

# WORKERS OF THE WORLD, UN-UNITED: A DISCUSSION THROUGH A GENDERED LENS ON WHY STRONGER PROTECTION OF WORKERS IN THE INFORMAL ECONOMY WILL BETTER EQUIP SOUTH AFRICA TO COPE WITH LABOUR MARKET CHANGES OF THE FOURTH INDUSTRIAL REVOLUTION

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*The process of empowerment cannot be simplistically defined in accordance with our own particular class interests. We must learn to lift as we climb.*’ - Angela Davis

## 1 Introduction

South African labour legislation’s focus on creating a fair employment structure which balances employer and employee interests is evident in its founding values of economic development and social justice.<sup>1</sup> Labour legislation must be understood and interpreted against the backdrop of deeply imbalanced power dynamics and exploitative, exclusionary labour practices adopted and maintained during apartheid. It is with this in mind that legislators formulated seemingly

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1 S1 Labour Relations Act 66 of 1995 (LRA), S2 of Basic Conditions of Employment Act 75 of 1997 (BCEA).

progressive policy frameworks that seek to equalise the inherent power dynamics at play in labour relations. Over time, labour legislation has failed to adapt to the changing needs and structure of the labour market. While there are several issues with the current framing of legislation, this article will focus on the exclusionary nature of its protective mechanisms. The main thrust is that the future of work in South Africa mirrors that of the current informal sector in its labour flexibility and decentralised workspace. This article will investigate the readiness for labour legislation to cater for the Fourth Industrial Revolution (4IR) by comparing the structure of the current labour market and that of the future, through a gendered perspective.

A brief unpacking of what the Fourth Industrial Revolution is will be done for a contextual understanding of how labour structures are likely to change. These projected changes, specifically atypical work, are mirrored in the existing informal sector, with the key difference being that poverty forces people to opt for atypical work in the status quo, and not technological and structural changes. Women are highlighted as the key actors of labour legislation beneficiaries because they dominate the informal sector, and are therefore largely excluded from labour legislation protections, but also because little to no consideration is given to gendered issues within existing labour legislation. Women are entering the workforce at a higher rate than before,<sup>2</sup> thus having a legislative structure in place that protects their interests is paramount to truly achieving the aim of social justice.

There are two core protections that underpin employee entitlements and rights. The first is the formal recognition of an individual as an employee or worker, which is often formalised through an employment contract. Many South Africans are engaged with work in the informal sector which do not make them privy to most of those rights and entitlements. This is problematic when considering how vulnerable these individuals already are, and that black women are concentrated in this sector. The inadequate protection of informal workers is going to pose challenges for South Africa's ability to cope with changes brought on by the Fourth Industrial Revolution and the projected shift towards labour flexibility and casualisation.

The second is collective bargaining, which empowers other rights to be realised. Collective bargaining is framed through the use of trade unions as its primary mechanism. While they may have been relevant at the time of the Labour Relation's Act's (LRA) inception, they have become an inappropriate medium to further workers' rights

2 This is termed 'the feminisation of labour' by most academics. M Mabilo 'Women in the informal economy: Precarious labour in South Africa' unpublished MA thesis, Stellenbosch University, 2018 71.

and are projected to continue to lose members in the near future, as organisation cannot happen as effectively with a decentralised workspace and an incoherent internal firm structure.

I will conclude the piece by offering recommendations which encourage more progressive labour legislation that takes into account both the changing nature of work and the specific interests of women.

## 2 The future of work in South Africa

4IR can, according to Schwab, be understood as ‘a range of new technologies that are fusing the physical, digital and biological worlds, impacting all disciplines, economies and industries’.<sup>3</sup> Greater technological advances, machine learning, big data, the internet of things, automation, artificial intelligence and robotics are some of the defining features of this revolution.<sup>4</sup> It is estimated that disruptive technologies will cost 5.1 million jobs across China, India, Japan, South Africa, the UK, the US, and Brazil.<sup>5</sup> Importantly, a key feature of 4IR is the shift away from traditional employment structures towards job flexibility. The rise in non-standard forms of employment, such as part-time, short-term, and contractor jobs, has been steady and is expected to continue.<sup>6</sup>

The nature of employment is going to change drastically from a traditional, top-down hierarchy between an employer and an employee, to a flatter system where services and tasks are required by firms or individuals and tendered by atypical workers as they are needed. This has wide-reaching legal implications for labour relations as we know it.<sup>7</sup> The rise of the gig economy,<sup>8</sup> is expected to result in more precarious forms of labour,<sup>9</sup> people are likely going to be self-employed or hire their skills out to firms as and when necessary. The rise in digitised forms of labour is a core characteristic of the gig economy.<sup>10</sup> Increased connectivity through the democratisation of the internet means there will be a shift towards online work. This raises questions around the concept of ‘workplace’,<sup>11</sup> the status of the employer,<sup>12</sup> and how to ensure protection of workers on a platform as unregulated as the internet. As with all economic

3 Trade & Industrial Policy Strategies (TIPS) ‘World Economic Forum and The Fourth Industrial Revolution in South Africa’ (2018) *Research Report for the Department of Trade and Industry* 5.

