act (BCEA) sets a single floor of minimum conditions for all workers. The conditions include ordinary hours of work, meal intervals, daily and weekly rest periods, night work, work on a Sunday and public holidays, a limit on overtime, an overtime rate, annual leave, sick leave, maternity leave, family responsibility leave, written particulars of employment, keeping of records, payment of remuneration, deductions from wages, notice periods, severance pay, and prohibitions on the employment of children and forced labour. All these conditions constitute terms in an employee's contract of employment, unless varied in terms of the Act.[2]

Enforcement of the BCEA is the responsibility of the DoL Inspectorate which is given wide powers to inspect workplaces and issue undertakings and compliance orders. The latter can be made orders of the Labour Court and can thereafter be executed as with any other court order. However, disputes over severance pay, which often involved questions of law, must be referred to the CCMA or an accredited bargaining council with jurisdiction. Non-compliance with most provisions of the Act are not criminal offences, but a breach of, amongst others, the provisions in respect of child labour and forced labour are criminal offences. It appears that such cases are referred by the Inspectorate directly to the National Prosecuting Authority for prosecution, i.e. the prosecution will not require investigation by the South African Police Service (SAPS) but will rely on the inspection(s) carried out by the DoL.

Enforcement of the recently introduced National Minimum Wage Act (NMWA) is closely related to the procedure to enforce the BCEA. In fact, the BCEA was amended to encompass enforcement of the NMWA. This amendment, however, also introduces an innovation that sees disputes about compliance with the NMWA dealt with through arbitrations conducted by the CCMA, in the process substituting the CCMA for the role that the Labour Court plays in the BCEA enforcement system.

[2] The Act provides a hierarchy of methods to vary its provisions: a fairly wide range of rights can be varied in a sectoral determination or a determination issued by the Minister of Labour, a more limited set of rights can be varied by a bargaining council agreement or other collective agreement, and a restricted number of rights can be varied by contract.

1.2. Employment Equity Act (EEA)

The EEA seeks to address the racially biased occupational structure inherited from Apartheid and achieve equity in the workplace. It has two main purposes. First, it puts in place provisions to eliminate unfair discrimination in the workplace and promote equal opportunity and fair treatment. No person may unfairly discriminate, directly or indirectly, against an employee, in any employment policy or practice, on a lengthy list of grounds, including race, gender, sex, pregnancy, marital status, ethnic or social origin, colour, sexual orientation, age, religion, HIV status, or political opinion. It is not unfair discrimination to take affirmative action measures consistent with the purpose of the Act or to distinguish, exclude or prefer any person on the basis of an inherent requirement of a job.

Enforcing compliance with regard to affirmative action measures, the drafting of an employment equity plan, and the annual submission of employment equity reports, is the responsibility of the Inspectorate of the DoL. The latter are authorised to conduct inspections and, if necessary, may issue a compliance order, which may be made an order of the Labour Court.

Breaches of certain other parts of the EEA are dealt with through the dispute resolution functions of the CCMA and/or the Labour Court.

1.3. Occupational Health and Safety Act (OHSA)

OHSA sets out the general duties of employers in relation to the health and safety of their employees as well as the general duties of employees at work. The Act therefore recognises that only well-informed employers and employees can achieve a healthy and safe working environment. An employer is required to provide and maintain, as far as is reasonably practicable, a working environment that is safe and without risk to the health of his/her employees. This general duty is broken down into a range of more specific duties in the Act. There are also a wide range of regulations published in terms of OHSA that add detail to its provisions.

A key mechanism for ensuring compliance with those duties is the health and safety representative. Every employer who has more than 20 employees at a workplace must designate in writing for a specified period health and safety representatives for the workplace or different sections of the workplace. The number of such representatives is determined by the number of employees in the workplace or section of the workplace. Health and safety representatives are given certain powers: reviewing the effectiveness of health and safety measures; identifying potential hazards and major incidents at the workplace; investigating complaints by any employee relating to that employee's health or safety at work; and making representations to the employer on specific or general matters affecting the health or safety of employees in the workplace.

The Inspectorate of the DoL is responsible for enforcing the provisions of OHSA. Inspectors are given wide powers by the Act to carry out their duties. Contraventions of most of the provisions of OHSA are offences that attract fines or imprisonment. It appears that such cases will be referred directly to the National Prosecuting Authority for prosecution, i.e. the prosecution will not require investigation by the South African Police Service but will rely on the inspection(s) carried out by the DoL.

1.4. Compensation for Occupational Injuries and Diseases Act (COIDA)

The purpose of COIDA is to provide employees who meet with accidents or contract diseases at work that result in their disablement with compensation. In the case of the death of an employee in such an accident or as a result of such disease the dependants of the deceased have a right to compensation. Generally, an employee who is injured because of his or her own wilful misconduct will not be entitled to compensation. Claims for compensation in respect of injuries and illnesses, or death, as a result of employment exclude other remedies such as a delictual claim for damages, i.e. an employee or dependant is restricted to a claim for compensation in terms of COIDA.

A claim for compensation starts with notice of an accident by or on behalf of an employee to an employer and to the Commissioner in the prescribed manner. This must be done as soon as possible after the accident (although failure to give notice to an employer does not bar an employee's right to compensation if it is proved that the employer had knowledge of the accident from another source). The employer must within seven days of receiving such notice of an accident or learning of it in some other way, report the accident to the Commissioner in the prescribed manner. The Act outlines subsequent procedures that must be followed, including obtaining medical reports, for the processing and payment of the claim. This might include an application for increased compensation where the employer is found to have been negligent. Contraventions of many of COIDA's provisions constitute criminal offences. As with OHSA (see Section 1.3 above), such cases will be referred by the Inspectorate directly to the National Prosecuting Authority for prosecution.

At the time of writing the Department was in the process of appointing at team of specialist inspectors to enforce compliance with COIDA. It appears that these inspectors will be based in the Directorate: Legal Services rather than in the

Inspection and Enforcement Services section.[3] Their powers, similar to those of 'ordinary' inspectors, are set out in an amendment Bill.[4]

1.5. Unemployment Insurance Act (UIA) and Unemployment Insurance Contributors Act

The UIA establishes the Unemployment Insurance Board and the Unemployment Insurance Fund to which employers and employees contribute. It also provides for the appointment of the Unemployment Insurance Commissioner within the DoL. The Act is aimed primarily at providing benefits to employees who become unemployed (or their dependents in the case of the death of a contributor). Applications for benefits are administered by the Unemployment Insurance Commissioner and are paid from the Fund. Besides providing for unemployment benefits the UIA also makes provision for illness benefits, maternity benefits, and adoption benefits.

The Inspectorate of the DoL may be requested by the Commissioner of the South African Revenue Service (SARS) or the Unemployment Insurance Commissioner to investigate any employer who is required to contribute in terms of the Act. Unpaid contributions attract a penalty of 10% of the unpaid amount, although the full penalty or part thereof may be remitted to the employer.

1.6. Skills Development Act (SDA) and Skills Development Levies Act (SDLA)

The SDA and SDLA create a new institutional and financial framework for training and skills development in the workplace.[5] The SDA establishes the National Skills Authority (NSA), which advises the Minister of Higher Education and Training on skills development policy and strategy, and also liaises with Sector Education and Training Authorities (SETAs). SETAs have a key role in the new dispensation. A SETA must develop sectoral skills plans within the framework of the national strategy; it must implement those plans by establishing learnerships; it must approve workplace skills plans; it must allocate grants to employers, education and training providers, and workers; and it must monitor education and training in its sector.

A DoL labour inspector, i.e. appointed in terms of the BCEA, is regarded as an inspector for the purposes of the SDLA with regard to the collection of levies by a SETA or its approved body. The Director-General can however also designate an

[3] DoL, *Compensation Fund Amendment Bill proposes introduction of inspection specialist*, <http://www.polity.org.za/article/dol-compensation-fund-amendment-bill-proposes-introduction-of-inspection-specialist-2018-11-26>.
[4] Compensation for Occupational Injuries and Diseases Amendment Bill. Government Notice No. 1133, dated 18 October 2018, Government Gazette No. 41985.
[5] As noted above, the SDA and SDLA initially fell within the ambit of the Minister of Labour's responsibilities but about nine years ago this responsibility was transferred to the Minister of Higher Education and Training.

agent of a SETA or its approved body to be an inspector for the collection of levies by the SETA or its approved body. Inspectors may require an undertaking from a non-compliant employer or issue such an employer with a compliance order as per the enforcement system established by the BCEA.

1.7. Labour Relations Act (LRA)

The LRA is the centrepiece of the labour statutes but its role in enforcement is primarily on the dispute resolution end of the spectrum. It establishes the Commission for Conciliation, Mediation and Arbitration, a dispute resolution institution that deals with a wide range of disputes through conciliation and arbitration (and now plays a role in enforcement of the NMWA). Much of the work of the CCMA involves resolution of unfair dismissal disputes but it also deals with unfair labour practice and unfair discrimination disputes (usually termed rights disputes). The CCMA also has a role with regard to collective disputes arising from deadlocked collective bargaining processes (termed interest disputes). The LRA also establishes the Labour Court and the Labour Appeal Court, which complete the labour dispute resolution system.

The LRA has a limited role to play with regard to enforcement: it provides the framework for establishing bargaining councils and also provides the authority for a bargaining council to appoint agents (the term used for bargaining council inspectors) and gives them powers to enter workplaces, examine documents, and so on (these powers are much the same as those given to DoL inspectors by the BCEA).[6]

1.8. Commission for Conciliation, Mediation and Arbitration (CCMA)

Although it is primarily a dispute resolution institution, the new NMWA has brought the CCMA into the ambit of the compliance and enforcement framework (as of 1 January 2019). Established in terms of the Labour Relations Act, the main purpose of the CCMA is the resolution of disputes referred in terms of the LRA by way of conciliation, mediation and arbitration. As previously indicated, most of these disputes are individual disputes, mainly related to alleged unfair dismissals, but the CCMA also has an important role to play with regard to collective disputes. The CCMA is also empowered to perform a number of other functions aimed at pre-empting disputes and provides assistance of an administrative nature to lower-paid employees to aid them with serving any notices required by the LRA.

[6] It should be noted that a bargaining council can be accredited in terms of the LRA to carry out the conciliation and arbitration of disputes within its jurisdiction. In effect, a bargaining council will substitute for the CCMA with respect to the resolution of most disputes within its jurisdiction.

The CCMA plays a key role in the labour relations system in the country and has relatively successfully coped with a case load that has vastly exceeded initial projections.[7]

1.9. Labour Court and Labour Appeal Court

Established by the LRA, the Labour Court (LC) hears applications for the review of CCMA arbitration awards, interdict applications (often related to allegedly unprotected strikes) and various other matters. It may be approached directly with regard to a number of specified disputes, which are generally those involving greater complexity than the type of disputes dealt with by the CCMA. The Labour Appeal Court (LAC) hears appeals against the LC's decisions and may also determine points of law referred to it by the LC. The LC has equivalent status to the High Court and the LAC with the Supreme Court of Appeal. The parties to a dispute in the LAC may appeal to the Constitutional Court (Collier et al, 2018: 35).

2. Implementing compliance: institutions and processes, challenges and opportunities

2.1. Department of Labour: inspection and enforcement services

The DoL has a division, Inspection and Enforcement Services, headed by a Deputy Director-General. The objective of the Inspectorate is the 'realization of decent work by regulating non-employment and employment conditions through inspection and enforcement, to achieve compliance with all labour market policies.'[8] The DoL is primarily responsible for enforcement in respect of the national minimum wage (NMWA), basic conditions of employment (BCEA), health and safety standards (OHSA), and affirmative action measures and reporting (EEA) as well as registration and contributions to the Compensation Fund (COIDA) and the Unemployment Insurance Fund (UIA and UICA).

The section that follows draws on interviews and some secondary material to provide some insight into the functioning of the enforcement and compliance system, including its strengths and weaknesses and the challenges it faces. While some of the section provides data on the national system, much of it focuses on inspections in the Western Cape province.

