



Labour Markets and Social Policy

A Review of Labour Markets in South Africa:
Labour Market Regulation: International and South African Perspectives

P. Benjamin

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LABOUR MARKET REGULATION: INTERNATIONAL AND SOUTH AFRICAN PERSPECTIVES

Paul Benjamin

Adjunct Professor
University of Cape Town
Director
Cheadle Thompson & Haysom Inc.

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Produced by Paul Benjamin
Adjunct Professor, University of Cape Town
Director, Cheadle Thompson & Haysom Inc.

E-mail: paul@cthcpt.co.za
Tel: +27 21 422 2210

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1. Introduction

The purpose of this paper is to provide an overview of existing literature concerning the rationale for labour market regulation. The paper consists of two parts:

- A survey of literature concerning the rationale for the legal regulation of the labour market; and
- An analysis of debates in South Africa concerning labour market regulation in the light of the international survey.



Part one: International perspectives

2. Issues of terminology

At the outset, it is helpful to clarify some issues of terminology. The concept of “regulation” is now used widely and in a number of different contexts. “Regulation” may refer to a specific set of rules, to all forms of deliberate State influence or to describe all forms of social control or influence, including those that are not derived from the State, such as markets (Baldwin & Cave, 1999).

In this paper, “regulation” is used primarily in the second sense and refers to “the sustained and focused control exercised by a public agency over activities that are valued by a community” (Selznick, 1985: 363). The study of regulation is concerned with the use of law (and other mechanisms of regulation available to the State) to achieve the goals of social policy. The term “law transmission system” has been used to describe the process by which a statement of policy is translated into “real world” changes and socio-economic behaviour. This covers “legislative, administrative and judicial actions which interact with regulated institutions, beneficiary organisations and individuals to achieve a real world response to a legislative standard” (Blumrosen, 2003). This approach emphasises that the efficacy of regulation cannot be assessed by reference to its content alone but must take into account a wider range of implementation factors.

Labour market regulation refers to a range of laws and policies the primary purpose of which is to regulate the labour market. The term indicates a wider focus than conventional notions of labour or employment law, which have generally been used to refer to laws enacted to protect persons defined as employees. Labour market regulation goes beyond the goal of regulating existing employment relationships and seeks to regulate the broader operation of the labour market: what have been described as the “legal steering mechanisms” of the labour market (Collins, 1989). It may also be used to refer to the regulation of paid work performed by persons other than employees.

At the same time, it is necessary to draw some form of line around labour market regulation to prevent the concept interpenetrating seamlessly with a broader body of law, which creates rights, and duties of general application across society as a whole. The term labour market regulation will generally exclude laws and policies which, while applying to actors in the labour market, do so irrespective of their status in the labour market.

3. Categories of labour market regulation

Labour market regulation can be divided into a number of sub-categories:

a) Minimum conditions of employment

Labour law has traditionally provided a set of minimum conditions (minimum floor of rights) for employees. The earliest labour laws protected workers against the worst abuses of the industrial revolution. Minimum conditions include restrictions on forced labour and child labour as well as laws regulating hours of work, periods of leave, the termination of employment and health and safety at work.

b) Collective bargaining and worker participation

Labour law promotes the conditions for the formation and regulation of trade unions and employer's organisation, the conduct of collective bargaining, dispute resolution and the taking of industrial action. From the 1980s, certain states sought to promote individual bargaining at the expense of collective bargaining. In addition, many countries legislated for the establishment of bodies such as works councils or workplace forums which are elected in workplace. These bodies may be consultative or may have decision-making rights in respect of particular matters. Another example of worker participation is the elected worker health and safety representatives and committees provided for in occupational health and safety laws.

c) Institutions of governance

Labour laws establish a complex and varied architecture of institutions of governance for the labour market. These institutions include-

- Institutions for stakeholder participation in developing labour policy and legislation or advising on the application of particular laws;
- Institutions empowered to set or recommend minimum wages and other conditions of employment, either nationally or in respect of specific sectors of the economy; and
- Enforcement agencies or inspectorates charged with promoting, monitoring and enforcing compliance with legislation.