4 TIPS (n 3 above) 6.

5 World Economic Forum (WEF) *The future of jobs* (2016) 13.

6 T Balliester & A Elsheikhi for the International Labour Organization ‘The future of work: A literature review’ (2018) 18.

7 Balliester & Elsheikhi (n 6 above) 19.

8 Also known as the sharing or platform economy.

9 Balliester & Elsheikhi (n 6 above) 19.

10 M Graham *et al* ‘Digital labour and development: impacts of global digital labour platforms and the gig economy on worker livelihoods’ (2017) 23 *ETUI* 136.

disruptors, 4IR is expected to result in job displacement. This is likely to have a gendered impact given the low concentration of women in STEM fields, which are central to 4IR, and their high concentration in fields at risk of automation, like sales, business and financial operations, and office and administrative work.<sup>13</sup>

The problem South Africa faces is not a lack of awareness of this advent, but a lack of preparedness for the impact this may have on the labour market.<sup>14</sup> Further, the government has only just started looking into various working groups to prepare for the acceptance of 4IR, suggesting that the focus should be on prospectively gearing these groups to be as robust as possible, instead of retrospectively fixing gaps in legislation.<sup>15</sup> In South Africa, the current labour market is, like most developing countries, split between the formal and informal sector.<sup>16</sup> The forms of atypical work anticipated to occur in 4IR are already seen quite prominently in the informal South African labour market already. Flexibility, casualisation, and atypical employment relations characterise the future of work, and many of the jobs in the formal sector.<sup>17</sup> More interestingly, they also characterise the nature of work in the informal sector. This indicates an increasingly blurry line between formality and informality, where their differences are no longer primarily about the nature of work. The increase of workers in the informal economy can be attributed to high unemployment rates,<sup>18</sup> as well as the popularisation of casual work.<sup>19</sup> While increasing casualisation does not necessarily render

- 11 Section 213(c) of the LRA defines 'workplace' as: 'the place or places where the employees of an employer work. If an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organisation, the place or places where employees work in connection with each independent operation, constitutes the workplace for that operation,'.
- 12 The term 'employer' is not defined by the LRA, but can be understood as the converse of an employee, which is defined as: any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and any other person who in any manner assists in carrying on or conducting the business of an employer, and 'employed' and 'employment' have meanings corresponding to that of 'employee'.
- 13 World Economic Forum 'The future of jobs' (2016) *Global Challenge Insight Report* 14.
- 14 In 2019, the 4IR Commission presented a draft report of South Africa's preparedness to the President. While the final draft is yet to be released, there is sufficient evidence to show the government's *awareness* of this advent. Department of Communications '4IR Commission presents draft diagnostic report' (2019) <https://www.sanews.gov.za/south-africa/4ir-commission-presents-draft-diagnostic-report> (accessed on 10 June 2020).
- 15 Department of Communications 'Minister Stella Ndabeni-Abrahams: Department's State of readiness to lead 4IR' (2019) <https://www.gov.za/speeches/minister-stella-ndabeni-abrahams-department%E2%80%99s-state-readiness-lead-4ir-19-dec-2019-0000> (accessed on 10 June 2020).
- 16 The informal sector accounted for 17.9% of the workforce in 2018 - R Maluleke for Statistics South Africa 'Labour market dynamics in SA' (2018) *Report No. 02-11-02* 42.
- 17 International Labour Organisation 'Transitioning from the informal to the formal economy' (2014) *Report V(1)* 5.

workers as participants in the informal sector, they do lack many of the safety nets offered to people engaged primarily or substantially in more formal, secure jobs. The vast majority of South Africans engaged in the informal economy do not have the financial or political capital to vindicate their labour rights. The lack of regulatory oversight and inability to organise or seek recourse outside of contractual claims suggests they are not privy to the same legislative protection as their counterparts with more secure jobs, and even if they were, the barriers to access them remain too high for most to overcome. Thus, in as far as we are unable to protect the flexible work practices seen in the informal sector, it is unlikely that we will be able to cope with an influx of workers in casual work arrangements. The crux of the case is, therefore, that through strengthening labour legislation to account for characteristics associated with the informal sector, we will be better positioned to accommodate and protect workers in future.<sup>20</sup>

### 3 Contextualising South African labour relations

A defining feature of the South African economy is its duality as it operates formally and informally. The regulation of labour relations is structured such that greater protections are afforded to workers in the formal economy.

The key privilege of working within the formal sector is the recognition and protection of one's labour rights. This recognition and protection are upheld in labour legislation like the Labour Relations Act (LRA), Basic Conditions of Employment Act (BCEA), and the National Minimum Wage Act (NMWA). These protections are manifested in various ways. Firstly, the LRA protects all employees. Merely through the title of employee,<sup>21</sup> workers are privy to the protection under the LRA, even if there is no formal contract of employment.<sup>22</sup>

Secondly, these pieces of legislation allow direct access to courts and tribunals as mechanisms of recourse in instances where employers have breached the terms of employment.<sup>23</sup> Thus, the formal sector

18 There has been an increase of 1.2 million unemployed persons between 2013-2018. In 2018, the unemployment rate was at 27.1% - Statistics South Africa 'Labour market dynamics in SA' 76, 102.