2.1.1. The structure of the Inspectorate

[7] In the 2016/17 financial year it dealt with a total of 188,449 matters, a significant increase on the 168,434 matters referred to it in 2012/13 (CCMA Annual Report 2016/2017 at 24).
[8] Department of Labour 2017 Annual Report at 38.

The Inspectorate within the DoL has undergone restructuring in recent years to make it more effective. First, the Inspectorate became a directorate within the Department under the management of a director. The director has three deputies who are responsible for respectively enforcement of the UIA and COIDA, enforcement of the BCEA and the EEA, and enforcement of the OHSA. A fourth division within the Inspectorate is Legal Services.

The Inspectorate is divided into nine provincial offices, with each provincial inspectorate headed by a chief inspector. The national office audits the inspection statistics produced by each province to monitor performance. The chief inspector in a province has a hierarchy beneath him/her comprising a number of regional managers in different parts of the province. The regional managers have team leaders beneath them who are responsible for managing individual inspectors.

2.1.2. The capacity of the Inspectorate

The DoL Inspectorate is not well staffed: in 2017 there was a total of 1,312 labour inspectors.[9] The budget to allow for the appointment of a further 124 inspectors in 2018, mainly with a view to enforcing the impending NMW Act, was rejected by the National Treasury. The inspectors are spread between the nine provincial offices and enforce labour rights for a total labour force of about 16 million. The number of employers or workplaces is not known.

Notwithstanding the low number of inspectors, 144,061 inspections were carried out in respect of the BCEA, OHSA and the EEA in the 2016/2017 financial year (which exceeded the target of 134,958 inspections). Of this number, 20,546 employers were found to be non-compliant. Most of the non-compliant companies were in the Kwazulu-Natal province, where 5,198 of the inspected employers were found to be non-compliant. This province also constitutes the biggest challenge for the NBCCI (see Section 2.3 below). The 170 inspectors in the Western Cape province conduct a total of about 22,000 inspections per year. This breaks down to about 18 to 20 inspections per month (depending on the rank of the inspector).

The problem with the above data is that the number of employers or workplaces is not known. This means that one cannot determine what proportion of employers the 144,061 inspections covers: for example, is this 50% of all employers or 20%.[10] It also means one cannot get an indication of how frequently an employer is inspected: if 144,061 inspections covers 50% of all employers, one can infer that an employer should be inspected every second year, but if it is only 20% of employers it indicates that an employer will be inspected only every five years.

[9] Ibid at 102.
[10] It is also not clear whether the 144,061 inspections were actual physical inspections of a workplace. Some complaints by employees are resolved by telephone with the employer and it is not known whether the latter are counted as a completed inspections.

2.1.3. The capability of the Inspectorate

The DoL has over the last few years recruited much more highly skilled staff for the Inspectorate. Some years ago the minimum qualification for an inspector was a Grade 12 school pass but it is now an LLB degree. Further, the legal services division is staffed by qualified lawyers, which means better representation in the Labour Court and the relief of inspectors from having to attend Labour Court hearings. Similarly, the division responsible for enforcing the UIA and COIDA employs qualified auditors as inspectors because of the expertise required for such investigations.[11]

Besides hiring more highly-qualified inspectors, the DoL also provides internal training. Furthermore, there is a perception within the DoL that the training needs to be taken a step further in order to better equip inspectors. The Department is therefore currently in talks with the University of KwaZulu-Natal and Witwatersrand University to develop a specialized program for labour inspectors.

Currently, however, the Inspectorate still has many inspectors with only a Grade 12 school pass, so the benefits of the much better qualified inspectors recruited in recent years have not been translated into systemic changes, e.g. greater discretion being given to inspectors to fashion compromises at workplaces.

2.1.4. Management of the Inspectorate

Management of the Inspectorate must deal with a tension between the DoL Head Office's quantitative monitoring and evaluation of enforcement and the desire at the provincial level for better quality inspections to be conducted. The quantitative orientation can lead to bad practices, which has in turn compelled managers to monitor one dimension of inspection to the detriment of a more holistic approach that would incorporate depth and quality. What entrenches the emphasis on quantity is that the number of inspections determines how much money a provincial office is given in the annual budget.

For example, an inspector who wants to push up the number of inspections he/she has conducted can do return visits to the same employer. Countering this abuse has led to a rule that an inspector cannot return to a workplace within a year of the last inspection unless there have been more recent complaints by workers. The management system has therefore become primarily about the verification of inspections: team leaders do compulsory monthly verifications of the inspections done by each inspector in his/her team. In turn, the team leader's inspection report is verified by the regional manager. The final step is when the Chief Inspector in the

[11] The auditors are designated as inspectors so that they have the powers of inspectors to enter workplaces, access records, etc.

province signs off on the report. The Head Office then gets what it wants: a true account of the number of inspections conducted excluding repeat inspections.

The system is reportedly watertight but is one-dimensional. It has made enforcement much more effective in terms of achieving a high number of inspections and restricting certain bad practices by inspectors, but it has also meant that the quality of inspections has been neglected and inspections are conducted within a quite rigid framework. For example, an inspector should interview workers during an inspection. If only five workers are interviewed (in a workplace with 250 employees) the inspection can be done quickly, but this could mean missing instances of non-compliance and other problems that are occurring in the workplace. On the other hand, setting a rigid percentage of the workforce for inspections removes discretion from the inspector and could result in more workers being interviewed than necessary. This means time being wasted without adding any value to the inspection. The solution is to give the inspector more discretion in order to conduct high quality inspections, but if he/she is being evaluated on the number of inspections conducted, an inspector will be under constant pressure to choose quantity rather than opting to conduct better quality inspections.

A compromise of sorts is a new approach to planning inspections that is currently being tested in the Western Cape. Inspectors are being encouraged to go to areas or sectors that are seldom inspected or have never been inspected. This approach is apparently making the Inspectorate more effective, but it comes with a cost: inspectors are spread more thinly, travel more widely, and they have to stay overnight in distant towns.

2.1.5. The functioning of the Inspectorate

The Inspectorate has sought to avoid its specialist divisions becoming silos. There is close collaboration with regard to inspections, with inspectors from the three divisions conducting simultaneous inspections. This has improved effectiveness but is demanding in terms of coordination and resources. One challenge is that the numbers within the divisions are not equal: there are 140 inspectors in the BCEA and EEA division but only 20 in the UIA/COIDA division (where inspectors have higher qualifications) and 20 in the OHSA division (where inspectors need more technical knowledge). However, there are plans to employ an additional 12 auditors and 50 more OHSA inspectors to partly address this imbalance.

The current framework for inspections is demanding of inspectors, particularly with regard to time frames. Many employers do not comply with the deadlines given to them in written undertakings and compliance orders. Similarly, inspectors are often reliant on employees to provide them with information to pursue the matter against the employer. Delays on the part of employees leave inspectors and the ‘case’ in limbo. This puts pressure on the inspector to keep to the procedural

time frame in order to advance the case.

Attempts to streamline the procedures can create additional problems. After an amendment to the BCEA, the Inspectorate stopped doing follow-up inspections after issuing a compliance order. Now, if they do not hear from the employer to confirm he/she is now compliant, they simply send a confirmatory notice stating that the employer has not complied and that the matter is being referred to the LC. The onus has therefore shifted from the Inspectorate to follow up to the employer to contact the Inspectorate. As a DoL interviewee noted:

> So there is no engagement after I have served you the initial notice, there is no facilitation, there is no get together, and there is no further discussion on how we can rectify the problem. The inspector has no business with you after he has served the notice because he has given you the 14 days to comply. You don't do it [and tell us you have done it], you see us in court.

The problem is that this approach has pushed up the referrals to the LC by 70%. The referrals are, however, often unnecessary – the employer is compliant but has simply not informed or sent proof to the inspector. Thus, it is only when the matter is heard in the LC that the employer provides proof of compliance. This is rigid to say the least and emphasises a policing/penalising approach at the expense a more compliance-oriented process.

2.1.6. Flexibility in the enforcement system

Currently there appears to be very little leeway for inspectors to exercise discretion when conducting inspections. Inspectors must administer an inspection template and their inspection reports are monitored and in some cases double-checked. The procedure, furthermore, has become legalistic. With the potential of a court challenge, all instances of non-compliance must be supported by evidence, usually documentation. On the other hand, it was argued by an interviewee that legislation is open to interpretation so there is always scope for inspectors to use their discretion.

The main form of flexibility accommodated by the LRA (through bargaining councils) and the BCEA is exemptions (or 'variation' to use the terminology of the BCEA). This gives 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 gives the employer the opportunity to apply for an exemption in respect of areas of non-compliance. A DoL interviewee argued that the DoL recognises that it is counter-productive to take employers to the LC if they are willing to comply but need a period of grace within which to comply. Providing for exemptions in such cases saves the DoL and employer the time and expense of going to the LC without any prejudice to workers. Exemptions

are reportedly granted 90% of the time if it is evident that the employer is willing to comply.

2.1.7. The effectiveness of the Inspectorate

It is difficult to know how effective the DoL enforcement system is because there have been few studies of this issue. Besides the inferences that one can draw from the research by Bhorat et al (2011) and Ronconi et al (2016), discussed in Section 2.1 above, one has to rely on the occasional press statement. For example, it was reported in 2018 that the Acting Unemployment Insurance Commissioner stated that there were 1.8 million employers and 8 million employees registered with the Unemployment Insurance Fund. This compares to over 16 million employees in South Africa in September 2018, suggesting that about 50% of all employees were not registered with the Fund, as required by the UIA. While there is no data on the number of employers in the country, employment in the private household sector was 1,267,000 in September 2018. Given that most private households that employ someone will employ a single worker, one can estimate that there are probably over a million employers just in the private household sector. Yet there are only 1.8 million employers across the entire economy that are registered with the Unemployment Insurance Fund. This indicates a huge level of non-compliance with the UIA and suggests high non-compliance with labour legislation more generally.

A second indicator is provided by a report from the Private Security Sector Provident Fund (PSSPF), a fund set up by Sectoral Determination 6: Private Security Sector in terms of the BCEA.[12] The PSSPF has more than 242,600 employers registered with it, of which it states that more than 2,500 (employing about 80,000 workers) are non-compliant.[13] However, non-compliance is probably higher because the above excludes employers operating private security firms that are not registered with the PSSPF. Registered employers are presumably easy to monitor because one tracks their monthly contributions and takes action when these are interrupted, but unregistered firms will need to be 'discovered' by DoL inspectors.

2.2. Enforcement by the National Bargaining Council for the Clothing Manufacturing Industry

Bargaining councils are established in terms of the LRA. The LRA also provides a framework for the enforcement of bargaining council agreements by providing for

[12] Sectoral Determination 6: Private Security Sector, South Africa Government Notice 786, dated 1 September 2015, Government Gazette No. 39156.
[13] Barbara Maregele, 'Pensions of more than 80,000 security guards at risk' (*Ground Up*, 18 October 2018), available at <https://www.groundup.org.za/article/pensions-more-80000-security-guards-are-risk/>.

the appointment of designated agents (i.e. inspectors) and sets out the powers bargaining councils have to enforce their agreements. Bargaining councils usually elaborate upon the provisions in the LRA in their agreements. The NBCCMI is a case in point, setting out in detail an extensive enforcement and compliance system in what is termed its Main Agreement, which is extended by the Minister of Labour in terms of the LRA to all employers and employees within the clothing sector (as defined by the NBCCMI).[14] The NBCCMI's collective agreements provide for minimum wages, a wide range of minimum working conditions, and contributions to social benefit funds in certain regions.[15] Registered employers and employers' organisations can make an application in the prescribed form to be exempted from the application of all or part of a collective agreement.[16]

Designated agents are tasked with securing compliance by publicising the contents of agreements, conducting inspections, investigating complaints, and by issuing compliance orders requiring an employer to comply with an agreement within a specified period. In order to conduct inspections or investigate complaints an agent may, without warrant or notice, at any reasonable time enter any workplace or any other place where an employer carries on business or keeps employment records (other than a private home). Agents have wide powers to inspect records or documents and question people. Every employer and each employee must provide any facility and assistance at a workplace that is reasonably required by a designated agent to effectively perform his or her functions.

