

# Labour law and worker protection in emerging countries

In emerging countries, the priority given to employment growth and external competitiveness has long overshadowed the need to consolidate labour markets and to protect workers. But increased income, along with the volatility of global markets, is now encouraging these countries to put greater emphasis on endogenous drivers of growth.

Consequently, and after a period of strong economic growth, emerging countries have undertaken to strengthen labour laws and workers protection. They have done so under a pressing challenge from economic factors (reducing external dependency), political factors (changes in power) and social factors (increased social discontent). Social rights are nevertheless still severely handicapped, because of the extreme segmentation and fragmentation of the labour markets and because of the difficulty of establishing funding priorities when faced with the multiplicity of urgent needs.

To reconcile employment growth, labour protection and assistance to the most vulnerable, emerging

countries have established innovative mechanisms combining emergency facility, the reinforcement of legal norms and the extension of social protection. These innovative mechanisms take into account the specific characteristics and nature of the social contracts of every country. Progress is therefore not unequivocal, which makes it difficult to adopt a binding and effective legal floor at the international level.

The 21<sup>st</sup> century nevertheless starts with a new opportunity for extending social rights and worker protection, thanks to the complementarity between national efforts towards building labour protection systems, and international actions, either public (standards and recommendations of the International Labour Organization, technical cooperation) or private (international framework agreements, international trade union movements). Together, these initiatives tend to strengthen effective rights and, increasingly, social protection for individuals. ■

## THE CHALLENGES

With the shift in the global economy towards emerging countries, the world is facing an unprecedented landscape made of countries with considerable economic weight, but whose per capita income remains relatively low, placing them amongst the so-called middle-income countries. This impacts the state of their labour legislation and their ability to adopt and implement social rights, which, in general, still apply only to a minority of workers. The debate on the social issue in emerging countries has long been controversial, with Northern countries worrying about social dumping and the catching-up economies perceiving this argument as a protectionist temptation.

The 2008 recession and its worldwide impacts on labour markets have moved the challenges of extending social protection high on the agenda of international discussions about growth strategies for emerging countries. The G20 held in Cannes in November 2011 has consequently acknowledged the need for better labour protection, as a factor of stable growth<sup>(1)</sup>.

How emerging countries can meet national and international expectations in this respect remains however a matter of debate. Between assistance or insurance, universal or targeted mechanisms, flexibility of law or career paths security, this *Note d'analyse* gives an overview of the options available to these countries, the constraints they face and the solutions they provide to extend the coverage of labour law and improve worker protection.

## METHODOLOGY AND DEFINITIONS

The term “emerging country” on the international stage characterises those countries whose demographic weight and economic catch-up rate are accompanied by their desire to exert an increased influence within the international community. The “emergence” of these countries has led to a global rebalancing, compared with a previous economy dominated by the old industrialised economies and by bipolar policies (Russia is therefore not considered as an emerging nation in this paper). Three major emerging countries – China, Brazil and India – embody this global shift and are the core of this analysis. This paper is supplemented by three monographs<sup>(2)</sup>, which benefited from data collected by the French embassies in these countries. Other emerging countries, although more modest on an economic, demographic and political scale, are also growing in influence: South Africa, Turkey, Indonesia, Vietnam or even Chile and Mexico. They have not undergone an in-depth analysis in this paper, but they are sometimes quoted as examples of great relevance.

The analysis of labour law and worker protection in the latter countries leads to consider all labour market institutions, i.e. all regulations, practices and policies affecting the functioning of the labour market, including work-related social protection<sup>(3)</sup>.

### Box 1: Main labour market institutions<sup>(4)</sup>

- the employment contract;
- the regulations aimed at the enforcement of the employment contract; they can be legal or contractual [collective bargaining];
- the labour inspections and courts responsible for controlling the enforcement of labour regulations;
- the organisations representing workers and employers;
- the wage-setting mechanisms;
- work-related social protection, which aims to provide a replacement income to the unemployed labour force [in the case of unemployment, sickness, disability or maternity].

[1] G20 [2012], G20 Labour and Employment Ministers' Conclusions, Guadalajara, Mexico, May.

[2] Available on [www.strategie.gouv.fr](http://www.strategie.gouv.fr). They are based on the published literature and on talks held not only with national and international institutions involved in labour and employment issues, but also with country experts in various disciplines (economy, political science, sociology, etc.).

[3] The social protection, as related to healthcare, family and retirement, is addressed in *La Note d'analyse*, N°300, November 2012.

[4] See International Labour Organization (ILO) [2008], *Defence of labour market institutions*.

## ▶ THE INCLUSION CHALLENGE IN EMERGING COUNTRIES

Although quite recently created<sup>(5)</sup>, labour market institutions are formally well established in emerging countries. Resulting from an "historical transplant<sup>(6)</sup>" dating back from the colonial era, they however adjust with difficulties to highly segmented labour markets, where casualization and job insecurity are the norm rather than permanent employment, as shown by recurring periods of unemployment and underemployment for most workers. Hence, effective protection is actually restricted to a minority of workers in "regulatory enclaves<sup>(7)</sup>".