19 I Valodia 'Economic policy and women's informal work in South Africa' (2001) 32 *Development and Change* 873.

20 A Britwum 'Women's future at work: Gender and equality in the Ghanaian informal economy' (2019) 9 *International Journal of Labour and Research* 209.

21 See (n 12 above).

22 See *Kylie v Commission for Conciliation Mediation and Arbitration* 2008 9 BLLR 870 (LC).

23 These include the CCMA, labour tribunals, and the Labour Courts, and the High Court for contractual breaches.

can be characterised as the traditional employer-employee relationship, with a contract of employment, various social protections, entitlements to organisation rights, and specific terms of termination. Its defining feature is legal and social protection – any disputes can legitimately be taken to courts of law or the CCMA on the basis of labour legislation alone, as noted in the preamble of the LRA.

Women in Informal Employment: Globalizing and Organizing (WIEGO) defines the informal sector as ‘the diversified set of economic activities, enterprises, jobs, and workers that are not regulated or protected by the state.’<sup>24</sup> In the context of labour markets, ‘informality’ can be understood as a range of employment forms that fall outside the application of existing labour legislation.<sup>25</sup> More concretely, there are a number of characteristics which, holistically, paint a clear picture of the informal labour market.

Firstly, the nature of employment is markedly different from that of the formal sector. Labour in the informal sector is characterised by entrepreneurship<sup>26</sup> and flexible, insecure employment structures.<sup>27</sup> Entrepreneurs can be thought of as street vendors/hawkers, hairdressers in township areas, waste-pickers, and spaza shop owners. Generally speaking, this form of entrepreneurship is undertaken most often as a survivalist strategy as they require little capital investment and offer an escape from poverty.<sup>28</sup> Flexible employment can be considered as precarious and can take the form of casual workers who are hired on an ad hoc basis, outsourced workers, atypical workers, and temporary employees. These occupations are manifested in domestic workers, car guards who are sub-contracted, and agricultural farm workers. Secondly, there is no employment contract which regulates the terms of employment.<sup>29</sup> Thirdly, there is an absence of social protection.<sup>30</sup> This is due to the insecure and unregulated nature of their work<sup>31</sup> – domestic workers working overtime without compensation and street vendors facing eviction by authorities are some examples of this. This element is wide reaching and also refers to no pension funds, health insurance, access to UIF

24 Women in informal employment: Globalizing and organizing ‘informal economy’ [https://www.wiego.org/informal-economy\\_](https://www.wiego.org/informal-economy_) (accessed on 4 April 2020).

25 Britwum (n 20 above) 201.

26 Mabilo (n 2 above) 18.

27 Britwum (n 20 above) 201.

28 Mabilo (n 2 above) 18.

29 Mabilo (n 2 above) referring to H Bhorat *et al* ‘Vulnerability in employment: Evidence from South Africa’ (2016) 20.

30 Mabilo (n 2 above) referring to S Groenmeyer ‘Intersectionality in apartheid and post-apartheid South Africa’ (2011); H Bhorat *et al* (n 29 above); FJ Lund and S Srinivas ‘Learning from experience: A gendered approach to social protection for workers in the informal economy’ (2000) 20.

31 V Pillay ‘A new labour movement: Securing livelihoods and reducing inequality through organisational development and network building in the informal economy’ (2016) prepared for the *UN Women Expert Group Meeting 2*.

and other safety nets.<sup>32</sup> Fourthly, organisation and unionisation is a key feature of formal employment that seeks to equalise the power differences between employers and employees.<sup>33</sup>

While there is a distinct nature of either sector, there is an increasing overlap, whereby the formal sector is starting to assume more characteristics of the informal sector by way of more atypical workers, outsourcing, and casualisation.<sup>34</sup> Current labour legislation is insufficient, as will be thoroughly discussed below. One such example is in its definition of ‘employee’, which necessarily excludes an independent contractor.<sup>35</sup> Therefore, when discussing what the future labour market might look like, the point of departure must be that the lines between the formal and informal sector are blurred and it is likely that labour legislation will have to adapt significantly to cater for the shift towards flexibility.

The International Labour Organisation (ILO) recognises that the emergence and maintenance of the informal economy happens in areas of high unemployment, poverty, gender inequality and precariousness.<sup>36</sup> The people most predominant in this sector are women, specifically in developing countries. This is due to multiple structural reasons. Often the types of work in the informal sector mirror the work done in the household,<sup>37</sup> which women are culturally expected to perform. Due to the compatibility with household skills they have already acquired, the informal sector allows women to participate in this sphere with very few barriers to entry. Importantly, the types of jobs offered in the informal sector require little formal education and academic skill, allowing women in the developing world who often lack or have previously lacked access to education to participate.<sup>38</sup> These factors place women at the bottom of an already precarious system.