d) Dispute resolution and adjudication

Labour law establishes a range of institutions to resolve disputes that arise in the workplace. It is common for these disputes to be divided into disputes of interest over wages and other conditions of employment arising from collective bargaining and disputes of right which concern the interpretation of existing rights. Procedures for resolving disputes of interest generally include conciliation and the regulation of industrial action while disputes of right which cannot be settled are generally referred to adjudication. In some countries specialist labour law courts or tribunals have been established, while in others they are dealt with by the ordinary courts.

e) Promoting equality in the workplace

The primary provisions promoting equality are anti-discrimination statutes, pay equity law and, in certain societies, obligations to implement employment equity or affirmative action. These laws may be of general application or apply specifically to workplaces.

f) Providing skills development and placement within the labour market

Labour laws seek to promote the employability of individuals through national and sectoral schemes providing training and skills development for employees and work-seekers as well as mechanisms for the placing persons in work.

g) Providing employment-linked social security

Labour law has conventionally been seen as encompassing contributory social insurance schemes established for persons in paid employment, such as unemployment insurance and compensation for occupational injuries and diseases. The border between labour market regulation and social insurance may be difficult to draw and varies. In countries with comprehensive social security systems, these forms of social insurance may be classified as aspects of social security as they are guaranteed to all citizens irrespective of their employment status. Labour market regulation may include the provision of a range of forms of social insurance such as health insurance and retirement funds. Legislation may establish state-run (generally contributory) schemes to provide certain of these benefits or legislation may merely play the role of setting standards for private providers to provide these benefits. These categories are overlapping and different aspects of labour law easily be fitted into more than one category.

A Canadian report suggests that for the purpose of delineating the scope of labour protection, it is useful to identify three dimensions of labour regulation. These are social justice which includes human rights concerns (for example anti-discrimination law and employment equity) and occupational health and safety regulation. Secondly, regulations dealing with economic exchange and governance which includes employment standards, certain common law duties such as implied notice upon termination and collective bargaining. The third dimension of labour regulation encompasses social wage and social revenue, including employment insurance, public pensions, workers' compensation and income tax (Fudge, Tucker & Vosko, 2002).

It has been suggested that there are three types of labour standards:

- Protective standards which constitute a legitimate “corridor” of employer conduct;
- Standards of participation which provide the rights, institutions and means for participation by labour, capital and business in setting and implementing labour standards; and
- Standards of promotion which further labour productivity, promote job creation and combat unemployment.

These standards are complementary and their joint effect may exceed the impact of each single standard (Sengenberger, 1994).

4. The purposes of labour market regulation

To understand contemporary labour law debates, it is useful to start with a prior conventional wisdom. Until the early 1980s, the following statement by Otto Kahn-Freund in the 1950s was widely accepted as reflecting the essential rationale of labour law:

“The main object of labour law has always been, and we must venture to say always will be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship”.

In terms of this vision, labour law performed the social function of redressing the imbalance of power between employees and employers. It did so by two “vintage” strategies – the promotion of collective bargaining and the enactment of minimum rights and entitlements for employees.

From the early 1980s onwards, labour lawyers began to reassess the “vocation” of labour law. In this period, many governments sought to re-regulate or deregulate labour markets to enhance the bargaining power of employers at the expense of workers and trade unions. It became widely accepted that labour law could be used as an instrument of economic policy to, for instance, control inflation. In societies with declining trade union density, collective bargaining became an increasingly less effective vehicle for balancing labour market power. In addition, situations emerged in which employees or trade unions may have greater bargaining power than that of an employer.

There is now widespread acceptance that labour law is concerned with the broader regulation of the labour market – it can no longer only perform a protective function in relation to persons already in employment. The Australian authors Gahan & Mitchell suggest that the appropriate starting point is the acceptance that governments may have a variety of reasons for regulating labour markets. These may not be co-ordinated or harmonious and may vary between governments and historically. Labour law is a contested site of policy formation and implementation and the different purposes may be inconsistent and even conflict.