The NBCCI is exceptional in that it has introduced two measures of compliance, i.e. it provides for what is 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 prescribed minimum wage. If this does not happen, the employer will face enforcement of full compliance.

As a means of promoting the concept of decent work, the agreement also provides for the monitoring of atypical, outsourced and sub-contracted work. Sub-contracting to non-compliant employers in the industry is not permitted by the NBCCMI agreement. If it is found that an employer has 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. However, a 'Level B' employer will be considered compliant if it is paying at least 80% of the minimum wage rate, which means that the joint and several liability provisions will not apply.

[14] Bargaining council agreements are generally extended by the Minister of Labour.
[15] The NBCCI has separate agreements covering the major metropolitan areas in which garment manufacturing is concentrated as well as an agreement that covers much of the rest of the country (the so-called non-metro areas agreement).
[16] In order for a bargaining council agreement to be extended by the Minister it must include a list of the criteria against which applications for exemptions are assessed.

An investigation into non-compliance can be triggered through own investigation by bargaining council agents (i.e. what can be referred to as a routine inspection) or on instigation of any other source (e.g. a complaint by an employee or ex-employee). An investigation can lead to the issuing of a compliance order if non-compliance is identified. If an employer does not comply with the terms of a compliance order within the prescribed period, the designated agent reports the dispute to the general secretary of the NBCCI who may refer the unresolved dispute to arbitration, i.e. the non-compliance becomes a 'dispute' between the council and the employer. The NBCCI has a panel of independent arbitrators who have a wide scope regarding the arbitration orders they may make. Such award or order is final and binding on the parties to the dispute. If an award or order is not complied with then it may be referred by the bargaining council to the messenger of a magistrates' court for issue of a warrant of execution and thereafter a sale in execution.

The NBCCI is also exceptional in that it has managed to have full compliance incentivised. An inspection that results in an employer being found fully compliant with the agreement will lead to the issue of a compliance certificate to the employer. The compliance certificate is important because access to the Department of Trade and Industry's assistance programmes for the garment sector and to public procurement tenders has been made dependent on the employer possessing a valid compliance certificate.

The NBCCI aims to inspect every registered party employer annually (i.e. an employer who is a member of an employers' organisation that is a party to the NBCCI agreement) and non-party companies twice per year. Inspections are also conducted when the NBCCI is considering an exemption application or has received a complaint from an employee. However, we were unable to establish how many agents are employed by the NBCCI, although we were informed that five agents were based at the Durban office and two were employed in Newcastle. These agents were responsible for inspecting 108 and 139 employers respectively, which suggests a manageable ratio of agents to employers (although it is puzzling why there are so few agents in a problematic town such as Newcastle – see further Section 2.3.1 below). However, one also needs to factor in the many unregistered employers; it is also the responsibility of agents to discover such employers and compel them to register. One well-informed respondent estimated that there were between 450 to 460 unregistered co-operatives in the KwaZulu-Natal province alone.

2.2.1. The NBCCI compliance and enforcement processes

A number of the respondents concurred that the NBCCI compliance and enforcement provisions worked quickly, efficiently and smoothly. According to one interviewee, it takes 'a month or two from start to finish'. But this appears to be the best-case scenario. According to one respondent it can take three months for the

NBCCI to get an arbitration award against a non-compliant employer made into an order by the CCMA. By the time a sheriff is secured to serve the order, a minimum of six months will have passed. Then further delays often result because 'third parties claiming ownership of machinery enter the scene', which means the sale in execution to recover monies cannot proceed. Or the NBCCI is confronted with a rescission application against the original award. As a result, the entire process can take up to a year with no guarantee of success.

2.3. Challenges to public enforcement

2.3.1 The regional dimension

The challenges to enforcement have a very strong regional dimension. In the Western Cape province the main challenge is posed by the many home-based operations, which present problems because agents have limited access to private residential properties. Further, many of the home-based operations are in low-income suburbs that are riven by gang and taxi violence. It was suggested by a respondent that certain suburbs were no-go areas for agents (although other respondents disagreed). In any event, the home-based operations pose dangers to agents: we were told of agents being attacked by dogs and assaulted by residents.

The KwaZulu-Natal province presents a very different challenge. Towns in the rural interior of the province attracted clothing manufacturers many years ago because they were outside the registered area of the bargaining council (then known as an industrial council). With the merger of regional bargaining councils to establish the NBCCI, its scope was extended to cover the entire country, thereby bringing manufacturers in rural towns within its jurisdiction. Furthermore, SACTWU subsequently sought to close the wage differential between workers in so-called non-metro areas and the metro areas. Manufacturers in rural towns were therefore brought within the jurisdiction of the NBCCI at a time when wages were being pushed upwards sharply (albeit off a very low base). The result has been a rejection of the legitimacy of the bargaining council and open non-compliance: one interviewee stated that these manufacturers 'displayed a total disregard for the enforcement regime and authority from the outset.'

The immigrant Taiwanese and Chinese manufacturers in Newcastle are in the vanguard of this challenge. However, a number of key interviewees in KwaZulu-Natal noted that there was nothing exceptional about Newcastle and that the same resistance to enforcement could be found in other towns and industrial areas in KZN and the Free State province.[17] Abetting this resistance are the remarkably high unemployment rates in and around these areas, especially for black African women, who make up the bulk of the workforce in the clothing sector. This gives the manufacturers grounds to argue that they are creating jobs and that attempts

[17] For example, Phuthaditjhaba, Qwa-Qwa and Isithebe.

to enforce the bargaining council agreement, particularly the minimum wage rate, will destroy jobs. But interviewees argue strongly that job creation is not the concern of these manufacturers. Rather, it is a question of ideology: they do not recognise the bargaining council as having any authority to prescribe minimum wages and working conditions. It can be termed a 'culture of non-compliance'. Their opposition to the NBCCI is certainly not based on an argument for a better balance between labour costs and job creation.

The culture of non-compliance can be seen in action in the 2010 lock-out by Newcastle manufacturers in response to the NBCCI's efforts to serve writs of execution (as part of a national 'compliance campaign'). Similarly, previous research revealed that Newcastle manufacturers meet when wage increases and other changes to working conditions are agreed in the NBCCI negotiations. They will discuss and decide what provisions they will comply with, what they will not comply with, and at what level they will set that non-compliance. No manufacturer is bound by such decisions but clearly they carry considerable weight because they rely on each other for achieving a critical mass that make enforcement very difficult.[18]

Another example is with regard to payment for annual leave, which is required in the NBCCI main agreement. It was found that most manufacturers closed their factories for two or three weeks over the Christmas/New Year period. Many did so without providing annual leave pay to workers for this period, although there were some manufacturers who paid one week's leave (if the closure was for two weeks) or two weeks' leave (if the closure was for three weeks). The contravention of the NBCCI provision for annual leave was widespread with only some variation in the extent of the non-compliance. It is difficult not to conclude that there was significant coordination.

The culture of non-compliance is also evidenced in the resistance of the Newcastle manufacturers to inspections. Given the challenge posed in Newcastle, the NBCCI and other regulatory agencies have adopted a strategy of 'blitz' inspections in Newcastle, i.e. a team comprising NBCCI agents, SACTWU officials, DoL inspectors, Department of Home Affairs staff (for illegal immigrant workers) and even the SAPS is assembled to comprehensively inspect all the clothing factories over a number of days. However, these blitz inspections are undermined because:

- firstly, the clothing manufacturers are warned when members of the team book into hotels in Newcastle;
- secondly, it is alleged that members of the inspection team are bribed and warn manufacturers in advance of the blitz; or,
- thirdly, if a warning has not gone out, the first manufacturer that the team inspects will immediately warn others, who in turn warn others until all manufacturers know that a blitz is in progress, with the result that the team

[18] Unpublished research by S Godfrey and M Shapiro commissioned by the Ethical Trading Initiative (ETI).

of inspectors will thereafter encounter locked gates and factories that are dark and silent (employers have either told their workers to stay away for a day or two, or the lights have been switched off and workers have been told to sit quietly in the locked factory until the inspection team moves off.

In addition, it was reported by a number of interviewees that the NBCCI has come under pressure repeatedly from the KwaZulu-Natal provincial government to back off from Newcastle. The risk of job losses due to rigorous enforcement by the NBCCI is politically unpalatable in the province.

The concerted opposition from the Newcastle manufacturers and high unemployment in the area have compelled the NBCCI parties to adopt a developmental approach to enforcement. They are cognisant of the threat to jobs that a rigid approach will entail. As one key informant stated, the challenge is not strictly about regulating labour standards but is rather a 'socio-political and ethical challenge'. This means that the NBCCI tends not to proceed to the final stage of enforcement, which is the service of a writ of execution on the employer and probable closure of the factory. If they took this step, one key informant argued, 'over the last two years, up to 25,000 workers would have ended up without jobs.' So, the parties to the Council, while wanting to enforce standards, 'were mindful of ethical considerations, so that even if corruption or criminality were being dealt with, the threat of job losses was overriding.' As another key informant put it, the NBCCI is 'charged with ensuring compliance and is not in the business of closing down companies.'

2.3.2. A loophole for non-compliance: becoming a cooperative

As indicated in the introduction, the restructuring of the production process, mainly through the splitting of design functions from the cutting and assembling of garments, has been an important contributor to non-compliance. This saw many manufacturers converting into or setting up as design houses,[19] with factories downgrading to become CMT operations. Retailers now place orders with design houses, which in turn place the orders with networks of CMT factories. The very tight margins facing CMTs make non-compliance with labour standards a constant option for hard-pressed or inefficient manufacturers. A repeated complaint one hears from these manufacturers is that the prices they are getting from the design houses makes it impossible to comply with the NBCCI's minimum wages. Importantly, the design house is usually well-aware that it is demanding prices that compel non-compliance on the part of its suppliers.

[19] Design houses employ sample machinists and a few other workers that fall within the scope of the NBCCI. They must therefore register with the NBCCI and comply with the relevant agreements. This is not usually an issue for design houses; what is an issue is the power imbalance between design houses and the CMT operations they use to make up garments. This power imbalance plays out in low prices on orders, usually presented to the CMT on a 'take it or leave it' basis by the design house. Non-compliance with labour standards, particularly wages, is often the result.

Following the inclusion of a provision for joint and several liability for non-compliance in the NBCCI agreement, CMTs (particularly those in KwaZulu-Natal) were reportedly encouraged by design houses to convert themselves into co-operatives. The motivation was found in the 2005 Cooperatives Act,[20] which sought to promote worker cooperatives by excluding them from compliance with the LRA and the BCEA (in order to achieve its objectives of economic empowerment and employment creation). It did this by declaring that a member of a worker co-operative is not an employee as defined in the LRA and the BCEA.[21] Whether a bargaining council agreement, enabled by the framework for bargaining councils in LRA, would as a consequence also be excluded, was not clear.

The problem with regard to the Act was not so much the exclusion of members of a workers cooperative from the LRA and BCEA but rather the implementation of the Act, in particular the ease with which co-operatives could be established and the lack of any verification or monitoring of co-operatives to establish whether they were 'genuine' rather than 'shams' set up to take advantage of the exclusion.[22] Following the introduction of the Act there was an explosion in the registration of cooperatives and it soon became apparent that many co-operatives were not 'genuine'.

The NBCCI challenged the loophole that the Cooperatives Act created all the way to the Constitutional Court but it was unsuccessful.[23] The abuse of the Act led to the Co-operatives Amendment Act (COAA) being passed by Parliament in early 2013. The COAA provides that a member of a co-operative is an employee of the co-operative if they satisfy the definition of 'employee' in the LRA. The consequence is that the LRA and BCEA applies to members of worker co-operatives, which the amendment makes explicit by stating in the new Item 6(2) that all 'worker co-operatives must comply with labour legislation'. The amendment then goes on to provide that a worker co-operative may apply to a Bargaining Council having jurisdiction over it for a full or partial exemption from 'applicable labour legislation' (which should presumably be interpreted to include the Bargaining Council's agreements). If there is no Bargaining Council with jurisdiction over the cooperative, it should apply to the Minister of Labour for a full or partial exemption from 'applicable labour legislation'.