When considering the demographic make-up of each sector, one must be cognisant of the significant disparity between the treatment of men and women.<sup>39</sup> These disparities are manifested as unequal ‘labour force participation and pay, occupational segregation, working conditions and women’s burden of unpaid domestic and care work’ and are present in both sectors.<sup>40</sup> Interestingly, despite the looser and arguably flatter structure of the informal sector, it still

32 Pillay (n 31 above) 9.

33 Mabilo (n 2 above), referring to N Pons-Vignon & W Anseeuw ‘Great expectations: working conditions in South Africa since the end of apartheid’ (2009) and F Lund & C Skinner ‘Promoting the interests of women in the informal economy’ (1999) 20.

34 Britwum (n 14 above) 202.

35 S213 of LRA.

36 International Labour Organisation (n 17 above) 3.

37 Mabilo (n 2 above) 30.

38 Mabilo (n 2 above) 28.

39 Unfortunately, binary language will be used and analysis will be centred around the binary due to a lack of data on other gender identities.

mirrors the obstacles women face in the formal sector. Women have a lower earning propensity, do not have access to the same level of resources and capital, and lack social protection within the community.<sup>41</sup> The harms of the gender pay gap, the motherhood pay gap,<sup>42</sup> and little to no adequate representation in unions are augmented for women in the informal sector.<sup>43</sup>

It is for these reasons that this article highlights a gendered perspective of the future of work.

## 4 Shortfalls of protective mechanisms within labour legislation

As mentioned earlier, 4IR can be understood as an increase of the role of technology in the economy. Most importantly, job displacement and changes as a result of increased technologisation is an inevitability of the revolution.<sup>44</sup> If labour laws do not adapt to accommodate this, it could leave a large segment of the future workforce unprotected, given the vulnerability of atypical employees.<sup>45</sup>

### 4.1 Recognition as an employee

A key protective mechanism in labour legislation is the recognition of the 'employee' and the formalisation of that recognition in the contract of employment. This allows workers to be entitled to protection under the LRA, BCEA and NMWA. In the best-case scenarios, there is a formalised, written employment contract which clearly sets out the terms of the relationship and allows both parties to hold each other accountable where there is a breach. In the worst-case scenario, there is no written or evident oral contract that proves employment. Even in those cases, there is a presumption of employment if an employee meets one of the seven criteria as per

40 L McGowan *et al* 'Women's labor rights and economic power, now and in the future' (2016) prepared for *UN Women Expert Group Meeting 7*.

41 Britwum (n 20 above) 204.

42 C Dicks & P Govender 'Feminist visions of the future of work' (2019) *Friedrich-Ebert-Stiftung* 3.

43 Dicks and Govender (n 42 above) 4.

44 Balliester and Elsheikhi (n 6 above) 17.

45 MA Chen 'Rethinking the informal economy: Linkages with the formal economy and the formal regulatory environment' (2007) *DESA Working Paper No 46* 9.



the LRA, they are privy to its protections.<sup>46</sup> While this is not a flawless clause, it does offer a safety net to employees where comparatively, independent contractors have nothing to rely on.

This core feature of the LRA is problematic in view of the increasing flexibility of the work force and the fact that an expansion of triangular employment relationships is likely to be a core feature when conceptualising the future of work.<sup>47</sup> In the status quo, labour brokering is embedded in the labour market and shows signs of growth.<sup>48</sup> Independent contractors<sup>49</sup> are left largely unprotected by labour legislation as there is no clear definition of 'contract of employment', 'contract of the independent contractor' or 'work'.<sup>50</sup> There are a number of tests that the courts have formulated to determine if someone is an independent contractor, however very little social and legal protection exists for independent contractors.<sup>51</sup> Employees are entitled to social protection and benefits under BCEA whereas independent contractors are only entitled to them insofar as there is an agreement between them and the employer.<sup>52</sup> Apart from not being exposed to hazards, they are not privy to statutory minimum employment benefits.<sup>53</sup> Another hole in labour legislation is that terms of termination for independent contractors is missing; termination of their contract is governed entirely by the parties' agreement.<sup>54</sup> The largest downfall of this is it allows employers to exploit the power differential that is already in their

46 S200A:

- (a) the manner in which the person works is subject to the control or direction of another person;
- (b) the person's hours of work are subject to the control or direction of another person
- (c) in the case of a person who works for an organisation, the person forms part of that organisation;
- (d) the person has worked for that other person for an average of at least 40 hours per month over the last three months;
- (e) the person is economically dependent on the other person for whom he or she works or renders services;
- (f) the person is provided with tools of trade or work equipment by the other person; or
- (g) the person only works for or renders services to one person.