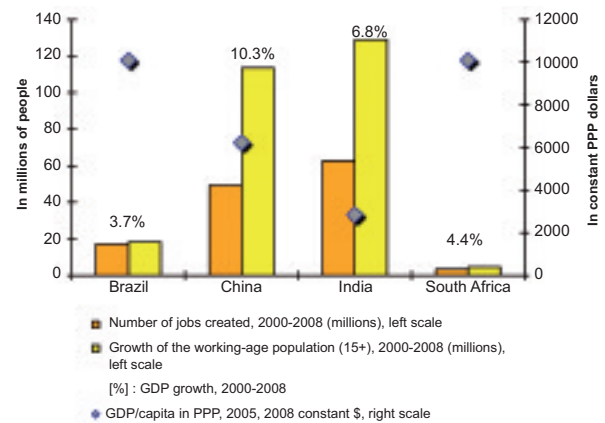
### ⌋ The segmentation and fragmentation of labour markets make formal protections difficult

#### ■ The lack of jobs : as worrying as the lack of worker protection

The greatest challenge faced by emerging countries is often the lack of jobs rather than the lack of labour protection. In fact, the employment elasticity of economic growth, i.e. the number of jobs created for a 1% economic growth, has so far remained too low to absorb the relatively high number of young people entering the labour market (except in Brazil). This affects the balance of power between job supply and demand and, consequently, the rate at which worker protection improves.

Yet, these observations must be qualified by the population dynamics, which vary greatly from one country to another: while China is already facing a shortage of labour in certain sectors, in India the demand for jobs is expected to continue to exceed supply. Brazil is in an intermediate position, with a higher income bracket and a smaller labour force than in the past, while South Africa is experiencing far lower growth and employment rates than these countries.

### ▶ Population and employment growth: 2000-2008



Sources: Jobs and World Development Indicators of the World Bank, Department of Social and Economic Affairs of the United Nations.

In addition, underemployment and low employment rates (with the exception of China) add further to this relative lack of jobs, especially for the following four categories: rural population, women, young people and low skilled workers<sup>(8)</sup>.

#### ■ A multifaceted segmentation of labour markets

For employed workers, despite fairly high formal protection (see below), the effectiveness of law and social protection is only relative.

It is difficult for labour laws to apply in societies still mainly agricultural and dual, where the absence of contracts and job insecurity are the norm for most of the people. Emerging countries are faced on the one hand with the labour market duality that exists in industrialised countries between permanent and temporary or subcontracted workers and, on the other hand, with the "traditional" rural/urban and informal/formal dualities. Consequently, variations in worker protection, both de facto and de jure, does not only correspond to the usual distinction between declared and undeclared work, but also to a whole range of declared jobs whose status or precariousness provides little or no legal protection<sup>(9)</sup> (see box 2).

[5] The first British "labour code", the *Factory Act*, dates from 1802, and it was not until the end of World War II that work-related social protection institutions were set up in Europe and then gradually throughout the world.

[6] Téklé T. (2010), *Labour Law and Worker Protection in Developing Countries*, ILO.

[7] Posthuma A. (2010), "Beyond regulatory enclaves, challenges and opportunities to promote decent work in global production networks", In *Labour in global production network in India*, Oxford.

[8] They are, however, difficult to measure, due to the extent of informal work, see below.

[9] International trade union confederation (2012), *Rapport annuel sur les violations des droits syndicaux*.

In addition, the legacy of social and spatial characteristics has a long-lasting effect on the job markets of emerging countries. These mean that jobs with little or no protection tend to concentrate on categories of individuals and in certain regions. In Brazil for instance, inequalities and poverty particularly affect black and indigenous populations. In South Africa, significant segregation inherited from apartheid still exists. Moreover, people from poor regions, whether they still work there or whether they have moved to urban areas, are also more likely to be doing casual or precarious work. Such regional disparities may even be statutory, as in China where rural/urban duality, the *hukous*<sup>(10)</sup> system, is enshrined in the law. Under this system, migrant workers have fewer employment rights and less social protection than urban residents. All in all, labour laws often differ from one region to another, with a great deal of latitude given to local authorities<sup>(11)</sup>.

#### ■ Towards a unification of labour markets in emerging countries?

Although the aforementioned segmentations generally remain strong in the labour markets of emerging countries, the dynamics of both market and labour law unification vary significantly from one country to another (stronger in Brazil, gradual in China, still slow in India).

Inequalities on the labour market have considerably reduced in Brazil and China, due to higher income; wage inflation in cities; increased agricultural productivity; and a decline in surplus labour in rural areas due to lower fertility rate. Hence, Brazil has already unified its labour market regulations, putting an end to regional labour legislation. In China, the segmentation between rural migrants and urban residents still exists, but the benefits granted to urban residents in terms of job security regulations and social protection are gradually being extended. In certain areas, for instance, accidents at work and social protection, regulations are progressively becoming universal.

It is mainly economic and demographic factors that tend to unify labour market regulations. China for instance is said to be on track to reach the "Lewis turning point"<sup>(12)</sup>, after which the fall in surplus rural labour is accompanied by wage increases in industry and leads to inland relocation of industries. In Brazil, the Green Revolution combined with redistribution policies has contributed to

higher rural wage increases. In contrast, in India, imbalances amongst the States tend to widen between those reaping the benefits of growth and the poorer ones, more populated (Bihar, Madhya Pradesh, Uttar Pradesh and Kerala).

