

HARMONIZATION OF LABOUR LAWS AND POLICIES IN THE SAARC REGION IN LINE WITH
INTERNATIONAL LABOUR STANDARDS FOR THE CREATION OF INCLUSIVE LABOUR MARKETS

Some Observations¹

Background

The classic theories of economic production teach us that three ingredients are imperative to achieve the ideals of value addition, economic growth and profits: land, capital and labour. These ingredients are interdependent - one cannot do without the other. In reality however, the ownership of land and capital has traditionally been concentrated in the hands of relatively few people. Vast majorities are left without land or capital. To them selling off their labour is the only option for survival.

For many years, economies were fuelled by slavery and servitude, a business conducted primarily by public powers. It was the State itself responsible for trading in humans as animals, leaving treatment of an individual worker completely dependent on the benevolence of the master. It took many years for this to change.

Devote of their freedom, workers did nevertheless not remain docile. The world found it necessary to learn it the hard way that labour matters can be an explosive subject. Revolutions and wars had to be battled to abolish slavery and other forms of labour exploitation before a framework of labour protection was going to be established. Few subjects have therefore stirred more emotions than the relation between capital and labour, or what we have come to call the “social question”.

Workers today are, in theory, constitutionally and legally protected against exploitative labour arrangements. Even where labour remains plentiful and prevailing market mechanisms of demand and supply would push wages down to the cheapest possible price, the State protects labour from undue exploitation.

Without labour, land and capital do not bear fruit. But for labour to prosper it needs to be healthy and strong. This implies a sufficiently high price to ensure its maintenance. To resolve the social question and to turn labour matters into an equitable affair, workers and employers entered into a “social contract”.

The state is supposed to assume the role of guardian of the social contract. It is expected to promote its implementation and enforce work regulations and agreements. In this manner, the State has sought to establish some balance in the power relations between the richly endowed and a workforce traditionally prone to exploitation.

¹ Coen Kompier, Senior Specialist International Labour Standards, ILO Decent Work Team for South Asia. The observations are the author's only

If this social contract model is respected it will boost productivity too as the social contract is ideally based on a platform of worker's dignity, deriving from the premise that a happy worker is a productive worker.

Decent Work

Today, this social contract is best understood through the concept of "decent work", adopted by the members of the International Labour Organization in 1999. Decent work is defined as "productive work by men and women, in conditions of freedom, equity, safety and dignity". Productive work must benefit people by enabling the generation of an adequate income.

Decent work guarantees sufficient work which is safe, with effective social protection in cases where work is not possible or simply not available. In times of economic slackness or in personal crises workers should be able to rely on some form of social security, to counter a threatening slide towards poverty and ultimately destitution.

In other words, decent work is a political choice in which employment, income and social protection can be achieved without compromising rights at work. These rights fundamentally confer workers with the right to freedom of expression and association, from exploitative labour conditions like child and forced labour, and from discrimination.

Labour laws: Synergies and differences

People depend on having a job for their survival but not just any job on any terms. Jobs must maintain the dignity for any working person and need to be governed by a normative system. This system cannot rely on voluntary rules since interests of employers and employees mostly represent opposite sides. Therefore the State must create a minimum normative framework that guarantees this dignity.

In South Asia there exists a true plethora of labour laws to protect workers from exploitation and to effectively govern labour relations. These laws touch upon a large number of issues aspiring to achieve the principles of decent work and reflect the provisions of international labour standards of the International Labour Organization.

In South Asia, the average worker can easily form trade unions, is entitled to minimum wages paid at regular intervals, is protected against excessive working hours and enjoys at least one day off during a working week. In larger industrial establishments, the labour laws maintain a regime of safety and secure work, and enterprises outside its coverage get equal protection from other laws.

Labour excesses such as boundless contract labour, child and bonded labour, and forms of contemporary slavery such as trafficking for labour exploitation are banned by special laws. Women workers are entitled to maternity benefits, equal pay with men for work of equal

value, and protected against sexual harassment at the workplace. On paper South Asian workers never had it so good.

While there is a strong case to be made for improving access to decent work purely from a legal and social justice standpoint as an end in itself, there is also an economic case to be made. Amartya Sen, a famous Indian economist and Nobel Prize winner, invoked this business case of labour rights on the opinion page of the New York Times to explain China's economic success: "... to match China in its range of manufacturing capacity ... it needs a better-educated and healthier labor force at all levels of society. The case for combating debilitating inequality ... is not only a matter of social justice ... China did not miss the huge lesson of Asian economic development, about the economic returns that come from bettering human lives, especially at the bottom of the socioeconomic pyramid."

Labour laws within South Asia can be split into two groups. On one side we find former British colonies, Bangladesh, India, Pakistan and Sri Lanka, which adopted the common law system. This automatically implies these countries take a 'dualist' approach on the integration of international labour standards, which requires national legislation for their execution. Labour laws in these countries are characterized by their large volume, sectoral approach, detailed Rules, archaic language and judicial corrections.

The other SAARC countries, Afghanistan, Bhutan, Nepal and Maldives, have one labour law. Their labour laws are relatively new, or in the process of being amended with ILO support. These laws are relatively concise, drafted in simple language and generally apply to the vast majority of workers. They adopted a 'monist' or 'semi-monist' approach which means that international labour standards can be applied without mandatory adoption of national legislation.