47 Also referred to as labour brokering.

48 In 2014, labour brokering accounted for 6.4% of employment in South Africa – Mabilo (n 2 above) 59.

49 The term used to describe someone who performs work for an employer but is not regarded as an employee.

50 AC Basson *et al* *The new essential labour law handbook* (2017) 61.

51 Basson *et al* (n 50 above) 62-69.

52 Regulation of working hours, payment at premiums for overtime and irregular work shifts, deductions for the purposes of medical aid or pension funds and entitlement to leave are some of these conditions.

53 L&E Global 'Legal framework differentiating employees from independent contractors' (2020) <https://knowledge.leglobal.org/eic/country/south-africa/legal-framework-differentiating-employees-independent-contractors-31/> – Paragraph C (accessed on 6 April 2020).

54 L&E Global (n 53 above) Paragraph D.

favour.<sup>55</sup> Employers are exempt from the peripheral costs of employment<sup>56</sup> and do not have to engage with trade unions. What can conclusively be said about the position of independent contractors is that labour legislation is inadequate in its current form. Independent contractors remain vulnerable to the precariousness of their rights and to potential exploitation by employers.

Independent contracting is anticipated to increase in the future. The demand for skills in the future will mean people are less likely to stay with one firm for the duration of their career.<sup>57</sup> Brassey describes independent contractors as ‘selling their job’, whereas employees ‘sell their hands’,<sup>58</sup> which effectively articulates the core difference between them: independent contractors sell the product of their labour, not the labour itself. Remuneration is often only given at completion of the job, unlike employees where the mere capacity to produce warrants remuneration.<sup>59</sup> With the flattening of existing top-down employment structures, and the equalising of positions within the gig economy,<sup>60</sup> it is likely that the demand for labour will be more task-orientated, requiring the work of specialists, instead of indefinitely employed generalists. The demand for skilled work means that it would likely be more profitable for workers to perform tasks for firms on an ad hoc basis and be paid a premium rate for their expertise, than to stay in a secure employment relationship with a set salary. This is as a result of labour flexibility within the market that prioritises mobility of labour. This is achieved by increasing or decreasing employment wage levels to allow for greater movement in and out of short-term jobs, depending on the demand for skill.<sup>61</sup> It is estimated the factors including the ‘globalisation of the market economy, the demographic explosion, and information and communication technology’ will force companies to reduce labour costs, thereby resulting in downsizing and outsourcing of labour.<sup>62</sup> Thus, a common theme among 4IR literature is the expected proliferation of labour flexibility in the specific form of independent contractors.

55 Mabilo (n 2 above) 58.

56 Including hiring and training costs and employee benefits. SW Mills ‘The situation of the elusive independent contractor and other forms of atypical employment in South Africa: Balancing equity and flexibility’ 25 *Industrial Law Journal* 1208.

57 The era of lifelong secure employment in permanent jobs is effectively a thing of the past. See Britwum (n 21 above) 201.

58 M Brassey ‘The nature of employment’ (1990) 11 *Industrial Labour Journal* 889.

59 As above.

60 Balliester & Elsheikhi (n 6 above) 19.

61 Mabilo (n 2 above) 74.

62 Mills (n 56 above) 1212.

The casualisation of workers in future extends beyond independent contractors, however. Casualisation refers to 'displacement of standard employment towards flexible employment such as part-time, project-based or temporary work'.<sup>63</sup> This means that there is likely to be an overall increase in the number of short-term work arrangements. These proliferations are occurring in places they ordinarily didn't in South Africa, showing the extent of the trend towards casualisation.<sup>64</sup> Labour flexibility, therefore, is an important advent that policy makers need to take into account. Labour flexibility, in this context, is an all-encompassing term made up of three core elements:

wage flexibility (which grants employers the freedom to alter wages without limits); functional flexibility (which affords organisations the freedom to adjust conditions and terms of employment) and employment flexibility (which grants employers the liberty to determine employment levels cheaply and instantaneously).<sup>65</sup>

Evinced here is that the same harms that exist with independent contractors, exist with casual forms of labour. The potential for exploitation and misuse is far greater where there is no regulatory system in place.

It is anticipated that 4IR may cause the displacement of jobs at the lower end of the spectrum, where women are concentrated.<sup>66</sup> Precarious forms of employment, as is the case in the informal sector and will be the case throughout the labour market in future, disproportionately affects women who continue to undertake the burdens of household care and guardianship.<sup>67</sup> Often women who work in the informal sector are forced to compromise on their employment options to accommodate their care responsibilities.<sup>68</sup> In a Sub-Saharan African context, women bear the primary burden of caregiving and household chores, spending up to three times longer on these tasks than men.<sup>69</sup> Women will continue to be excluded from market participation in as far as they are forced to make trade-offs between work and domestic duties. Women engaged in the formal sector often do not, and cannot, contribute to funds that offer social protection.<sup>70</sup> This means that when they are no longer able to work, they rely on state-funded assistance, like grants. These grants are often insufficient to cover costs beyond the most basic necessities, thus often trapping them in a bubble of struggle and impoverishment.

63 Mabilo (n 2 above) 64.

64 Mills (n 56 above) 1212.

65 H Cheadle 'Regulated flexibility and small business: Revisiting the LRA and the BCEA' (2006) 27 *Industrial Law Journal* 665.