On the other hand, there has scarcely been any significant progress in reducing informal employment, despite a slight decline in Brazil and China. Not only does informal employment remain high in emerging countries, but it also tends to persist or even increase. According to the *World of Work Report 2012* by the International Labour Organization (ILO), informal employment stands at 40% in two thirds of emerging or developing countries. Although the past experience of Korean and Taiwanese economies has shown a positive correlation between the output growth and that of the formal sector, the same does not apply to the new emerging Asian economies where strong growth has not been followed by a significant reduction in the informal sector of the economy, for instance in Vietnam and India.

Moreover, in addition to the drop in "formal" public employment that followed economic reforms (in China and in India), there is now a tendency to employ informal workers in the formal sector (sometimes included in the public sector), even though "traditional"<sup>(13)</sup> informal employment has scarcely been reduced. The 2008 recession also increased the decline in formal employment, as well as the probability of becoming unemployed or working in the informal sector.

#### Box 2:

##### Definition and scope of the informal sector<sup>(14)</sup>

Although the measurement of informal employment is far from being unified, the ILO (International Labour Office) recommends that a distinction be made between, informal employment on the one hand - i.e. workers employed without a contract and not benefiting from the associated protection (unemployment, redundancy compensation, insurance against accidents at work and also working hours and minimum wages) which can be used by duly registered companies (minimizing the number of employees) –and, on the other hand, the informal sector which is not registered (tax evasion).

Informal employment accounts for:

- approximately 45% of total employment in Brazil where it is concentrated in certain business sectors (agriculture, construction, tourism, domestic services) with wage differentials of up to 80%;

[10] Registration booklet giving every Chinese an agricultural or urban status and a place of residence with which the social rights of the individuals are associated.

[11] In India, Kerala has both a relatively high GDP per capita compared to the rest of India and better social welfare regulations than those of most Indian states. The same is true for the Beijing and Shanghai regions in China.

[12] Chan K. W. (2010), "A China paradox: Migrant labor shortage amidst rural labor supply abundance", *Eurasian Geography and Economics*.

[13] Regular or casual wage earners in the informal sector, home workers, non-registered freelance workers.

[14] Jütting J. P., Laiglesia J. R. (de) (2009), *L'emploi informel dans les pays en développement une normalité indélébile?*, OECD Development Centre, Paris.

- 53% in China, where it is concentrated on rural migrants and employees laid off from state-owned companies;
- 90% in India, where it is concentrated in the unorganised sector (company registration is optional for businesses with less than 24 employees, a sector representing 86% of total employment) and with an increase in informal and subcontracting employment in the organised sector, which is said to amount to about 50%.

As a whole, labour markets in emerging countries are characterised by an extreme heterogeneity of employment relations and statuses, which the distinction between informal and formal employment does not sum up. In this context, strategies for extending the coverage of the labour regulations and worker protection are debated.

### **A consensus on the need for more worker protection, but debated extension strategies**

#### ■ **Extending worker protection at the heart of inclusive growth strategies**

Broadly, discussions about social rights in emerging countries have long seen an opposition between two very different approaches: an economic and instrumental one, according to which economic growth “trickles down to the poor”, i.e. the gains of economic growth accruing to the poorest will by themselves foster poverty reduction and, in the long term, better working and living conditions; and one “human rights based” approach according to which worker protection represents a fundamental human right and hence an end to be pursued in itself<sup>(15)</sup>.

Both structural and cyclical factors are now fostering a convergence between these two approaches. Firstly, a growing body of research and empirical literature suggests that inequalities are detrimental to long term economic growth and the sustainability of growth<sup>(16)</sup>. These results underline the need for labour market regulation as well as redistributive policies. The success story of Brazil regarding economic growth and poverty reduction, notably thanks to effective social policies, is often taken as an illustration in this respect. Secondly, the vulnerability of emerging countries to external shocks, related to their export-led growth strategies, as well as the awareness that precautionary savings undermine

domestic consumption, have encouraged emerging countries to put a stronger emphasis on the internal drivers of economic growth, notably in China and in Brazil. Lastly, the 2008 recession has underlined the need for worker protection to reduce the vulnerability of workers and exercise a counter cyclical effect<sup>(17)</sup>. All in all, and with the help of rapid increases in income in some countries, worker protection has gained renewed recognition as a key element of inclusive growth strategies.

#### ■ **But how to achieve this goal is still debated**

The discussions on how to extend rights and protection can be schematically illustrated by three strategies.

A “targeted” strategy is based on non-contributive assistance and reserve worker protection and redistribution to the poorest. Its supporters claim that the weak administrative and financial capacities of emerging countries and the economic distortions potentially induced by protection measures justify a very gradual extension of social protection. Firstly, budgetary and fiscal constraints, together with weak institutions, lead to advocating the targeting of protection at those most in need (“*pro-poor*”) and to non-contributory, rather than contributory social protection mechanisms. Consequently, cash transfer mechanisms are often targeted at the most vulnerable (limiting the number of beneficiaries) and financed by taxes (not by social security contributions). They were first developed<sup>(18)</sup> in Latin America, following the economic crisis of the nineties and are now presented as a possible viable alternative to universal insurance systems. Secondly, the potentially perverse incentives of social regulations on the labour market lead to limiting the level of generosity of such protection and adding conditionalities. From this point of view, the existence of a minimum subsistence income guaranteed by the State (in the form of a minimum wage, unemployment benefits and/or cash transfers) is debated, as it may reduce labour demand since it raises its cost, and labour supply since it reduces the incentive for beneficiaries to seek job opportunities. Such considerations encourage the “activation” of spending on employment and social protection in order to avoid this moral hazard,

[15] Of course, the opposition described here is somewhat simplified and overlooks the considerable amount of microeconomic research that has focused on the economic benefits associated with labour market institutions. See Lee and McCann ed. (2011), *Regulating for Decent Work*, for a closer look at this research.