The Amendment Act requires that regulations be introduced within six months of its date of commencement which would set out what 'constitutes good grounds'

[20] Act 14 of 2005.
[21] Item 6(1) of Part 2 of Schedule 1 of the Act. Note that members of a worker co-operative are not excluded from the SDA, the SDLA, OHSA, COIDA, or the UIA and UICA. Further, an employee (rather than a member) of a worker co-operative was not excluded from the LRA and BCEA.
[22] Implementation of the Cooperatives Act first fell under the Department of Trade and Industry but after some years transferred to the newly-established Department of Small Business Development.
[23] The NBCCI lost the case in the Labour Appeal Court (National Bargaining Council for the Clothing Manufacturing Industry (KZN Chamber) v Glamour Fashions Primary Worker Cooperative and others, (2018) 39 ILJ 1737 (LAC)) and appealed to the Constitutional Court, which dismissed the case in February 2019 (CCT 142/18), mainly because an amendment that would address the issue had been passed and was awaiting proclamation by the President.

for a bargaining council or the Minister to grant such exemptions. It was not until six years later, however, that the Co-operatives Amendment Act was proclaimed by the President in order to bring it into effect, on 1 April 2019.[24] The official reasons for the delay were that regulations needed to be drafted before it could be promulgated, consultations as well as public comment had to take place with regard to draft regulations, and the Companies and Intellectual Property Commission (CIPC) had to make changes to its business processes to meet the requirements of the COAA.[25] While this delay persisted, the COA continued to be abused, to the detriment of labour standards in the garment sector.

The challenge the loophole in the Cooperatives Act has created for enforcement was raised by most of the interviewees, particularly those in KZN. While some co-operatives had been established before the joint and several liability provision was introduced, this trend accelerated once liability was extended to design houses. The conversions have been facilitated by a number of consultants in KZN who have specialised in processing the formalities to turn companies into cooperatives. The NBCCI engaged with these consultants but a resolution to the problem was not reached. There were also numerous attempts to engage with the Department of Small Business Development regarding its failure to investigate whether an entity that registered as a co-operative was actually functioning as a co-operative. These attempts were not successful.

2.3.3. Cooperation between the Inspectorate and the NBCCI

A bargaining council is responsible for monitoring and enforcing compliance with its collective agreements within its jurisdiction. Bargaining council collective agreements generally set minimum wages as well as a range of basic conditions of employment. Some councils also establish social security funds. The NBCCI is one such council. However, even where there is a bargaining council the DoL is responsible for enforcing OHSA, COIDA and the UIA. The opportunity therefore exists for cooperation between the DoL and bargaining councils, at the very least comprising some sharing of information.

No policy, however, exists on cooperation between the DoL Inspectorate and bargaining councils. Further, the interviews established that there was virtually no communication between the Inspectorate and bargaining councils. In fact, there seems to be some suspicion and distrust between the Inspectorate and councils. In any event, it seems that the Inspectorate believe that where there is a bargaining council there is a high degree of regulation, which means it does not have to worry too much about that particular sector.

[24] The proclamation (Proclamation 14 of 2019, Government Gazette No. 42320 of 19 March) was issued after the research was completed. It made the Cooperatives Amendment Act 6 of 2013 effective as from 1 April 2019.
[25] Personal communication from Department of Small Business Development dated 8 October 2018.

One respondent from the DoL pointed to a recent interaction with a particular bargaining council in the course of which he believed the council was trying to blame the Inspectorate for not doing its job. The respondents view was that this was out of order: the DoL acts in terms of legislation and is not beholden to bargaining councils. In fact, the respondent argued, bargaining councils are part of the DoL, but the DoL has no oversight of how effectively bargaining council are enforcing their agreements. It was argued, for example, that bargaining councils have an incentive to institute excessive fines against non-compliant employers, because the councils rely on this money to run themselves. These fines are significantly higher than the fines imposed by the DoL Inspectorate. It was also argued that bargaining council agents operate virtually without accountability whereas inspectors of the DoL are closely supervised. The bottom line for this respondent was that rather than the DoL and bargaining council working as partners, bargaining councils should be subordinate to the DoL.

Another respondent suggested that a better division of labour between the Inspectorate and bargaining councils would be for bargaining councils to take over responsibility for enforcing the OHSA, COIDA and UIA within their jurisdictions. This idea, however, was rejected by the respondent from the Inspectorate because it would lead to different interpretations arising of the same provision; arguably this is not an insurmountable problem. But, given the tension that appears to exist between the Inspectorate and councils, it is unlikely that this idea would have any traction at this point in time.

2.3.4. Opportunities for improving the enforcement system: a new type of hybrid

Two quite different options, which on the face of it contradict one another, were explored in interviews. The one option was the idea of a more developmental or cooperative mode of enforcement, and the other was for more comprehensive criminalisation of non-compliance.[26]

The option of a collaborative approach to enforcement was voiced particularly strongly by respondents in the clothing sector, although one also picked up elements of this approach from the DoL respondent. It was generally believed that a more collaborative approach would improve levels of compliance over time. One respondent stated: 'A more collaborative approach encourages developmental outcomes and greater levels of compliance'. Another argued that a collaborative approach 'legitimizes' a targeted company and draws other non-compliant companies towards compliance rather than driving them away. If such an approach was rolled out it would 'increase the footprint of compliant companies.'

[26] When the new suite of labour statutes was introduced after the 1994 democratic elections, non-compliance with the LRA, BCEA, EEA, COIDA and the UIA was decriminalised, although a limited number of provisions still have criminal sanctions (e.g. child labour and forced labour in the BCEA).

It was argued further that the NBCCI was already implementing such an approach, with the example how the council has enforced the joint and several liability provision being cited as an example. When the joint and several liability provision was introduced the council wrote to all the registered design houses requesting lists of the CMTs with which they contract. Bargaining council agents then inspected these CMTs and informed the design houses as to which ones were non-compliant and what the issues were. Rather than holding the CMT and design house liable, or pressuring the design house to cut its ties with non-compliant CMTs, the bargaining council has engaged in a process to get both parties to work towards compliance.[27]

At the same time, all the respondents indicated that the criminalisation of non-compliance needed to be seriously considered. While one or two argued for caution, other respondents were strongly of the view that it had been a mistake to decriminalise labour legislation after 1994 and that 'non-compliant employers should be charged criminally and face the music.' According to one, reflecting back on enforcement under the pre-1994 dispensation, 'criminalization and imprisonment for non-compliance ensued greater levels of compliance.' It was, furthermore, a much quicker process: a maximum of six weeks. While the current provisions of the LRA allow for imprisonment arising from contempt of court for disregarding a Labour Court order, judges of the Labour Court are reluctant to impose prison time. Further, contravention of certain provisions in the BCEA and most in the OHSA are penalised by criminal sanctions.

Many respondents, however, also recognised that there were two types of non-compliance: 'wilful' non-compliance and non-compliance arising from legitimate financial constraints.[28] The former should be criminally prosecuted, while the bargaining council would be willing 'to work with the latter group.' It is this distinction that probably explains how one can accommodate both a more cooperative or developmental approach to enforcement and a much harsher and arguably more rigid approach. The challenge, of course, is identifying employers who are being wilfully non-compliant and those who are non-compliant due to force of circumstances.

Interviewees also noted that enforcing compliance required a more holistic approach. Those in KZN were hopeful of initiatives being taken by provincial government in this regard. Importantly, one stated that there has been 'a shift in focus away from potential job losses arising from enforcement to the threat to personal health and safety arising from non-compliance'. Another respondent argued that enforcement should not be viewed narrowly as simply a labour matter,

[27] It should be noted that this was the approach adopted by the Western Cape office of the NBCCI. It is not known whether the same approach was being followed in other regions.
[28] It is interesting to note that much the same distinction was noted by Piore and Shank (2006) with regard to the French/Spanish model: see quote on page 21 above.

and that institutions like that South African Revenue Service (SARS) and the Public Investment Corporation (PIC) have a role to play in fostering compliance.[29]

Some respondents touched more explicitly on the notion of 'hybrid' enforcement models. One referred to the ethical sourcing initiative being pursued by the retailer, Mr Price, through its membership of the ETI. This needed to be rolled out more widely. There was also recognition that other organisations besides trade unions were emerging to deal with compliance with labour standards. South African retailers were starting to take this development more seriously, even in respect of goods being sold in the local market. Evidence of this can be seen in the following section, although it must be stressed that the major retailers in the country are moving cautiously and slowly. Mr Price is at the forefront, and together with the ETI and SACTWU are possibly putting in place some of the building blocks of a genuine 'hybrid' enforcement system (see further in the next section).

3. Labour standards and private enforcement: taking it slow in the absence of consumer pressure

For most of the 20th century the focus of South African clothing manufacturers and retailers was the domestic market. It was only in the early 2000s that clothing retailers started to source from further afield than South Africa and also began to look at expanding their footprint beyond the SACU member countries (i.e. Botswana, Lesotho, Namibia and Swaziland) into the Sub-Saharan Africa region and beyond.[30] Further, in recent years global retailers such as Zara, H&M and Cotton On have opened stores in South Africa. With this greater internationalisation of the South African clothing manufacturing and buying sector there have been some signs of interest in private governance of supply chains. However, it is still embryonic and quite tentative compared to the prominent role of corporate social responsibility (CSR) in the global apparel value chain. Arguably, the main reason has been that South African retailers have not faced any pressure from consumers about working conditions in their supply chains. This was the main reason given by South African manufacturers in Lesotho for not joining Better Work Lesotho.

The attention now being given to the issue is arguably due to the influence of the heightened international exposure of the sector in recent years, with SACTWU also playing some part.[31] Table 1 below outlines the emerging private compliance and enforcement regimes of labour standards at the 'big six' South African clothing retailers: Edcon, Mr Price Group (MrP), Steinhoff Africa Retail (STAR), The Foschini Group (TFG), Truworths International (TI), Woolworths Holdings Limited (WHL).

[29] SARS to enforce tax compliance and the PIC to use its immense power as an investor to compel compliance by managers (if necessary via retailers).
[30] There have been forays into Australia and the United Kingdom as well by some South African retailers, for the most part without a great deal of success although there have been exceptions.
[31] See 'SACTWU set to protest against Zara' (H&M *IOL*, 3 November 2017), available at <https://www.iol.co.za/news/south-africa/sactwu-set-to-protest-against-zara-h-and-m-11848934>.

Much of it is taken from the websites of the retailers but this data is supplemented by information from interviews with two of the retailers.

It should be noted that labour rights in the retail sector in South Africa are regulated by all the statutes briefly outlined above (see section 3 of Chapter 3). In addition, there is a Sectoral Determination for the Wholesale and Retail Trade that is issued in terms of the BCEA. It sets minimum wages for 18 employment categories and varies conditions of employment in the BCEA. Probably the most important feature of the Sectoral Determination is that it provides for different sets of conditions for full-time workers (i.e. 45 hours per week), part-time workers (less than 40 hours per week), and a second category of part-time workers (less than 27 hours per week).[32] These provisions are to accommodate the large number of part-timers employed in the sector. Enforcement appears to be effective at the large (and visible) retailers but it is much more challenging at the thousands of very small stores spread across cities, towns and countryside.

Trade union density is very low in the sector and collective bargaining takes place in the main at the very big grocery retailers, i.e. Shoprite, Pick n Pay and Massmart. Union density is especially low at the major clothing retailers because, although they employ large number of workers in total, most stores are relatively small, employing just five or six workers, and are widely dispersed. Employees tend to also be young. This makes the clothing retailers very difficult to organise. Not surprisingly, it appears that limited collective bargaining takes place in the retail clothing sector.

This section, however, is not primarily concerned with the labour standards of retail workers in South Africa, or even workers at South African retailers in countries in the region. Rather, the sections deals with the way in which private governance mechanisms are used to improve wages and working conditions of employees at suppliers, in particular suppliers in the clothing value chain. The focus, furthermore, is South African suppliers (although some retailers are looking to private governance to monitor compliance with labour standards at suppliers outside South Africa).