66 Britwum (n 20 above) 204.

67 Mabilo (n 2 above) 64.

68 Mabilo (n 2 above) 85.

69 Dicks & Govender (n 42 above) 3. If unpaid household work were to be monetised, it would account for 10-39% of GDP in these countries (OECD 2014).

70 Dicks and Govender (n 42 above) 3.

Thus, as long as labour legislation fails to accommodate and provide for flexible working and employment relationships, it could leave millions unprotected and ultimately fail to achieve its goals of social justice and economic empowerment for all.<sup>71</sup>

#### 4.2 Organisation and unionisation for informal workers

Arguably the most prominent aspect of the LRA is its emphasis on organisation rights and collective agreements as mechanisms to equalise power dynamics between the employer and employee. Importantly, it relies on trade unions to broker these rights and agreements. This is one of the biggest weaknesses of the LRA – not only does it ignore that a large proportion of workers are engaged in the informal sector and therefore are not privy to the rights associated with organisation, but the steady decline in union subscription indicates that unions lack the capital needed to effectively negotiate with employers.<sup>72</sup>

Labour unions played a key role in the subverting the entrenched system of unequal power relations between employers and employees through mass mobilisation and organisation.<sup>73</sup> This not only helped workers achieve better conditions and wages, but given the exploitation of black<sup>74</sup> labour as a cornerstone of the apartheid system, labour unions went a long way in vindicating the dignity of workers.<sup>75</sup> This, in conjunction with the ANC's neoliberal leanings post-1994,<sup>76</sup> rationalises the LRA's *laissez-faire* approach to labour dynamics. It makes sense that policymakers framed labour legislation around collective bargaining through trade unions. This approach recognised the power of mass mobilisation and the importance of discourse around areas of mutual interest between the employer and employee. While this approach would have been useful and relevant at its conception, there are a number of factors which suggest it is outdated. This section of the essay will therefore focus on why the LRA and BCEA are ill-suited to deal with changing forms of labour relations and why that is problematic in the face of 4IR.

71 S1 of the LRA.

72 R Grinker 'Limping towards irrelevance' 1 August 2018 <https://africa.sacountry.com/2018/09/south-african-labor-federation-limps-towards-irrelevance> (accessed 27 July 2020).

73 A Bezuidenhout and S Bulungu 'From compounded to fragmented labour: Mineworkers and the demise of compounds in South Africa' 43 *Antipode* 239.

74 Particularly black, migrant labour engaged in mining activities.

75 This remains true for many African countries. Trade unions were often tied to national independence movements, like in Ghana, Tanzania and Guinea – see M Budeli 'Trade unionism and politics in Africa: the South African experience' 45 (2012) *The Comparative International Law Journal of Southern Africa* 461.

76 This is manifested in the GEAR programme and other economic policies which sought to liberalise the labour market by focusing on integration, trade, low trade barriers and an export-driven trade policy. Mabilo (n 2 above) 51-52.

The LRA primarily promotes collective bargaining through bargaining councils, statutory councils and workplace forums.<sup>77</sup> All these mediums are hinged on trade union representation. The decline of trade union membership and the total absence of such membership in the informal sector renders these equalising mechanisms largely redundant. Unions' power relies on their organisational capacity. The more members they have, the more political and financial capital they have to leverage against employers during negotiation processes.<sup>78</sup> Trade union density dropped by 11% between 1997 to 2013<sup>79</sup> – this is a significant decrease which suggests that the decline has been rapid; and continuing to use unions as the primary vehicle for change needs to be revised. The decrease in membership can largely be attributed to structural changes. A shift away from a traditional 'workplace', structural unemployment, a change in the nature of work performed,<sup>80</sup> and the influx of workers into more precarious forms of work are all factors contributing to its demise. Moreover, increasing flexibility and precariousness has reduced the bargaining power of trade unions.<sup>81</sup>

The second reason the LRA's focus on organisation as a medium to access rights is problematic is because it is highly exclusionary. In 2018, workers in the informal sector accounted for 17.9% of the total employed population.<sup>82</sup>

There are various barriers which prevent workers in the informal sector from organising. Firstly, and intuitively, because relations in the informal sector are individualistic and entrepreneurial,<sup>83</sup> there is no sense of comradeship or collective group identity that unionisation relies on. These relationships are competitive in nature, in other words, a woman selling home-made jewellery is often in direct competition with another woman engaged in the same work, unlike wage workers with an incentive to advocate for higher wages.<sup>84</sup> Secondly, poor lines of communication and the absence of a union structure prevents meaningful engagement with employees.<sup>85</sup> Trying to convince the employer of a domestic worker to negotiate with a group without centralised leadership structure is not only difficult but

77 Note that this analysis seeks to prove the growing redundancy of trade unions and does not deal with the flawed systems of collective bargaining. Please consult *The state of collective bargaining in South Africa an empirical and conceptual study of collective bargaining* by S Godfrey *et al* for more on the downfalls of collective bargaining mechanisms.