The prominent American writer Karl Klare suggests modern labour law has four objectives -

- Promoting allocative and productive efficiency and economic growth;
- Macroeconomic management, by achieving wage stabilisation, high employment levels and international competitiveness;
- Establishing and protecting fundamental rights; and
- Redistributing wealth and power in employment contexts (Klare, 2000).

4.1. Labour promotion

Labour law plays a “labour promotion” function through its contribution to improving the employability of workers and of the aggregate labour supply. In Australia, for example, labour promotion is seen as covering supply side regulation in areas such as immigration, training and social security aimed at creating or sustaining

“human capital”. Labour promotion aims at creating workers who are able to function in the market (Arup *et al*, 2000).

4.1.1. Themes in European law

In an influential analysis, Collins has identified three key themes driving the new directions of employment law within the European Community. These are social inclusion, competitiveness and citizenshipⁱ. Collins argues that employment law functions with other aspects of government policies to reduce or minimise social exclusion consequent upon unemployment in order to prevent a breakdown in order or social cohesion. Laws about discrimination, dismissal, family friendly measures and improvements to the employability of workers can be justified in a number of ways including the need to address the underlying problems of social exclusion in a market society.

The theme of competitiveness arises from the attempts of government to improve the competitiveness of businesses and national economies in an increasingly globalised economic system. While the ambition to improve business competitiveness has led governments to deregulate or reduce employment laws, Collins suggests that deregulation achieves little to improve the long-term competitiveness of businesses. This requires systems of management that attract investments because they offer efficient production, innovative products and highly skilled co-operative work force. He argues that employment law can be used to provide an institutional framework to support competitive enterprises. He suggests that competitiveness requires considerable flexibility and co-operation from work forces and this is best achieved through supplying reliable assurances of fair treatment, employment security as well as mechanisms for worker participation in the management of businesses.

Collins suggests that modern notions of citizenship embrace a broad range of social issues including education, culture and employment and that the citizens have fundamental social rights with protected of growing assistance that the State has a duty to its citizens to secure traditional, civil liberties in contexts such as the work place and that social rights as health and safety, fair treatment and fair pay should be protected (Collins, 2003).

4.1.2. Competition and costs

Labour law regulates competition between firms by setting the terms on which they compete with each other thereby avoid a race to the bottom. It seeks to prevent employers using certain practices that amount to destructive competition (low wages or lack of safety equipment) as a basis for competing with other employers. It therefore forces employers who wish to remain competitive to direct their efforts to effective utilisation of human resources, innovation and the search for new markets (Sengenberger, 1994).

Arguments concerning the regulation of competition are closely linked with those concerning the distribution of the costs of production. Labour law seeks to force employers to internalise costs and not to pass them on to society. It requires employers to take into account harmful extra-firm costs and internalise them to foster preventive action. This point is well illustrated by the regulation of occupational health and safety. Laws regulating occupational health and safety impose upon employers the costs of prohibiting dangerous work. This prevents the costs of accidents, injuries and diseases being passed onto to society more generally.

4.2. The balancing function of labour law

The Decent Work agenda of the ILO articulates the need to “devise social and economic systems which ensure both basic security and employment while remaining capable of adaptation to rapidly changing circumstances in a highly competitive global market” (Somavia, 1999). Sengenberger (2001) in article supporting the Decent Work agenda of the ILO argues that respect for fundamental employee rights is a prerequisite for a socially oriented labour market process. Without these basic rights, workers in general cannot develop as a counterweight, which is necessary to reduce the structural power imbalance in the labour market. The normative function of labour law in balancing competing social and economic concerns has been described as “Reconciling the worker’s claims to autonomy, dignity and security with the needs of the employing enterprise for efficiency in the performance of its institutional task and maintaining its viability or profitability” (Davies & Freedland, 2004).