[32] The Sectoral Determination is confusing in that it does not make the less than 40 hours per week category end at 27 hours and the second part-time category begin at less than 27 hours per week, although this is likely the intention.

Retailer	Own Code of Conduct for Suppliers	External Code of Conduct for Suppliers	Third-party audits of Suppliers	Other codes and commitments	Comments
Edcon	None	None	None	Sustainable Cotton Cluster	Makes statement of intent to encourage good environmental, social and governance practices in supply chain. In 2017, 50% of product sourced from SA suppliers, and states commitment to increase local (and regional) sourcing. Supports two local suppliers.
MrP	• Responsible Sourcing Policy and Guideline in conjunction with Supplier Code of Conduct • Training on ethical trading	Member of the ETII and SEDEX. Requires all 1st tier suppliers to register with SEDEX. In 2018, 914 suppliers had registered (including 85% of 1st tier suppliers).	Asia Inspection	• Sustainable Cotton Cluster • KwaZulu-Natal Clothing and Textile Cluster	Its membership of ETI (together with SEDEX and 3rd-party audits) puts it at the forefront of the six major retailers with regard to enforcement of private social standards. In 2018, 34% of product sourced from SA suppliers.
STAR	None	None	None	None	A discount and value retailer that competes on price, it claims to use its bargaining power to ensure low prices from suppliers.
TFG	• None • Has whistle-blower hot line but for own employees only	Member of SEDEX. Appears that the focus is on international suppliers rather than SA suppliers (presumably because latter are covered by the NBCCI). Engaging with	No auditing of international suppliers taking place but TFG reports it is moving in this direction.	• United Nations Global Compact • Cape and KZN Clothing and Textile Clusters	Appears to be increasing sourcing of SA made product. It also owns two production facilities for quick response supply. Unionised by the South African Commercial Catering and Allied Workers' Union (SACCAWU) with 8.7% membership. The manufacturing arm would fall under the NBCCI agreement and the

		suppliers in order to get them to register with SEDEX.			employees would be organised by SACTWU.
TI	Code of Ethics and Good Business Practice. The terms are included in the supplier terms of trade agreements signed by SA and international suppliers. But indirect supply via agents is excluded from requirement.	None	None	None	Code of Ethics and Good Business Practice based on various UN declarations and ILO conventions, and claims alignment with UK Modern Slavery Act.
WHL	Code of Business Principles Supplier Codes of Conduct and Good Business Journey principles. David Jones requires suppliers to sign Supplier Code of Conduct and Country Road Group requires compliance with Code of Labour Practice. Independently run whistle-blowing hotline extended to key suppliers and customers in South Africa.	Not a member of the ETI but bases the labour component of its Code of Business Principles on the ETI Base Code. It is a member of SEDEX together with David Jones and Country Road Group. The latter report that respectively 108 and 192 suppliers are registered with SEDEX.	Reports that supplier audits are conducted but unclear if done by own staff or 3rd party. David Jones and the Country Road Group report that suppliers are required to be audited by 3rd-party auditors. Both are also audited for the Ethical Fashion Report.	• United Nations Global Compact • Better Cotton Initiative	Unionised by SACCAWU with 3.3% membership.

Table 1. Private compliance and enforcement regime at the 'big six' South African clothing retailers

What emerges from Table 1 is that there are a number of steps that retailers can take to ensure ethical supply. The steps seem to follow a sequence: the symbolic first step is membership of something like the UN Global Compact[33] (TFG and WHL); then joining sustainability or competitiveness initiatives that do not have a strong labour standards component (e.g. the Sustainable Cotton Cluster or a Clothing and Textile Cluster)[34] (Edcon); followed by the retailer developing its own supplier code but without any monitoring mechanism[35] (WHL); and then the retailer joining SEDEX and starting to monitor suppliers via its own audits[36] (possibly TFG). The next step is critical; up to this point the retailer has kept control of the process and kept it internal: the membership of certain platforms or initiatives has not involved any external examination or intervention with regard to what is happening in its supply chains. The final step takes the compliance process out of the exclusive control of the retailer and opens it up to external involvement,

[33] The UN Global Compact is based on the Universal Declaration of Human Rights, ILO's Declaration on Fundamental Principles and Rights at Work, the Rio Declaration on Environment and Development, and the UN's Conventions against Corruption. It has ten principles which address human rights, labour, environment and anti-corruption. The human rights and labour principles of the compact are: to support and respect the protection of human rights; to avoid being complicit in human rights abuses; to uphold freedom of association and recognise the right to collective bargaining; the elimination of all forms of forced labour and child labour, and the elimination of discrimination in respect of employment and occupation. For further information, refer to <https://www.unglobalcompact.org/what-is-gc/mission/principles>.

[34] The Sustainable Cotton Initiative The former comprises a number of stakeholders in the South African cotton value chain from cotton growers to retailers. The cluster aims to improve the economic, social and environmental sustainability of the cotton value chain, including the rights of workers in the chain. For further information, refer to <http://cottonsa.org.za/sustainable-cotton-cluster/why-the-sustainable-cotton-cluster/>.

[35] The Mr Price Supplier Code, for example, provides as follows:

- Proof of a third-party audit conducted within a 12-month period prior to the supplier executing a supply agreement with the company;
- Proof of compliance with applicable legislation including bargaining council agreements and Broad Based Black Economic Empowerment (BBBEE) compliance certificates;[35]
- Full disclosure of all factory, manufacturing or sub-contracted sites used to procure goods for Mr Price Group, including but not limited to site names, addresses, locations (including GPS coordinates), and contact details (names, phone numbers, email addresses);
- Proof of compliance by any agent, guest or invitee or subcontractor (third parties) of the supplier involved in the manufacture or procurement of goods for Mr Price;
- Compliance with applicable environmental laws;
- Promotion of equality and prevention of unfair discrimination;
- Avoidance of the use of forced and child labour;
- Contracts of employment for all employees addressing basic conditions of work;
- Health and safety at work; and
- No corruption or inducement of staff of Mr Price.

Contraventions of the supplier code must be reported to the relevant divisional Managing Director, Group Ethics Officer or via the Group's Whistle-blowers Hotline, available at <https://www.mrpricegroup.com/MrPriceGroupCorporate/media/mrpgcorp/SiteAssets/2017/Supplier-Code-of-Conduct-approved-November-2017-V2-0.pdf>.

[36] SEDEX provides members with a platform to assist them to manage their performance with respect to labour rights, health and safety, the environment and business ethics. The platform enables members to assess risks at their suppliers using SEDEX metrics, including whether suppliers are treating their workforce fairly. In addition, SEDEX provides tools for driving improvements in responsible and ethical business practices in global supply chains. The effectiveness of the SEDEX platform depends on suppliers cooperating by uploading assessment and audit reports to the platform. For further information, refer to <www.sedexglobal.com>.

e.g. joining an organisation like the ETI[37] that will require trade union participation and independent audits of supplier factories (e.g. by Asia Inspection)[38]. Only Mr Price has taken this step, and the process that it has followed has advanced slowly and cautiously.

Not all private governance initiatives are driven directly by retailers. Some manufacturers (or suppliers) sign up to third-party compliance platforms of their own accord. This seems to usually take place when the supplier anticipates getting orders from a buyer that requires compliance or the supplier does it to make itself more attractive to potential buyers. One of the best known is Worldwide Responsible Accredited Production (WRAP). It is focused on helping apparel and footwear factories around the world verify that they are operating in compliance with local laws, workplace regulations and internationally accepted standards of practice.[39] Certification is only granted to individual production units.[40] There are three levels to the certification status (Silver, Gold and Platinum), which is determined by full compliance and management commitment to the WRAP Principles.[41]

As one would expect, there are very few South African clothing factories that are WRAP certified. They are Ninian and Lester, Hanes South Africa, and Trade Call Investments.[42] All have achieved the Gold level.

[37] The ETI is a global alliance of companies in the private sector (including major retailers), trade union associations and non-governmental organisations (NGOs) that aims to influence businesses to act responsibly and promote decent work. Members of ETI adopt its Base Code, which draws on the ILO's core conventions, and must ensure that these standards are met in their supply chain. The ETI also alerts member companies to serious violations in their supply chain and they are required to report back on their progress in addressing these issues. The ETI Base Code provides for nine labour rights which are that employment is freely chosen; freedom of association and the right to collective bargaining are respected; working conditions are safe and hygienic; child labour shall not be used; living wages are paid; working hours are not excessive; regular employment is provided, and no harsh or inhumane treatment is allowed. For further information refer to <https://www.ethicaltrade.org/eti-base-code>.

[38] Asia Inspection is a global firm that conducts audits of various kinds, including labour standards, at suppliers.

[39] For further information, see <http://www.wrapcompliance.org/en/home>.

[40] There are five steps to achieve certification: 1. Application – which entails the submission of basic information to WRAP and payment of registration fee; 2. Pre-audit self-assessment – this is done by the factories to show their use of socially-compliant practices for a minimum of 90 days; 3. Monitoring – the company selects a WRAP-accredited monitoring organisation to audit the company against WRAP's 12 principles; 4. Evaluation – review of the auditor's report and decision whether or not to certify the company; and, 5. Certification.

[41] WRAP has 12 principles which include: compliance with laws and workplace regulations; prohibition of forced labour and child labour, discrimination and harassment or abuse; compensation and benefits; hours of work; health and safety; freedom of association and collective bargaining; compliance with environmental rules and regulations; custom compliance, and security. For further information, see <http://www.wrapcompliance.org/en/12-principles>.

[42] Certification for the latter company appears to apply to three operations: two in Durban and one in Cape Town.

CHAPTER 4

Enforcement in Lesotho

1. Introduction

Lesotho is a small least developed country landlocked by South Africa. It has a population of around 2 million people (and a workforce of approximately 600,000), the majority of whom reside in rural areas and engage in subsistence agriculture. In the urban areas, the clothing and textile sector is an important 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. It is a labour-intensive sector employing approximately 40,000 workers (of whom about 80% are female). However, it is largely foreign-owned (being Asian – Taiwanese and Chinese operations based in Maseru - and South African investors, with operations largely in Maputsoe), 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). The sector has presented significant challenges for the public enforcement of labour standards and the opportunities for private and hybrid enforcement mechanisms to emerge remain somewhat underdeveloped.

2. Public enforcement: an overview of labour law, related institutions and political context

In terms of public enforcement, the setting of labour standards in Lesotho and the enforcement of these standards is governed primarily by the provisions of the Labour Code, 1992 (as amended). The Code is currently the subject of a labour law reform process.[1]

2.1. The Labour Code, 1992: an anchor for labour standards and public enforcement

The Labour Code establishes a legal framework for the protection of labour standards that are to be interpreted to give effect to Lesotho's obligations as a member state of the ILO. Although comprehensive in scope, the code is ill-equipped to deal with modern developments and is in the (slow) process of revision.[2]

The Labour Code sets certain minimum working conditions, but it creates the Wages Advisory Board (WAB) for setting minimum wages for certain sectors (and certain occupations within sectors). The WAB has representation by employers and

[1] The process has been slowed by resource and capacity constraints, exacerbated by the disruptions of political instability: in 2017 Lesotho held its third general elections in less than five years. On the political instability, see generally Sejanamane (2017).
[2] With the technical assistance of the ILO.

trade unions so the process to decide the minimum increase each year for the garment sector has become something akin to collective bargaining.

To secure compliance with labour standards, the ILO's Labour Inspection Convention, 1947 (No. 81) obliges its member states to establish and maintain adequate labour inspection structures. Although Convention 81 was ratified by Lesotho only in 2001, a Labour Inspectorate had already been established within the Ministry of Labour and Employment in 1986. However, the effectiveness of the Labour Inspectorate has long been a matter of concern and numerous processes have been undertaken with the objective of strengthening the labour inspection system. These include the current labour law reform process and also the ILO's *Strengthening labour inspection in Lesotho* project,[3] initiated in 2016. Relevant elements of both are considered next.