78 H Bhoorat *et al* 'Trade unions in an emerging economy' (2014) *DPRU Working Paper 201402* 13.

79 Bhorat *et al* (n 78 above) 5.

80 X Msila 'Trade union density and its implications for collective bargaining in South Africa' unpublished article, University of Pretoria, 2018 9 -10.

81 Mabilo (n 2 above) 34.

82 Maluleke (n 16 above) iv.

83 Mabilo (n 2 above) 18.

84 Mabilo (n 2 above) 29.

85 Pillay (n 31 above) 18.

will likely result in them resorting to replacing the domestic worker with someone else. In other words, there is no incentive for them to engage in discussions, given the hundreds of readily available substitutes needing a job. Thirdly, spatial dispersion and underfunding pose barriers for buy-in from the employees themselves.<sup>86</sup> As already noted, people resort to the informal sector for survivalist reasons. The cost of missing a day of work and spending money on transport to attend a caucus often cannot be justified because of their level of precariousness and insecurity. Lastly, disputes are generally handled by the community.<sup>87</sup>

Given the patriarchal structure, perceptions around gender roles, and paternalistic attitudes around work, the discussion is likely to be skewed against women and their interests.<sup>88</sup> These issues suggest that collective bargaining as envisioned by the LRA, between unions and employers, is not practical in the informal sector. The only other viable actor to engage with on this front, therefore, is the state.<sup>89</sup> Given the lack of dialogue between politicians and informal sector workers, and the lack of airtime given to these issues, it is unlikely that organisation can happen effectively.

Mention must be made to the rise of informal labour organisation. With its roots in the Self-Employed Women's Association (SEWA), informal labour organisation has made meaningful strides,<sup>90</sup> representing home-based workers (HomeNet International), street vendors (StreetNet Association), waste pickers (Latin American Waste Pickers Network), and domestic workers (International Domestic Workers Network). While beginning to change the global paradigm on informal work, there has been little tangible difference in the lives of South African women, many of whom are unaware of the mere existence of these organisations. Thus, even if South African policymakers ideologically agree with the trend towards the recognition of informal work, very little has been done to ensure these trends are realised in the lives of people in reality.

With the advent of 4IR, the above-mentioned concerns are likely to continue existing, and perhaps worsen over time. The increase of freelance, atypical work structured around a digitised environment means that there will be no defined 'workplace'. This is problematic as workspaces are going to be shaped by a largely digitised environment with no central point of meeting. Taking factors like globalisation and communicative technologies into account,<sup>91</sup> it could be the case that someone could perform work for one or several

86 Mabilo (n 2 above) 62.

87 Britwum (n 20 above) 207.

88 Britwum (n 20 above) 208.

89 Mabilo (n 2 above) 29.

90 Pillay (n 31 above) 4.

91 McGowan *et al* (n 40 above) 13.

overseas firms or individuals, with the only semblance to a common workspace being their computer. Having no organised union structure could prove more problematic for future workers than current informal works. Multiple workers engaged in triangular relationships within the gig economy wanting better working conditions, such as Uber drivers demanding a minimum wage per hour from Uber, have no capital to achieve those conditions. Spatial dispersion, and no mechanisms for conflict resolution constitute considerable and perhaps even impossible barriers to overcome in order to organise. When workers who do not have the clout of stopping production, as current trade union members do, because the cost of replacement is lower than the cost of negotiation, future employers or counter-bargaining agents have no incentive to respect their demands. In other words, future employment mirrors that of the informal sector indicating that thousands are likely to be left without protection while legitimately trying to keep up with changing labour demands.

## 5 Recommendations

Given the problems highlighted above, it is evident that South Africa must undergo aggressive labour legislation reform to stay true to its aims of equality and social justice.<sup>92</sup>

Firstly, chapter three of the LRA needs to be revisited to change the way collective bargaining is conducted to provide for ‘bargaining bodies’.<sup>93</sup> The principle of collective bargaining is laudable but needs to adjust to weakened trade unions and take into account actors other than structured firms. The key proposal here is to recognise who informal workers have to bargain with and to facilitate a meaningful negotiation process. Who they bargain with is largely defined by their place of work – domestic workers will bargain with household owners; street vendors will bargain with municipal governments.<sup>94</sup> Moreover, in the face of 4IR, it is likely that workers will have multiple control points and counter-bargaining partners.<sup>95</sup>

It is therefore suggested that legal recognition be given to small-scale associations who functionally play the same role as trade unions, but without the requirement of a centralised workplace. A shift away from majoritarianism towards a more pluralistic recognition of workers’ rights is also recommended, not just because that position is better able to vindicate constitutional rights of all workers,<sup>96</sup> but also because the proliferation of atypical jobs in the same sector will likely

92 S1 LRA.

93 Valodia (n 19 above) 884.

94 Pillay (n 31 above) 10.

95 Pillay (n 31 above) 18.

96 See *National Union of Metal Workers of South Africa and Others v Bader Bop (Pty) Ltd* (2003) 3 SA 513 (CC).

happen at such a high rate that attempts to organise and reach consensus on issues will be difficult. These bargaining bodies should not be limited to associations and their counter-bargaining partners but should include NGOs and civic organisations at the option of the associations, to allow for further support for informal workers. These bargaining bodies must allow for state agents to participate if the specific industry warrants such – municipalities should meet with an association for waste pickers to discuss viable working zones and hours. Thus, through a creative re-imagining of collective bargaining, it is possible to accommodate for workers in the informal sector right now, and 4IR's workforce.