[16] See in particular Ravallion M. (2009), *A Comparative Perspective on Poverty Reduction in Brazil, China and India*, Policy Research Working Paper 5080, World Bank.

[17] ILO (2011), *The global crisis causes, responses and challenges*.

[18] There are two social protection models: the “Beveridge” model, aimed at helping all those whose resources are deemed insufficient (assistance-related) through tax-based funding, with payments not dependent on contributions (non-contributory system); the “Bismarck” model, based on a risk-pooling insurance system of mandatory and earnings-based contributions (contributory system). In both cases, social protection coverage can be universal or targeted at specific audiences.



by making benefits conditional on "active" steps towards employment. Cash transfers are thus generally conditional, for instance in Latin America.

A "universal" strategy favours universal and contributory social assistance that can benefit all workers. It encourages the construction of a social contract between citizens, in which national solidarity would be based on universal and, at least partly, contributory protection mechanisms<sup>(19)</sup>. For its supporters, the arbitrage in emerging countries is not necessarily in favour of targeted strategies aimed at the poorest and/or limiting the level of generosity of social protection. Three sets of arguments justify this approach. The first refers to the recently industrialised countries of South Asia, such as South Korea, that built a social protection system at an early stage in their economic development<sup>(20)</sup>. Brazil itself is pursuing a policy of extending social protection coverage, and is placing social protection and human capital improvements at the heart of its growth strategy. The second criticises the view that conditional cash transfers are a panacea. It refutes the argument of the administrative and budgetary costs of universal protection by showing that the costs associated to conditional cash transfers can also be prohibitive (e.g. registering and monitoring eligible beneficiaries). Finally, the universal strategy highlights the "paradox of redistribution<sup>(21)</sup>", according to which social regulations exclusively benefiting the poorest ultimately reduce the benefits accruing to the poor. It emphasises that the legitimacy and sustainability of the institutions regulating the labour market is dependent on the benefits that all economic agents perceive of it.

Finally, a "rights recognition" strategy emphasises that formal businesses and jobs are marginal in emerging countries, which makes it difficult to apply a contributory system where insurance contributions are deducted from earnings. It advocates a disconnection between formal employment and access to social rights. South Africa for instance has changed its labour law, stating that employee status is not dependent on a contract, but on actual work conditions characteristics (subordination, control of working hours, etc.)<sup>(22)</sup>. But such recognition remains gen-

erally theoretical. It requires bringing an action before courts, which is difficult for the most vulnerable workers. Proposals for labour codes' reforms on the basis of actual work rather than a formal contract<sup>(23)</sup> are encountering similar difficulties.

The survey of these discussions summarized here as three strategies is obviously only an outline: in fact, the strategies adopted by countries combine legislative elements, the establishment of purely "pro-poor" mechanisms and a gradual extension of rights, both horizontally (increase in the number of beneficiaries) and vertically (increase in the level of benefits)<sup>(24)</sup>. Doing so, emerging countries have brought in new ideas to adapt labour market regulation to their priorities and special requirements. Building national regulatory models is part of the long procedure required to conclude a social contract between the State and its citizens. Yet, emerging countries are facing growing external and internal pressures encouraging them to speed up the definition of a social model.

## LABOUR MARKET REGULATIONS ARE GRADUALLY INSTITUTIONALIZED WHILE GROWING SOCIAL PRESSURES FAVOURS THE IMPLEMENTATION OF A MINIMUM INCOME FOR THE POOREST

The gradual institutionalisation of labour regulations is a sign that working conditions are on the road to improvement

### Labour regulations: relatively binding but rather ineffective

In all of the countries considered, labour regulations are based on the existence of an individual labour contract. Working hours are duly regulated (India has a legal working week of 48 hours, Brazil 44 hours and China 40 hours with two to three hours overtime allowed per day. Weekly or monthly limits on overtime also exist: China for example has a monthly limit of 36 hours, while South Africa and Brazil have weekly limits of 45 and 56 hours

[19] Mkandawire T. (2005), *Targeting and Universalism in Poverty Reduction*, UNRISD.

[20] Kwon H. J. (1999.), *The Welfare State in Korea: The Politics of Legitimation*, St. Antony's College, Oxford, in association with St. Martin's Press, New York.

[21] Korpi W. and Palme J. (1998) "The paradox of redistribution and strategies of equality: Welfare state institutions, inequality, and poverty in the Western countries", *American Sociological Review*, 63 (5), 661–87.

[22] 2002 Amendment to the *Labour Relations Act and the Basic Conditions of Employment Act*.

[23] See, for example, Supiot A. (1999), *Au-delà de l'emploi. Transformations du travail et devenir du droit du travail en Europe*, a report for the European Commission [ed.], Paris, Flammarion.