2.2. 'Enforcement deficits' identified in the labour law reform process

The labour law reform process envisages a consolidation of existing labour legislation and revisions (including amendments proposed in 2006),[4] which have yet to be incorporated into the Code. It was also envisaged that the revised law would take into account concerns that had been raised in the *ILO Report on Addressing the Implementation Deficits: Assisting the Constituents in Lesotho to Implement the Comments of the Committee of Experts on the Application of Conventions and Recommendations* (CEACR) (the ILO 2014 Report).

The ILO 2014 Report provides a helpful categorisation of six 'enforcement deficits' based on an analysis of the ILO's Committee of Experts on the Application of Conventions and Recommendations (CEACR) concerns regarding the enforcement of labour standards. In addition, the report proposes a plan of action to address these deficits. Both the deficits and the ILO's proposed plan of action (extracted from the report) are set out in Table 2 below:

Labour Inspection Convention, 1947 (No. 81)
Date of Ratification: 2001

1.	**Article 3(1) and (2) of the Convention. Performance of the primary duties of labour inspectors** The Committee raised a concern on Government's indication that in addition to carrying out routine inspections and inspections arising out of complaints, labour inspectors in Lesotho also attend to labour disputes reported within various labour offices by the public. The Committee observed that the time and energy that labour inspectors spend on seeking solutions to collective labour disputes, especially where resources are scarce, is often at the expense of their primary duties as defined in Article 3(1) of the Convention.

[3] Initiated by the ILO in 2016, the project (intended to run over three years) is funded by the US Department of Labor. For further information, see <https://www.dol.gov/agencies/ilab/improving-labor-law-compliance-kingdom-lesotho>.
[4] These amendments broaden the scope and application of labour standards and amend the framework for collective bargaining.

Action to be taken

a) Take measures to ensure that labour inspectors resume their primary duties as defined in Article 3(1) of the Convention so as to enable them to carry out inspections in the highest possible number of industrial and commercial workplaces liable to inspection.
b) Relieve labour inspectors from conciliation duties which normally pertain to the Directorate of Dispute Prevention and Resolution.

2. **Article 5(b): Collaboration with workers' and employers' organisations.**
The Government reported that it planned to strengthen collaboration with workers' (through the reporting of violations) and employers' organizations (through the encouragement of their members to respect legislation)

Action to be taken

Provide information on steps taken or envisaged with regards strengthening collaboration with workers' and employers' organisations.

3. **Article 7(3): Training of labour inspectors**
In an attempt to professionalise the inspectorate, Lesotho decided to approach the ILO Decent Work Team in Pretoria to assist in structuring a course for the inspectorate which will be offered by the National University of Lesotho.

Action to be taken

Provide information on progress made in the introduction of the course as well as its content, duration, attendance and impact of the effective discharge of duties of labour inspectors, including enforcement of legal provisions concerning conditions of work and the protection of works, the provision of technical advice and information on the most effective means of complying with these provisions and identification of any legislative gaps relating to protection of workers.

4. **Article 6, 7, 10 and 11: Status, recruitment procedure and number of labour inspectors material means placed at their disposal.**
The Committee noted that the Ministry of Labour intended to approach the Ministry of Public Service in order to improve the employment conditions of the labour inspectorate. The Ministry reported that the long-standing vacancy of the position of the inspection manager was filled in May 2011. The Ministry further reported that the improvements envisaged may not be realised in the near future owing to financial constraints.

Action to be taken

a) Take concrete measures, including in the context of the 2012–17 DWCP, in order to identify the financial resources necessary to meet the most urgent priorities for the improved functioning of the labour inspection system.
b) Take all necessary measures so as to ensure the full application in both law and practice of Article 6 concerning the status and conditions of service of inspection staff and Article 7 concerning the criteria and methods for selecting candidates for the profession as well as the training of inspection staff.
c) Inform the ILO of any concrete steps taken in this regard noting the possibility of seeking technical assistance of the ILO.

5. **Article 5(a), 17 and 18: Effective enforcement of sufficiently dissuasive penalties and cooperation with the justice system**
The Committee noted that, according to the Government, the amendment of the provisions establishing penalties for the violation of labour legislation constitutes an essential part of the revised draft Labour Code, which is currently being examined by the Parliamentary Council prior to its submission to Parliament. Moreover, the filling

of the long-standing vacancy of the position of inspection manager, who is competent to refer matters for prosecution, should contribute towards improving the number of administrative or penal actions taken in response to the violations observed by labour inspectors. The Committee recalled that these measures constitute a follow-up to recommendations made in 2005 by the ILO in the framework of an assessment aimed at improving the operation of the labour inspectorate. ***Action to be taken*** Provide information on progress made in relation to the amendment of the provisions establishing sufficiently dissuasive penalties for the violation of labour legislation and the increase in the number of administrative or penal actions taken in response to the violations observed by labour inspectors.
6. Article 20 and 21: Annual labour inspection report Government reported that the Ministry of Labour was in touch with the ILO Decent Work Team in Pretoria in order to seek assistance for the revamping of the computer system of the labour inspectorate which, as the Committee has previously noted, is an essential step for the elaboration, publication and communication to the ILO of an annual labour inspection report. ***Action to be taken*** Take concrete measures to create a computerized labour inspectorate so that the central inspection authority is able, in accordance with Article 20, to publish and transmit to the ILO an annual inspection report annually, containing all the information required in paragraphs (a) to (g) of Article 21.

Table 2. ILO 2014, Extract

In summary, the following six enforcement challenges were recognised in the ILO 2014 Report:

1. The dual function of inspectors which impedes enforcement;
2. Stronger collaborative partnerships with social partners are needed to promote effective enforcement;
3. Co-ordinated training of the Inspectorate is needed and collaboration with the National University of Lesotho was suggested;
4. Deficits in recruitment to key vacancies, status and the employment conditions of inspectors need to be addressed;
5. Sufficiently harsh penalties for non-compliance with labour standards and better coordination with the justice system are needed for effective prosecution; and
6. The Labour Inspectorate's computer systems need revamping to streamline administration and facilitate the compilation of an annual labour inspection report.

In the context of the clothing and textile sector in Lesotho, these challenges are prevalent too (Daemane, 2014). However, before a discussion of hybrid and private

enforcement systems in the clothing sector in Lesotho, key aspects of the ILO's recent intervention intended to strengthen the inspectorate are highlighted.[5]

2.3. Strengthening labour inspection and related processes

The following is an extract from the findings of the US Bureau of International Labor Affairs in regard to the ILO's *Strengthening Labour Inspection in Lesotho* project, which was implemented between December 2015 and December 2017: [6]

> The Ministry of Labor and Employment is one of the most resource poor agencies in the Government of Lesotho. The Ministry's Labor Inspectorate does not have enough inspectors (there are currently 31 general labor inspectors and seven occupational safety and health inspectors). Equipment and transportation resources are also scarce, making factory inspection visits difficult and thus infrequent. The Ministry of Labor and Employment also experiences challenges related to recruiting, selecting, developing, and retaining highly-skilled staff, including labor inspectors. Incentives for persuading job candidates to accept positions are so poor that some existing Labor Inspectorate posts are filled on the basis of temporary contracts or go unfilled. Additionally, the job training is insufficient to support professional development. Training materials are outdated and inadequate to support a training program consistent with ILO Convention No.81 on Labor Inspection, which Lesotho has ratified. As a result, most of Lesotho's labor inspectors are ill equipped to recognize labor law violations and take appropriate action. In addition, the Government of Lesotho has identified a number of systems and management challenges that negatively impact the effectiveness of the Labor Inspectorate. Tools for preparing, conducting, and following up on inspection visits, such as manuals, guidelines, protocols, and checklists, are outdated and do not cover all of the core labor standards.
>
> The Labor Inspectorate's low capacity results in a struggle to meet its mandate in many ways. The low number of inspectors limits the number of inspections that can be conducted. The Labor Inspectorate is unable to provide training to workers and employers on labor law awareness raising, enforcement, and remediation. Labor inspection data are not analyzed to target future inspections, and results are not shared across the Ministry.

The objective of the project was to increase labour law compliance by:

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[5] See for example, United States Bureau of International Labor Affairs, 'Improving Labor Law Compliance in the Kingdom of Lesotho', available at <https://www.dol.gov/agencies/ilab/improving-labor-law-compliance-kingdom-lesotho>.

[6] US Bureau of International Labor Affairs, 'Improving Labor Law Compliance in the Kingdom of Lesotho', available at <https://www.dol.gov/agencies/ilab/improving-labor-law-compliance-kingdom-lesotho>.

- Improving management of the Labor Inspectorate and systems for management and service delivery.
- Improving technical and management skills of the Labor Inspectorate's managers and inspectors.
- Creating a sustainable training program for new labor inspectors.

Hence the project sought to improve: (a) the management of the inspectorate; (b) the methodology for inspections; and (c) public engagement with the inspectorate. To date, the project has resulted in the delivery of management tools and capacity-building activities. Furthermore, closer cooperation between ministries involved in labour inspection has been reported. However, resource and budget constraints remain a problem for the Inspectorate and the simultaneous plans to restructure the Ministry of Labour and Employment (MoLE), which would formalise the autonomy and increase the budget of the inspectorate, have yet to materialise. Without the necessary resources and autonomy, the ability of the project to improve the effectiveness and efficiency of the Inspectorate remains compromised, hampered by the instability of the political context in Lesotho.

2.4. The political context and its impact on public enforcement institutions

The current instability in Lesotho is linked to the outcome of the May 2012 general election (involving 18 parties), which resulted in Lesotho's first coalition[7] government since gaining independence in 1996. The coalition government was led by Prime Minister Thomas Thabane, who unseated Pakalitha Mosisili, who had been the incumbent for 14 years. Soon after the elections, ideological differences between coalition partners and the lack of legal status for coalition agreements eroded political stability and governance in Lesotho (Moseme, 2017); and an attempted coup in August 2014 resulted in Prime Minister Thabane fleeing to South Africa for several days. Snap elections in February 2015 then returned Mosisili to power. Political instability remained, however, and, following a parliamentary vote of no confidence in the government, elections in June 2017 returned Thabane to power.

The Lesotho National Dialogue and Stabilisation Project (LNDSP), one of several interventions in Lesotho, was launched by the UN Development Program in June 2018.[8] The LNDSP responds to the problem of Lesotho's 'cyclic political instability'; and seeks to implement comprehensive National Reforms aimed at long-term

[7] A consequence of the Mixed Member Proportional (MMP) representation electoral system implemented in Lesotho.

[8] See Salvator Niyonzima, 'UN Resident Coordinator's Remarks at the official Launch of the Lesotho National Dialogue and Stabilization Project' (27 June 2018), available at <http://www.ls.undp.org/content/lesotho/en/home/news-centre/Speeches/Remarks-UN-Resident-Coordinator-Salvator-Niyonzima-at-official-Launch-of-the-Lesotho-National-Dialogue-Stabilization-Project.html>.

stability and sustained peace and development in Lesotho.[9] The project is funded by the UN Peace Building Fund project with the anticipation 'that the project will lead to a more united Lesotho with a commitment to identify and implement a raft of proposed political and other reforms aimed at addressing the causes of recurrent crises and building of sustainable peace and stability in the country'.[10] The political instability in Lesotho has impacted developments in the labour market and the enforcement of labour standards.