Secondly, job displacement is an inevitability of 4IR. More robust policies must be in place regulating the speed of automation or adoption of machines in labour-intense industries so as to give workers sufficient time to prepare themselves for likely retrenchments. It is likely that most low-skilled workers will be left unemployable, thus forced to operate within the informal sector. Severance packages should therefore include some programme for upskilling or a lump sum that enables workers to invest in education or use as capital for entrepreneurial ventures. At the very least, better social protections must be awarded while people are employed to ensure that they are not completely crippled if they lose their job. While this may seem idealistic, some provision must be put in place to ensure all people have some opportunity to economically engage in the workforce or the risk of leaving the poor behind is high. In the absence of a universal basic income from the government, people will have to rely on work as their primary means of income – equipping people to cope with the technological changes must be at the forefront of revised conditions of employment policies.

Thirdly, the LRA needs to re-define terms that will shape the face of employment structures. These terms include, but are not limited to, 'employee' and 'misconduct'. Most urgently; the 'workplace' needs to be defined and accommodate for unconventional workspaces, such as spaza shops or work-from-home environments. By broadening the scope of 'workplace', there is room for protection on varying levels. In the status quo, this could look like an individual who performs odd jobs being able to hold their temporary employer accountable for unpaid working hours or sub-par working conditions. In the future, this could look like being able to institute claims of sexual harassment in the workplace for inappropriate comments made over a videoconference in one's home.



Lastly, legislators need to be aware of gender disparities that prevent women from being able to access the same level of benefits and entitlements as men. Most obviously, provision must be made to accommodate their role in the care economy.<sup>97</sup> While the ILO has mandated informal care workers, like domestic workers, to be recognised as workers,<sup>98</sup> and the BCEA recognises domestic workers' rights, there is very little room for regulation over those areas. Proposing better regulation over this area is difficult and an ineffective approach. Instead, a removal of downward variation of minimum standards of employment for women in atypical work is recommended. A current drawback of the BCEA is that while it promotes flexibility, it does not consider how this would disproportionately affect atypical women workers, who would likely prioritise a higher wage rate in exchange for a relaxation of working standards, harming her wellbeing. Moreover, the option of downward variation places already precarious workers in an even more vulnerable position and is contradictory to the aim of a minimum standard in the first place.<sup>99</sup> Accommodation needs to be made for women to better balance their household responsibilities with their work. This could manifest in subsidising childcare fees, such as creches, flexibility in working hours, gender-inclusive and transformative policies that place a higher burden on men to take up these activities, and setting strict penalties for labour brokers/ 'employers' for breaching unpaid care work regulations. While there has been some legislative shift towards equalising the burden between mothers and fathers,<sup>100</sup> it is not aggressive enough to substantially lower the burden on women to head these household activities. Given the feminisation of work, legislators need to prepare for a more gender-even workforce during 4IR. To leave half a working population under-protected would be regressive and contrary to the aims of equality and human dignity.

## 6 Conclusion

With the changing face of labour structures as we know it, movements toward a flexibility, self-employment and atypical working arrangements are inevitable. The casualisation of labour is a large and growing feature of the South African economy, yet it remains largely peripheral in the current structure of labour legislation. Labour legislation is skewed towards protecting people in traditional, formalised employment arrangements, which serves to exclude a large proportion of the working population. Worst affected by this

97 Which is likely to remain largely unaffected by technological advancements.

98 Pillay (n 31 above) 14.

99 Valodia (n 19 above) 886.

100 S25A, 25B, 25C of BCEA.

exclusion are women, who are systematically cornered into low-wage, insecure jobs, and who still bear the patriarchal burdens of domestication. Casual and flexible work is already a core feature of the informal sector, and a growing feature of the formal sector. If legislation is struggling to cope currently, the likelihood of gaping holes in protection and regulation in the future is high. A bottom-up approach that better protects workers in the most precarious position – people in insecure jobs in the informal sector – will automatically position casual, atypical workers who fall within the intersection of the informal and formal sectors better. By aiming to improve the lives of people in precarious labour positions now, future workers who find themselves in similar positions will be better protected.

Labour legislation must change its primary protective mechanisms and adopt a more inclusive approach to the regulation of labour to materialise the economic development and social justice goals as initially envisioned. By starting to pass legislation that protects precarious work and gendered issues, it will be one step closer to being ready for the pervasive and fast-approaching wave of the Fourth Industrial Revolution.