[24] See ILO [Conclusions of the International Labour Conference in 2011 and recommendation 202 of 2012].

respectively). China, Brazil and India also have legislation covering insurance claims for workplace accidents. Only a minority of employees, however, benefit from full-time employment contracts and the related social rights. Labour inspections are often not efficient and only have few dissuasive sanction mechanisms at their disposal<sup>(25)</sup>. In most cases, labour disputes are settled through courts, but in reality individual access to justice is very limited. Hence, working conditions usually fall short of legal requirements. In this respect, while media attention tends to focus on the formal sector – and especially on companies like Foxconn<sup>(26)</sup> that work as subcontractors for multinationals – employment relations in this sector are actually more formally governed and offer greater worker protection than in national private businesses and in domestic services where workers are neither protected nor represented. And yet, most jobs are concentrated in the latter. The best working conditions are usually found in state-run enterprises and in joint-ventures set-up with foreign businesses, but these concern a minority of workers only.

Theoretically, social dialogue and collective bargaining, which are both formally recognised in emerging countries, could make up for the lack of individual bargaining power. Trade unions have been or remain influential in public debate. Collective bargaining, however, is often restricted to large companies and government where trade unions usually are the strongest. Moreover, collective bargaining often takes place at the company level rather than at the industry level. It gives more power to employers who tend, in India, China and Mexico, for example, to prefer co-opted company unions. Even in South Africa and Brazil, where collective bargaining has more weight, the latter rarely deals with more than wage negotiations. Where tripartite dialogue exists, it is mainly government controlled. This is particularly true for negotiations concerning the minimum wage, a provision that exists in most countries<sup>(27)</sup>.

On the whole, progress in working conditions is sluggish except where driven by political will. But, even with such a strong will, progress in effective labour rights cannot be sustainably achieved without workers' organisations with the required bargaining powers. While social dialogue remains diffi-

cult in emerging countries, social protest becomes more and more organized and able to impact the political economy of labour market reform.

#### ■ On the road to social democracy?

The advent of trade unions in emerging countries has usually been a political rather than an industrial phenomenon. This has been so from 'Lula's Brazil' to India, where each trade union has strong links with a political party, but also in South Africa, where the Congress of South African Trade Unions is allied to the African National Congress (ANC) and to the Communist Party. While trade union monopolies tend to disappear under pressure from democratisation processes (China being the notable exception), trade union law remains largely disregarded. Trade union density, often below 10%, is undermined by the economic insecurity of wage earners, payment by the hour or by piecework, as in China and India, and poorly developed entrepreneurial networks beyond very small businesses. In addition, emerging countries are generally hesitant to give increased powers to social partners regarding the issues at stake, whether economic (labour market flexibility) or political (risks presented by regional separatist movements in north-eastern India and fears of political opposition in communist China). Hence, the ILO convention on trade union freedoms has not been ratified in Brazil, India or China and the ILO is seeing a growing number of complaints concerning anti-union discrimination.

Protests on working conditions, employment and wages nevertheless tend to increase in emerging countries, whether supported by trade unions or non-governmental organisations (NGOs). And while the right to strike is not always guaranteed<sup>(28)</sup>, it is exercised in practice with a greater frequency. In February 2012, Indian trade unions unanimously called for a general strike to strengthen labour laws and introduce a minimum wage. In China and South Africa, labour protests are also on the rise and often end up with wage negotiations.

In addition to mobilising workers, trade unions and social organisations have assumed a new dimension, namely taking care of the most vulnerable workers. In China, unofficial trade unions and NGOs exercised pressure for improved living conditions for rural migrants, the most marginalised category of the population in terms of labour and employment relations. Their success (e.g. substantial wage increases at Honda and Foxconn) has now encouraged the official trade union federation to

[25] International Labour Organization [2006], Labour Inspection, 95th Session International Labour Conference.

[26] In 2010, suicides occurred at Foxconn, a subcontractor in China for major multinational groups.

[27] See country monographs, available on [www.strategie.gouv.fr](http://www.strategie.gouv.fr).

[28] It is tolerated in China, restricted for 'essential' activities in Brazil, while lockout rights exist for private companies in India.

take on these movements. Brazil is considering the development of service-oriented unionism, where unions provide the most vulnerable with services that go far beyond labour disputes: healthcare, training, and even helping with family disputes.

In view of this growing social maturity in emerging countries, working conditions are likely to improve in the near future faster than in the past. The poorest workers represent the largest share of the population in these countries, and their votes and protest could pose a threat to social peace. Aware of this growing labour unrest, governments have embarked on a series of reforms to introduce a minimum safety net for the poorest workers and for the unemployed. They have also decided to put greater efforts at raising the minimum wage guaranteeing a decent income for all. Yet, they have had less success so far for setting up more permanent and institutional systems such as unemployment insurance.

### **Providing a minimum income for all**

Workers who lose their job in emerging countries rarely benefit from an unemployment insurance scheme as in Europe. They usually receive severance payments or, more and more, can benefit from *ad hoc* mechanisms such as public works programmes or cash transfers. Individual unemployment accounts are increasingly implemented as an alternative to traditional unemployment insurance.