3. Hybrid enforcement systems: the genesis, rise and demise of Better Work Lesotho

The Better Work programme was first initiated in 2007 as a joint initiative of the ILO and the International Finance Corporation (IFC),[11] and was officially launched in Lesotho in December 2010, with the aim of establishing Lesotho as an ethical sourcing destination.[12]

The components of the Better Work program include: compliance assessment (with ILO standards and domestic law) in factories; continuous improvement (through the facilitation of dialogue between managers and workers); and stakeholder engagement to achieve buy-in at all levels (government, employers, workers, and international buyers).[13] The program was designed to be sustainable: while relying on donor funding to develop and implement the program, the intention was that, within five to seven years income received from international garment buyers would pay for the activities of the program.[14]

An independent impact assessment by Tufts University, published in 2016, analysing implementation of the programme in Haiti, Indonesia, Jordan, Nicaragua and Vietnam, indicates that, at that stage, the programme was active in more than 1,300 factories across the world, and generally resulted in positive changes(Better Work, 2016). This assessment, in the context of evidence from Better Work in Vietnam, shows that better working conditions are linked to higher productivity.[15] Profitability, in turn, is negatively affected by verbal abuse and sexual harassment in the workplace. In the assessment, Better Work's impact on the following working conditions, among others, was considered:

- HR management practice, including worker-manager communication
- Forced labour

[9] See 'UN, Government of Lesotho and Partners Gear Up For Lesotho'S First PBF-Funded Project' (22 June 2018),available at <http://www.ls.undp.org/content/lesotho/en/home/news-centre/articles/UN-GOVERNMENT-OF-LESOTHO-AND-PARTNERS-GEAR.html>.
[10] Ibid.
[11] See generally Better Work, 2016.
[12] See the discussion in Chapter 1; and see Pike and Godfrey (2015).
[13] See generally <http://www.ilo.org/washington/areas/better-work/lang--en/index.htm>.
[14] Ibid.
[15] Ibid at 30.

- Verbal abuse
- Sexual harassment
- Excessive working hours
- The gender pay gap
- Health and safety in the workplace
- Compliance with fundamental rights (including free movement and freedom of association), and worker wellbeing

It is evident from the assessment that the multiple interventions of the Better Work programme have positively impacted worker conditions, and that these effects tend to increase the longer that Better Work remains embedded in participating factories.

The experience was similar in Lesotho.[16] According to Pike and Godfrey, who measured the impact of Better Work Lesotho (BWL) on compliance with labour standards by comparing direct feedback from workers/management at the outset of BWL (2011/2012) with their feedback two years later (2013/2014):

> [T]he findings are remarkable in the level of agreement between workers and managers on the main areas of positive impact. We find that workers and managers agree strongly on improvements in some compliance areas, namely, health and safety, communication and relations. However, they vary in their perceptions about the degree of improvement in supervisor relations. Similarly, different tiers of management agree that there has been a positive impact on productivity, but vary in their perceptions about the degree of improvement. We also find that BWL has had a positive impact on workers beyond the factory, including better financial budgeting and improved health and safety practices, for example.

In particular, noticeable improvements were seen in occupational safety and health conditions in the factories that participated in the Better Work programmes.

However, subscription to the Better Work Lesotho programme was not compulsory, and, in the absence of a legislative requirement to join BWL, and because of a lack of consumer pressure, there was no incentive for South African manufacturers based in Lesotho to subscribe. As a result, the programme was not sustainable and funding to support the programme was not forthcoming from government. Consequently, by 2016, the programme was terminated in Lesotho, effectively unbundling an innovative hybrid system for enforcement, which had successfully impacted labour standards in the industry. This has been to the detriment of labour standards generally and the knock-on effect is evident in discussions with stakeholders in Lesotho: BWL provided an important platform for

[16] See the discussion in Chapter 1; and see Pike and Godfrey (2015).

dialogue between workers (and between trade unions) and employers, which has not been replaced.

Unfortunately, Better Work Lesotho arguably ended before its time, just six years after the programme was launched. In the wake of its closure, personnel previously employed by Better Work Lesotho set up a private firm – Re Mmoho[17] Compliance Solutions – to provide a range of enforcement-related activities and other services.

4. Private enforcement systems: limitations and opportunities

The Re Mmoho team, having worked within the Better Work framework, are ideally positioned to provide compliance assessment, training and advisory services. Members of the Re Mmoho team hold advanced qualifications in Law, Engineering, Occupational Health and Safety, and have received extensive training in compliance auditing; and have years of experience, both within the Ministry of Labour and Employment and in the Better Work programme.

Specifically, Re Mmoho offers:

- Tailored training and advisory support
- Social compliance audits
- OHSE legal register and system files
- Pre-audit and risk assessment

Although there is potential for Re Mmoho to play a role within the spaces of public / hybrid / private enforcement systems, this would require a level of coordination and planning by all stakeholders, in particular the relevant public institutions. The latter should arguably take the lead in this process, but this has not transpired. One would envisage that a coordinated approach by LNDC and MoLE to compliance and enforcement would see LNDC requiring periodic auditing certification of manufacturers by private agencies such as Re Mmoho. In addition, MoLE may be brought in to prosecute non-compliance, at the stage where investors are failing to comply with the requirements for certification. Hence enforcement would be facilitated by a better coordinated approach between the systems of enforcement.

However, in the absence of such a coordinated approach, the barriers to Re Mmoho's integration into the enforcement system are significant and include:

- Manufacturer/retailer concerns about the 'legitimacy' or reputation of a private compliance organisation (under Better Work Lesotho the consultants issued 'ILO Reports'). The problem is exacerbated by the absence of a national standards body in Lesotho (the cost of other forms of accreditation, e.g. SACAS certification,[18] is prohibitive);

[17] Re Mmoho meaning 'We Are Together' in Sesotho. For further information, see <http://remmoho.org/About-Us/>.
[18] South African Certification and Auditing Services. For further information, see <www.sacas.co.za>.

- Foreign retailers may rely on their existing (global) H & S auditors for private auditing purposes;
- Concerns (budgetary and otherwise) about the use (by public institutions) of private enforcement agencies to perform public functions.

Again, a coordinated approach between the enforcement systems would assist in the process of overcoming these barriers, and would help private enforcement agencies to establish their legitimacy and build relationships with manufacturers/buyers.

5. Cooperation between enforcement agencies: challenges, innovations and possible future steps

5.1. Public enforcement challenges and possible future steps

There is a general perception that the government in Lesotho is ineffective in the management of public finances: this includes both the collection of tax revenue, and the expenditure of revenue that has been collected.[19] This, in turn, will have a negative impact on the capacity and resources available for the enforcement of labour standards.

Budgetary constraints and an under-resourced inspectorate[20] negatively impact public enforcement by the Ministry of Labour and Employment. While Lesotho consists of 10 districts, the Inspectorate (consisting of 40 inspectors)[21] only has use of three vehicles.[22] Inspectors are required to conduct routine inspections on a weekly basis (the objective is for each inspector to conduct three such investigations per week) as well as inspections on receipt of a specific compliant. However, interviewees stated that inspections remain infrequent and that reporting/feedback after inspections is poor. This is notwithstanding the ILO interventions to strengthen the Inspectorate.

Effective enforcement also requires strong collaboration with trade unions. However, unlike South Africa, with SACTWU as the dominant trade union, the trade union movement in Lesotho is fragmented,[23] which undermines the representivity and effectiveness of trade unions.

In addition, most factories are foreign-owned, which increases the need for co-operation between public agencies such as MoLE and the Department of Industry

[19] Reportedly, part of the failure to collect tax revenue relates to revenue from foreign-owned textile manufacturers.
[20] An additional concern that has been raised is the extent to which the Inspectorate engage in the 'mediation' of disputes as opposed to enforcement activities.
[21] The ratio between workforce and inspectors may not be the major problem; rather it is the lack of vehicles and distances to travel that are challenges.
[22] This was after the government cancelled a vehicle leasing agreement.
[23] Trade unions that organize in the sector include Lentsoe Le Sechaba; UNITE; IDUL and NACTWU.

and Trade (and the LNDC),[24] which should inform the approach to alignment and coordination between public / hybrid / private systems. In other words, for hybrid and private systems to be more effective, there needs to be alignment of applicable standards (and terminology used within the various systems) and linkages between the various agencies to facilitate enforcement. This is critical to enforcement but appears to be lacking in practice.

5.2. Enhanced co-ordination to address 'audit fatigue'

Stakeholders complain about the negative impact, including cost, lower productivity and 'audit fatigue' when there is a duplication of public and private inspections; for example, when retailers require their own auditing, in addition to an existing public system for inspections. In this regard it is noteworthy that:

> One of Better Work's goals is to reduce the inefficiency of excessive auditing in the garment industry. When multiple buyers each arrange their own inspections of working conditions in the same factory, production disruptions increase and 'audit fatigue' soon sets in. Better Work buyer partners commit to ending duplicative audits in their factories enrolled in the Better Work programme, which benefits both the factory and the buying organisation. The net result is that buyers are conducting fewer audits in Better Work factories.
>
> Evidence from Vietnam indicates that with each passing Better Work compliance assessment cycle, factories are more likely to report that their main customer has stopped conducting its own social audits. Factory managers report that the number of compliance assessment visits from their top two buyers declines after at least one year in Better Work. In addition, factories are increasingly likely to report that their main buyers are contacting them about their Better Work assessments. This suggests that information from Better Work assessments is being used as a basis for continuous improvement, and as an objective standard for discussing how to meet expectations with commercial partners (Better Work, 2016: 37).

Importantly though, the compliance standards of hybrid/private enforcement systems should be articulated carefully to align with both buyer requirements and with domestic law to facilitate compliance and eliminate the possibility of duplication or conflicting and confusing terminology and interpretations. In this regard, the labour law reform project provides an opportunity for better

[24] The Lesotho National Development Corporation (LNDC) is a statutory institution responsible for investment in Lesotho. The LNDC's mandate is '[t]o initiate, promote and facilitate the development of manufacturing and processing industries, mining and commerce in a manner calculated to raise the level of income and employment in Lesotho.' For further information, see <http://www.lndc.org.ls/>.

alignment/elaboration of standards to overcome concerns about terminology and to consider ways of reducing duplication.

5.3. The need to implement effective legislation

Finalisation of the labour law reform project in Lesotho is long overdue and the enactment of the revised Labour Code, along with the envisaged restructuring of the Ministry of Labour and Employment, has the potential to improve labour standards and facilitate better enforcement.

In this regard, some of the concerns that are likely to be addressed in the legislative process include:

- Improvement (and clarification) of trade union rights to organise (currently trade unions are denied rights by employers who rely on a '50% + 1 rule');
- The provision of an enabling framework for sectoral bargaining; and
- Strengthened provisions to deal with abuse of, for example, fixed-term contracts.

The envisaged restructuring of MoLE is likely to facilitate enforcement by addressing budgetary concerns, supporting greater independence of the Inspectorate, and, ideally, providing a better platform for enabling hybrid / private compliance mechanisms.

5.4. Political will and the need for responsive and accountable public administration

Shortcomings within government include deficits in planning and co-ordination between ministries, and between the public and private sectors. This has a negative impact on the development of policies and regulations, which are required to address particular challenges. This impacts not only enforcement but also growth within the sector: the garment industry is sustained primarily by foreign-owned garment firms and there is very little investment into local firms and little effort to integrate local firms into the garment value chains.

Policy-making appears to be highly politicised in Lesotho with little role for technocratic expertise to play a role. This has resulted in policies becoming bogged down for years or produces quite arbitrary initiatives. An example is the 2018 wage increase for the garment sector, which was derailed from its set procedure by a group of cabinet ministers who decided to increase the minimum wage by almost 40%. The size of the increase and the unprocedural nature of its introduction caused consternation amongst foreign investors in the garment sector.

5.5. Synergies between enforcement systems: a domestic, regional and global affair

Much has been said about the need to find ways of co-ordinating enforcement between public, hybrid and private systems. However, developments in the region and globally are likely to require further reflection.

From a regional perspective, an important development is the Agreement Establishing the African Continental Free Trade Area, which was signed by member states of the African Union on 21 March 2018. Article 3(e) lists that a general objective of the AfCFTA is to 'promote and attain sustainable and inclusive socio-economic development, gender equality and structural transformation of the State Parties'; and the AfCFTA accompanying measures include a Programme for the Accelerated Industrial Development of Africa and the Boosting Intra-Africa Trade (BIAT) Action Plan.

Labour standards, and mechanisms for their enforcement, will need to be considered in the AfCFTA processes. A related consideration is the limited access to regional global markets for services and products, including agricultural products, and goods manufactured in Lesotho. In this regard, infrastructure and capacity constraints are compounded by the lack of a national standards body.[25]

[25] This was raised by stakeholders as an issue.