Challenges: exclusion from labour law protection

South Asia's economies are characterized by relative large informal economies in which very few formal jobs are being created. The majority of the workers either work casual or are deemed self-employed. Self-employment entails a form of ownership of a small shop or plot of land with earnings coming from a product or service normally generated with the help of a few family members. Alternatively, self-employed offer a craft or trade in the open labour market for which they hope there may be some kind of a demand and work from their homes or in public spaces.

Casual workers on the other hand offer their labour to a potential employer, and by doing so enter into an employment relationship. In a classic capitalist labour market, employers create a demand for labour and hire persons to work in the workplace. The employment conditions are determined in an employment contract of certain duration. Subsequently, the worker will enjoy the status of employee of that enterprise.

Boundaries between these two forms of employment opportunities are increasingly getting blurred. In the new labour market of today employers hire the same employees, no longer on the basis of an employment relationship for a specified period of time, but to perform and complete a certain task. Workers are no longer being attached to an enterprise, but hired as individuals whom themselves are considered 'entrepreneurs'. They bring their own tools and in fact work at their own expense. Once the assigned task is accomplished, they get their fee for delivered services and move on to a next job. Their labour inputs are no longer part of an employment relationship between an employer and an employee, but part of a business contract between two different 'enterprises'.

Under this contractual regime workers no longer benefit from the protection of labour laws. For them the presumed social contract ceases to exist. Their sole responsibility in the eyes of the contractor is the completion of the assignment which forms the basis of their remuneration.

The modalities under which the assignment is being completed is left to the responsibility of the contracted party. Whether these imply excessive working hours, lack of safety gear and hazardous working conditions, the help of children and other family members, is no longer considered a concern for the contractor. In the new labour market, each one has to fetch for oneself.²

The powerlessness of these workers is compounded when they obtain work through an intermediary. It is this agent determining who gets to work where, for how long and at what price. For these services of making the match between supply and demand of labour the agent receives a fee, further depressing the remuneration of contracted labour, and further reducing the negotiation ability of contracted workers to strive for a proper deal.

This chain of command also means that work in the unorganised sector is more often than not conducted in inhumane conditions. Employers at each level attempt to escape direct responsibility for the health and safety of their employees, as well as their duty to provide them with minimum remuneration they would otherwise be legally obliged to pay.

Home-based workers for instance are prone to severe exploitation from contractors, typically working long hours for little pay. Workers engaged in stigmatized occupations, including ragpicking, manual scavenging and commercial sex work, typically face exploitative and unsafe work conditions, accompanied by extremely low wages.

² Paragraph 13 of ILO Employment Relationship Recommendation No. 198 contains a "control test", by which the degree of an employment relationship can be measured through factors like work carried out under the control of another party; the integration of the worker in the organization of the enterprise; performed solely or mainly for the benefit of another person; carried out within specific working hours or at a workplace specified or agreed by the party requesting the work; periodic payment of remuneration to the worker; the fact that such remuneration constitutes the worker's sole or principal source of income, etc.

The non-remunerated poor are, in a sense, some of the most deprived and vulnerable categories of those denied access to decent work. In the case of home-based remunerative work, often the elderly members of the household and children are drawn by household members to participate in the production process, although their contribution remains largely unrecognised and unremunerated. The elderly also contribute to housework, child-care, and other tasks. They are a significant pool of “invisible” or “unseen” labour that is by and large ignored in discussions of decent work. Unsurprisingly, as for almost all categories of workers, reliable data on the scale of their contribution are not available.

In conclusion, the demise of the employment relationship demands a fresh solution. This becomes more obvious even when we consider the exploitative nature of employment relationship that did not cease to exist: child labour, bonded and forced labour, and work which remains non-remunerated. This exploitation is particularly targeted towards discriminated groups excluded by religion, caste, migration or contract status. Within these groups, women are by definition worst off.

Harmonization

Entirely new labour laws are the need of the hour, covering all workers irrespective of their contractual nature, sector or workplace. These ‘omnibus laws’ must protect all workers against violation of fundamental rights at work; do away with child and forced labour, discrimination, and promote trade union membership and collective bargaining. It must guarantee worker’s equality before the law.

Hiring and firing can be flexible, in line with today’s labour market requirements, but only when lapses of employment security are compensated by an effective system of social security accessible to all. Wording of the law should be simple and accessible. It must have clear cut provisions on wage payment, fixing of wage levels, working hours and working conditions.

At international level, a drive is on its way to either make unacceptable work acceptable, or prohibit it completely. The idea of “unacceptable forms of work” is the anti-thesis of decent work. It implies violation of any of the fundamental principles and rights at work, but it comprises additionally any form of work which harms the physical integrity of a worker (related to working conditions), the dignity of a worker (related to employment terms and job security) and the degree of powerlessness of workers (related to lack of remedies and obstacles to union membership).

Enforcement and implementation of a new omnibus law will need a better functioning and independent public labour inspection system. This implies more staff, better skilled and equipped, working on the basis of clear and transparent instructions. This automatically implies more State funding for labour matters.