#### **■ Unemployment insurance is rare in the emerging and developing world**

In 2009-2010, only 71 out of 197 countries had set up an unemployment insurance scheme covering in total less than 30% of the world labour force<sup>(29)</sup>. From a worldwide perspective, unemployment insurance thus remains a privilege and its implementation highly dependent on income levels (35% of middle-income countries have set up a legal unemployment benefit scheme, while only 8% of low-income countries have done so).

Yet, following the 2008 global recession, more resources have been allocated to unemployment insurance schemes in emerging countries and in the developing world. Since the turn of the century, unemployment insurance schemes have been set up in Latin America (Brazil, Argentina, Venezuela, Uruguay), Asia (China, Vietnam, Thailand) as well as in South Africa and Turkey. These schemes are funded by both social security contributions and taxes, with the State taking over when contributions cannot be paid.

This development of unemployment insurance schemes nevertheless remains the exception rather than the norm. Such schemes are actually particularly difficult to introduce in emerging countries given the scale of informal work. The coverage and generosity of unemployment insurance schemes in these countries is also generally below international standards, which alleviates their redistributive effects<sup>(30)</sup>. All in all, only 16% of unemployed workers in China receive some form of unemployment benefit and this figure drops to 10% for South Africa and 8% for Brazil<sup>(31)</sup>.

When it exists, protection against job loss in most emerging countries is largely based on severance pay or redundancy payment.

#### **■ Severance pay or, more recently, targeted income support schemes, provide only temporary and partial protection against the risk of unemployment**

Severance pay is the most widespread form of protection against the risk of unemployment for workers in the formal sector. Paid entirely by the employer and requiring little administrative and financial efforts, it is seen as an attractive alternative to insurance. However, it often involves complex administrative and legal procedures and lengthy waiting periods, leading to legal uncertainties and higher costs of dismissals. Neither does severance pay help to meet the objective of greater job and career path security, which would be better achieved with unemployment insurance than with severance pay. As a matter of fact, in many countries severance pay laws have been explicitly seen as temporary or transitional measures, to be phased out with the growth of social protection.

Similarly, targeted and *ad hoc* public income support schemes involving public works programmes, such as India's national rural employment guarantee act or South Africa's Isibindi programme for integrating social workers in local communities<sup>(32)</sup>, only provide a temporary and partial solution (poor pay) towards achieving greater security for workers.

#### **■ Individual unemployment insurance savings accounts could be an alternative to unemployment insurance**

Conversely, individual unemployment insurance savings accounts could be an alternative to conventional unemployment insurance schemes. This system is increasingly being introduced in many countries of Latin America<sup>(33)</sup>, where it tends to progressively replace severance pay systems. The first of these types of account was implemented in Brazil in 1986 (*Seguro Desemprego*) and, in what is considered one of its most accomplished forms, in Chile in 2002

[29] ILO (2010), "World Social Security Report 2010/2011".

[30] Vodopivec M. (2009), "Introducing unemployment insurance to developing countries", World Bank, Social Protection and Labor, *SP Discussion Paper*, No. 0907, May.

[31] OECD (2010), « Tackling inequality ».

[32] See Collombet C. and Lensing-Hebben C. (2012), « La protection sociale dans les pays émergents », La Note d'analyse n°300, novembre, Centre d'analyse stratégique.

[33] Valentini F. (2008), "Unemployment insurance savings accounts: An overview", Helsinki, ETLA.



(*Seguro de Cesantia*). Employers can deposit indemnity amounts on these accounts. The amounts deposited then earn interest and can be withdrawn by employees when they lose their job, whether this result from dismissal or resignation, or any other reason. Based on private capitalisation, this system extends unemployment protection coverage with no need for the public authorities to register and monitor the employment or unemployment status of workers. Its also reduces moral hazard.

Yet, unemployment insurance accounts have to improve in terms of economic performance as well as regarding the level of protection actually provided to beneficiaries. First, the system is based on fund investments, which implies that its effectiveness is largely dependent on that of the financial institution managing the funds. In addition, returns are volatile, which can encourage employers and employees to reach a redundancy agreement in order to withdraw the funds. This has already happened in Brazil<sup>(34)</sup>. Another drawback is that the system individualises the risk, which puts the most vulnerable workers at a disadvantage. Considering the instability of employment in emerging countries labour markets, this makes it difficult to accumulate funds under this system.

The study of unemployment insurance shows that risk sharing and the compensation granted between governments, companies and workers are key to institutionalising labour regulations. To extend the coverage of social rights, emerging countries need to consider the overall architecture of their labour market institutions, in order to obtain a system that protects employment as well as workers and still provides incentives to find and remain in productive employment. Such reform also calls for important changes in social attitudes, which often come at a political cost. Without underestimating these difficulties, the present economic and political context offers emerging countries an unprecedented political window of opportunity to develop social rights and worker protection.

## ◀ FROM HARD LAW À LA SOFT LAW – THE ROLE OF THE INTERNATIONAL COMMUNITY

Economic interests, political will and innovative instruments combined suggest that the time could be ripe to extend the coverage of social rights. Public and private initiatives taken by the international community are now supplementing rather than substituting domestic efforts in this

area. Together, they are helping to define a minimum core of social rights to be implemented worldwide.