CHAPTER 5

Recommendations and Concluding Remarks

1. Recommendations

The research was guided by two aims: first, to study the effectiveness of the enforcement systems in the South African and Lesotho garment sectors given the challenges they face, and second, to assess the potential for a more coordinated approach between public and private governance and enforcement systems in the two sectors. As is usual with research, the empirical data did not conform neatly to some of the assumptions and expectations we had at the start of the research. The following recommendations are made in the light of the findings but we also make recommendations based on the methodological approach used in the broader DWR-Africa project as well as the research methodology used in this study. Given the major differences between the challenges faced by the enforcement systems in South Africa and Lesotho we make separate policy recommendations for each country.

1.1. Policy recommendations

1.1.1. South Africa

a. The enforcement system in South Africa, at both the national and sectoral levels, is predominantly of the Anglo-Saxon type. It 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, one is seeing a shift to what can be termed a developmental enforcement system, which has similarities with the French/Spanish model. But this shift is due to necessity and pressure rather than by design, which means that the development enforcement system is not being given the recognition and support it requires. The shift needs to become part of a strategy regarding labour standards, employment retention and efficiency that includes collective bargaining.

b. The real state of enforcement is undermined by a lack of data, in particular a lack of data 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.

c. South Africa has a dual public enforcement system in many sectors, i.e. enforcement by the Department of Labour and enforcement by bargaining councils. The garment sector is a case in point. However, in the garment sector there is no coordination between the two systems and there appears to be almost no communication between the relevant enforcement agencies. To speak of hybrid enforcement in this context is premature; as a starting point the Department of Labour and bargaining councils need to work out their differences and initiate a more coordinated approach to enforcement.

d. The quantitative measurement of enforcement used by the head office management at the Department of Labour needs to be conditioned by greater concern with the quality of inspections. To do this requires the delegation of more discretion to inspectors but with appropriate management systems and support.

e. 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 but continue to contravene labour standards, then criminal sanctions should arguably be an option.

f. The issue of the loophole created by the Cooperatives Act appears to have been addressed, but the implementation of the amendment should be closely monitored to ensure that it is effective.

1.1.2. Lesotho

a. Lesotho has a weak and dysfunctional public enforcement system that in the garment sector has been 'replaced' (to a large extent) by private enforcement. However, the impact of Better Work Lesotho shows that the private enforcement system was not very effective. The revamping of the pubic enforcement system should be a key part of the discussions on the reform of the Lesotho Labour Code.

b. 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 such a coordinated system. It is disappointing that the expertise of the staff of Better Work Lesotho should be squandered when there is such a need for their skills.

c. The Lesotho government needs to engage with the foreign investors in the garment sector as well as with buyers to get buy-in to a coordinated system of enforcement.

d. Capacity-building of trade unions and individual workers is crucial to ensure that formal labour standards are implemented in practice, from shop-floor level to union leadership.

1.1.3. South Africa and Lesotho

a. There needs to be high-level dialogue between the governments of South Africa and Lesotho so that their garment sectors develop together rather than competing with each other. Such dialogue needs to include the issue of labour standards and enforcement.

b. 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 DoL in terms of management of enforcement and both can explore the issue of achieving better quality inspections.

c. 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 in respect of such strategies.

1.1.4. International

a. 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.

b. The process of global multi-scalar dialogue drawn on in this study (see Chapter 1) 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.

c. The regional-level dialogue was particularly crucial and could valuably be incorporated into future research projects. The DWR-Africa project's Regional Meeting on *Decent Work Regulation in Africa* (Cape Town, June 2018 – see Chapter 1, Section 3), by providing an opportunity for stakeholders from countries across the region to share ideas and experience, provided valuable input into this research study. The Meeting also established and strengthened links with stakeholders that were drawn on in the interviews and illuminated the potential relevance of our research findings to southern Africa. The *Findings and Recommendations* generated by the Meeting highlighted key issues that were subsequently explored in the research. These included the use of cooperative structures to circumvent labour laws, and broader limitations in regulatory coverage of 'non-standard' working relationships and arrangements (Chapter 3, Section 2.3.2); multiple labour standards – public and private – causing complexity and 'audit fatigue' at the factory-level (Chapter 4, Section 4.2); and an interest in multi-stakeholder or hybrid models for reasons that are of particular resonance to the region e.g. to circumvent politically-deadlocked institutions, as a response to internationalisation of the regional economy (e.g. Chapter 3, Section 3 and Chapter 4, Section 2.4), and because of rising concerns about labour protection in Lesotho since the demise of the *Better Work* programme (Chapter 4, Section 3).

d. The intense stakeholder involvement that has characterised this 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 (see further e.g. Burger et al 2013, Slunge et al 2017, Hoolohan et al 2018).

e. The range of stakeholders involved in the project was particularly valuable and could be adopted in research in other settings. It allowed the research team to access as interviewees both traditional stakeholders - the relevant government Ministries and agencies, trade unions, employers' associations, and the International Labour Organization - and also less-conventional participants, including compliance auditors and a large South African retailer.

f. 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.'[1] 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. Lessons learned from this study could usefully be included in research on comparable regulatory problems in other regions. The Network Team that produced the initial research agenda (see Chapter 1), for example, has pointed to comparable enforcement challenges in Latin America and South-East Asia.

g. 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. These include issues that are rapidly evolving or subordinate in the policy debates and regulation research. Stakeholder engagement can also help to illuminate the potential for upscaling of research findings.

2. Concluding remarks

The research found major differences between the sorts of enforcement challenges being faced in the garment sectors of South Africa (a middle-income developing country) and Lesotho (a low income least developed country). This is not surprising given the differences between the countries and the sectors. But there are common factors, which are also present in most developing countries, namely the need to create formal manufacturing jobs in the context of widespread unemployment and under-employment. This poses challenges for effective enforcement of labour standards.

The differences between the two countries point to the need to be cautious about generalising about enforcement, whether with reference to enforcement models

[1] See Chapter 1, Section 1 above.

or effectiveness. Even within the South African garment sector there are major differences between the enforcement challenges in different parts of the country, with cooperatives prevalent in the KwaZulu-Natal province whereas they are absent in the Western Cape which instead is faced with widespread homeworking. Arguably there is a need for enforcement strategies to become more nuanced to take account of these differences.

A further finding is the extent to which enforcement is influenced by political pressures or government dysfunction. The impact of dysfunction is glaring in Lesotho. In South Africa, one saw the role of political influence to block enforcement in Newcastle because of the threat of job losses. This underlines the fact that enforcement is not simply a technical exercise. While the day-to-day practice of enforcement might appear to be mundane and is virtually invisible, it has ramifications that are noticed by (or ignored in the case of Lesotho) the higher levels of government. This is recognition of the important role that enforcement can play in modifying the impact of rights and standards in legislation in developing countries.

The research investigated enforcement in the garment sectors of the two countries in the form of parallel case studies, which allowed for a comparison in which the real benefit was to highlight the wide differences between the enforcement regimes, the need for enforcement agencies in both countries to work with each other to share information and expertise and, at a higher level, the value of a broader dialogue between the governments of South Africa and Lesotho towards supporting their garment sectors in developing in tandem. This comparative approach could be more widely adopted, including through inter-regional comparisons and studies of countries at a range of income-levels. The study findings and recommendations should also be integrated into international-level policy and practice so that the experience and needs of sub-Saharan Africa are fully represented.

ANNEX

Global Multi-Scalar Dialogue: Stakeholders and Academic Participants

1: ESRC/GCRF Strategic Network Team, *Enforcing Labour Laws*

Stakeholders

Brazilian Labour Inspectorate
International Labour Organization (ILO), Brazil
Labour Commissioner, Ministry of Labour and Employment, Lesotho
United Textile Employees (UNITE), Lesotho

Academic Participants

Professor Debbie Collier, Faculty of Law, University of Cape Town, South Africa
Dr Shane Godfrey, Faculty of Law, University of Cape Town, South Africa
Mr Mario Jacobs, Department of Sociology, University of Cape Town, South Africa
Professor Kelly Pike, School of Human Resource Management, York University, Canada
Professor Silvia Marina Pinheiro, Fundação Getúlio Vargas (Rio de Janeiro), Brazil

2: Unacceptable Forms of Work: Global Dialogue II, 14-15 September 2017, Durham Law School

Stakeholders

Brazilian Labour Inspectorate
Focus on Labour Exploitation (FLEX), UK
International Labour Organization (ILO), Geneva
International Labour Organization (ILO), Brazil
Lesotho Clothing Textile & Allied Workers Union (NACTWU)
United Nations Research Institute for Social Development (UNRISD)
WIEGO (Women in Informal Employment: Globalizing and Organizing)

Academic Participants

Professor Derick Blaauw, School of Economics, North-West University, South Africa
Professor Gary Craig, Law School, Newcastle University, United Kingdom
Professor Judy Fudge, Kent Law School, University of Kent, United Kingdom
Dr Shane Godfrey, Faculty of Law, University of Cape Town, South Africa
Dr Lydia Hayes, Law School, Cardiff University, United Kingdom
Dr Siobhán McGrath, Department of Geography, Durham University, United Kingdom
Professor Kelly Pike, School of Human Resource Management, York University, Canada
Professor Silvia Pinheiro, Fundação Getúlio Vargas (Rio de Janeiro), Brazil
Professor Catherina Schenk, Department of Social Work, University of the Western Cape, South Africa

3: *Decent Work Regulation in Africa* Planning Meetings, Cape Town, April 2018

Stakeholders

Apparel Manufacturers of South Africa (AMSA), Durban, South Africa
Association of Lesotho Employers and Business (ALEB)
Coastal Clothing Manufactorers Association, South Africa
Department of Labour (Western Cape), South Africa
Independent Democratic Union of Lesotho (IDUL)
Ministry of Labour and Employment, Lesotho
Lentsoe La Sechaba, Lesotho
Lesotho National Development Corporation (LNDC)
Lesotho Textile Exporters Association (LTEA)
National Bargaining Council for the Clothing Industry (NBCCI), South Africa
National Clothing Textile and Allied Workers Union (NACTWU), Lesotho
Re Mmoho Compliance Solutions, Lesotho
South African Clothing and Textile Workers Union (SACTWU)
United Textile Employees (UNITE), Lesotho

4: Regional Meeting on *Decent Work Regulation in Africa*, Graduate School of Business, University of Cape Town, 18 June 2018

Stakeholders

African Cotton & Textile Industries Federation (ACTIF), Kenya
Amalgamated Trade Union of Swaziland
Apparel Manufacturers of South Africa (AMSA), South Africa
Ethiopian Textile Industry Development Institute (ETIDI), Ethiopia
Gatsby Africa Textile Development Unit, Tanzania
Independent Democratic Union of Lesotho (IDUL)
IndustriALL Global Union
International Labour Organization (ILO), Pretoria, South Africa
Labour Commissioner, Ministry of Labour and Employment, Lesotho
Lesotho National Development Corporation (LNDC)
Ministry of Trade and Industry, Cooperatives and Marketing, Lesotho
Mr. Price Group, South Africa
ReMmoho Compliance Solutions, Lesotho
Social Capital Consulting, South Africa
South Africa Clothing and Textile Workers' Union (SACTWU)
United Textile Employees (UNITE), Lesotho

Academic Participants

Professor Derick Blaauw, School of Economics, North-West University, South Africa
Dr Emma Fergus, School of Law, University of Cape Town, South Africa

5: Consultations/Interviews in South Africa and Lesotho

Stakeholders

Association of Lesotho Employers and Business (ALEB)
Department of Labour (Western Cape), South Africa
Independent Democratic Union of Lesotho (IDUL)
Labour Commissioner, Ministry of Labour and Employment, Lesotho
Labour Inspectorate, Lesotho
Ministry of Labour and Employment, Lesotho
Lentsoe La Sechaba, Lesotho
Lesotho National Development Corporation (LNDC)
Lesotho Textile Exporters Association (LTEA)
National Bargaining Council for the Clothing Industry (NBCCI), South Africa
National Clothing Textile and Allied Workers Union (NACTWU), Lesotho
Re Mmoho Compliance Solutions, Lesotho
Registrar of Trade Unions, Lesotho
South African Clothing and Textile Workers Union (SACTWU)
United Textile Employees (UNITE), Lesotho

Academic Participants

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