### International attempts to design common minimum social standards

#### ■ Difficulties in achieving universal coverage of social rights

The process of defining a common core of labour law at the international level began with the organisation of trade unions in the 19th century<sup>(35)</sup>. This movement was involved in setting up the International Labour Organization (ILO) in 1919. The ILO is the institution that has contributed the most in the fight for universal social rights, as reflected in its standard-setting activities<sup>(36)</sup>. Yet, its work is hampered by a lack of coercive means and the reluctance of national governments to set up binding international common core of rights. Unlike the WTO's Dispute Settlement Body, the ILO has no way of imposing sanctions except through complaint mechanisms leading to recommendations. ILO efforts towards setting up an international legal framework culminated with the adoption of the Declaration on Fundamental Principles and Rights at Work on 19 June 1998. This declaration imposes eight conventions on the Organisation's Member States, even in the absence of ratification, which is unprecedented in international law. However, several obstacles remain to the implementation of these standards. Not only the aforementioned reluctance by governments to adopt them, but also the lack of uniform data to measure the effective coverage of these rights in Member States. An international observatory collecting these data would be of use in this respect.

The ILO's organisational structures and mode of operation are based on a prescriptive model that results from formalised industrial relations. This makes it difficult for the organisations' standards and recommendations to adapt to the situation of labour markets in emerging countries. Often feeling ignored and poorly represented by the international system<sup>(37)</sup>, the latter claim that they have specific domestic issues that impose different priorities. Brazil puts forward that fighting inequality is the priority (and the country is a leader in social rights), for China it is maintaining full sovereignty in the field of social rights, for India it is holding on to its advantage in terms of labour costs (and India sometimes perceives international labour standards as protectionism in disguise) and for South Africa, it is fighting discrimination.

[34] Ferrer A.M. and Riddell W.C. [2009], "Unemployment insurance savings accounts in Latin America: Overview and assessment", Social Protection and Labor, World Bank SP Discussion Paper No. 0910.

[35] The International Working Men's Association in 1864, the International Secretariat of Trade Union Centres in 1901 or the International Federation of Trade Unions in 1913.

[36] These standards include all ILO conventions and general incentive recommendations.

[37] *Joint Declaration of the 77 Countries*, United Nations Conference on Trade and Development (UNCTAD), 15 June 1964.

In the absence of a binding common core of labour laws, some industrialised countries use bilateral initiatives. The latter are used as a mean of overcoming this lack of unity at the international level, which they fear could place their own workers under pressure from 'social dumping'.

#### ■ Multiple bilateral initiatives struggling to succeed

As of the turn of the century, the trade agreements signed by the United States and Canada<sup>(38)</sup> with emerging countries imposed the observance of a series of labour laws, of trade union freedom and of minimum standards regarding working conditions. These agreements often include provisions for dispute settlement mechanisms. However, few cases have been brought before the bodies concerned, and emerging countries often accuse these agreements of being more a matter of settling purely commercial disputes rather than enforcing good working conditions. Overall, preference is now given to technical cooperation mechanisms, rather than bilateral trade agreements, to promote the development of labour regulations in emerging countries. This is particularly true for the European Union<sup>(39)</sup>, and means that no trade sanctions are taken if these conditions are not met. In 2012, the European Commission prepared a communication on "social protection in European Union development cooperation" in which it stressed that, as regards social rights implementation, the EU favours a demand-based approach and wishes to support local initiatives and South-South cooperation<sup>(40)</sup>.

The inflexibility of hard law generally leads to reluctance and mistrust on the part of governments. Consequently, these standards serve as an example and stakeholders tend to turn to various soft law solutions that are supposed to help them to reach the targets defined by hard law.

### The emergence of new stakeholders and less binding international labour standards

#### ■ Development of *soft law* standards by public stakeholders

At the same time as the ILO 1998 declaration and ever since, international organisations have also been seeking to set intermediate standards (ILO Tripartite Declaration of Principles concerning Multinational Enterprises and

Social Policy in 1977, UN Global Compact in 2000, OECD Guidelines for Multinational Enterprises in 2000) which are only intended for Member States that voluntarily accede to them. These instruments encourage best practices but are not binding. From the workers' point of view, such soft law standards can also be the result of tripartite negotiations at the international level, but they are not negotiated with local trade unions.

Following on these initiatives, the ILO has issued a new original system with the joint support of the B20 (Business20) and L20 (Labour 20)<sup>(41)</sup>. The ILO recommendation<sup>(42)</sup>, adopted on the 14th June 2012, requests Member States to guarantee basic income security for their population, funded by domestic resources to be defined within each country. Member States are encouraged to set up national social protection floors and, in this respect, may "seek international cooperation and support to complement their own efforts". It is too early to analyse the impact of this initiative. Yet, it is emblematic of current growing efforts undertaken both by workers and employers' organisations to unify and strengthen social rights at the international level.

#### ■ Initiatives by businesses and trade unions

Given the difficulties encountered in setting up a common set of binding regulations, businesses and labour representatives have also developed their own 'private regulations'. But these soft law standards are often less demanding than the ILO core conventions.

Starting in the 1990s, international trade union federations have launched campaigns to promote trade union rights in the South, particularly in the special economic zones of south-east Asia and the Caribbean Basin. These campaigns are aimed at raising consumer awareness in the North and promoting local initiatives fostering the unionization of workers. Various methods are used to expose and denounce poor working conditions in emerging countries' industries (calls for boycott in the media, complaints lodged with international organisations, activist demonstrations). These movements notably 'name and shame' the subcontractors of northern brands, which they accuse of "outsourcing their bad reputation". Grouped together as part of the anti-sweatshop movement, more than a hundred such campaigns have been organized in the special economic zones of the Caribbean Basin<sup>(43)</sup>.

[38] For example the Free Trade Agreements (FTA) of 1 January 2004 (EU-Chile), or 1 January 2009 (Oman-USA), 5 September 1996 (Chile-Canada) and 1 August 2009 (Peru-Canada).

[39] EUROMED or ASEAN agreements, as examples.

[40] See European Commission (2011), "Public Consultation: Social Protection in European Union Development Cooperation", a summary.

[41] G20 business and trade union organisations.

[42] Recommendation adopted during the 101<sup>st</sup> session of the International Labour Conference. Cf. See Collombet C. and Lensing-Hebben C. (2012).

[43] Delpech O. (2011), "A Puro Golpe! Mobilisations syndicales transnationales, luttes locales et répressions au Guatemala", PhD thesis, Paris I-Panthéon-Sorbonne University.

Despite such international activism, new private initiatives have mostly been developed unilaterally by businesses, in particular through ISO standards or through corporate social responsibility (CSR) for the most successful among them. These standards suffer, however, from limited requirement levels and a lack of control mechanisms. They are enacted on a voluntary basis and have no provisions for sanctions, apart from name and shame tactics. Like social audits and codes of conduct, all these standards have been developed unilaterally without consulting social partners.

Yet, although they have relatively little normative power, codes of conduct can have a legal impact if, and only if, they are part of an International Framework Agreement (IFA)<sup>(44)</sup>. The IUF<sup>(45)</sup> and the food group BSN-Danone signed the first IFA<sup>(46)</sup> in 1988. The purpose of these agreements is to create long lasting relationships between social partners and provide a basis for social dialogue with trade unions. These can take part in IFA's negotiations. For businesses IFAs represent an opportunity to mitigate the opinion campaigns that could target them. Given the lack of internationally recognised federation of employers, these agreements are only signed on a company-by-company basis, although they are initialised by an international trade union federation. Provisions are sometimes made for private dispute settlement mechanisms<sup>(47)</sup> in IFAs. But the latter do not offer the same guarantees as public justice. Outside such provisions, IFAs can only be enforced by domestic jurisdictions if they are considered as a collective agreement under national law, which is exceptional<sup>(48)</sup>. It is thus hard to enforce recognition of a group's liability abroad, based on this type of obligation towards its employees. Some attempts in this direction are nevertheless made on the basis of criminal liability.

Based on IFAs, ISO standards or CSR, sanctions can also be taken against misleading advertising or consumers' rights. In this case, the dispute is settled in terms of civil liability, as it is considered that the company's obligations are towards the consumer<sup>(49)</sup>. Yet, even if sanctions are taken against the company, it is not necessarily in favour of the employees as injured parties, but in favour of the consumer: a case itself won't encourage as much companies to improve the working conditions of their employees, as the fear of new name and shame campaign.

Despite these imperfections, trade unions and businesses have now expressed a desire to see IFAs increase. There is, however, no legal incentive at the supranational level to create spaces for negotiating this type of agreement outside the European Works Councils<sup>(50)</sup> which seem to produce results at the regional level.

**CONCLUSION** Both at State and international level, the extension of workers' rights and protection presents a twofold challenge. First, segmented labour markets mean that governments have to build bridges between different types of scheme in order to extend social protection in a sustainable way. These schemes may be assistance-based or insurance-based, targeted or universal, emergency or institutionalised. Second, at the international level, initiatives must find a balance between a desire for applicable standards or the willingness to serve as an example. The risk of the former being that any consensus reached would be based on the lowest common denominator and would avoid any binding effect. Whether at national or international level, in both cases it is not so much the actual standards as the overall architecture of protection systems that needs to be considered. This entails taking into account the political economy of reforms in order to ensure sustainable models conciling economic growth, worker and employment protection as well as assistance to the poorest.

► **Keywords:** emerging countries; labour law; employment; social protection; informal work; inclusive growth.



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[44] Following the IFA signed by the IKEA Group in 1998, a code of conduct, known as IWAY, was drafted in 1999 to become part of the IFA in 2001.

[45] International Union of Food, Agricultural, Hotel, Restaurant, Catering, Tobacco and Allied Workers' Associations.

[46] Strevis D. [2010], "International framework agreements and global social dialogue: parameters and prospects", ILO Employment Working Paper, n° 47.

[47] Arbitration for EADS, joint stakeholder consultation at Accor.

[48] The IFA signed by the Swedish group Securitas in 2006 can be applied under domestic law because of an agreement signed between Union Network International and the Swedish transport union.

[49] See in particular *Nike vs. Kuski*, US Supreme Court, 2003.

[50] Directive 94/45/EC, dated 22 September 1994, established European works council, or a procedure for informing and consulting employees within companies or groups with a European dimension, according to an agreement negotiated between the employees' representatives, grouped together in a special negotiating body and the management, to promote negotiation within European-scale undertakings.

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