4.3. Labour law and managerial discretion

Another strand in the debate is a focus on labour law as a mechanism for controlling or restricting the exercise of managerial decision-making. For instance, unfair dismissal laws require management to exercise decisions in a manner that is fair. Likewise the employee’s right not to be discriminated against is confined to ‘unfair discrimination’ and the employer’s obligations to provide a healthy and safe workplace is limited by the standard of what is reasonably practicable. The restraints may be of a procedural nature requiring the following of procedures before a decision is made or of a substantive nature requiring an evaluation of the content of the decision. The precise nature of the requirement of fairness or reasonableness as spelt out in legislation and interpreted by the relevant tribunals will determine the balance between the worker protection and managerial autonomy (Anderman, 2000: 4-6). Labour law may also impact upon managerial discretion by subjecting particular decisions to joint decision-making processes (co-determination). Employees may also acquire rights to participate in decision-making by institutions such as worker directors. This raises the linkages between labour law and corporate law (Wedderburn, 1995: 81-131).

4.4. Justifications for labour law

Collins suggests the regulation of employment relation may be justified on grounds of market failure and distributive concerns. The argument based on market failure runs that ordinary market rules do not work efficiently and therefore additional special regulation is required to facilitate competitive labour markets. The argument concerning distributive concerns runs that ordinary market rules produce a “distribution of wealth, power and other goods, which are unacceptable by reference to distributive criteria such as fairness or welfare maximisation” (Collins, 2000).

4.5. Forms of labour market regulation

It has been suggested that there are five forms of statutory labour market regulation:

- Protective regulations – rules and procedures designed to prevent those in strong positions from abusing their power in respect of those who are weaker;

- Facilitating regulations – designed to enable certain developments to take place;
- Repressive regulations – designed to prevent something the state does not wish to occur;
- Promotional regulations – designed to promote certain developments; and
- Fiscal regulations – in terms of which tax and benefit systems influence the structure of incentives, rewards and costs of pursuing different actions (Standing *et al*, 1996).

Regulation theory seeks to identify the regulatory strategies adopted by states. This analysis proceeds from an identification of the basic capacities or resources that governments possess and are able to use to influence industrial, economic or social activity. The principle regulatory strategies have been identified as:

- Command and control;
- Self-regulation and enforced self-regulation;
- Incentive-based regulation;
- Market control;
- Disclosure regulation;
- Legal rights and litigation; and
- Public compensation or social insurance funds (Baldwin & Cave, 1999).

There is a tendency for the debates to be portrayed as ideological battles between proponents of regulation and opponents over regulation. This is a false dichotomy because there can never be a total absence of regulation. Deregulation concerns the replacement of one set of regulations with another (Sengenberger, 2001). The key issue is to determine whether regulation is appropriate. In recent years, debates about regulation have played a more prominent role in labour law discourse.

5. Labour law and the changing nature of work

The International Labour Organisation has co-ordinated an extensive series of studies and discussions aimed at understanding the capacity and limitations of conventional notions of the employment relationship as a component of national policies managing labour market change. These are reflected in three significant reports (ILO, 2000, 2003 and 2005). According to these reports, internationally worker's protection has largely been centred on the "universal notion of employment relationship, based on a distinction between dependent and independent workers, also known as own-account or self-employed workers" (ILO, 2003). However, changes in the nature of work have resulted in situations in which the legal scope of employment relationships does not accord with the realities of working relationships. As a result, studies show that over the last two decades increasing numbers of workers do not enjoy labour protection.

Changes in the nature of enterprises have resulted in a transformation and polarisation of employment relations. At the high end of this spectrum are knowledge workers associated with the rise of the "new economy" and networked organisations (Fudge, 2005; Dickens, 2004 and Stone, 2004). These workers were employed primarily in managerial professional and technical occupations. At the other end of the spectrum are "precarious" or vulnerable workers associated with the informal economy and sub-contracted labour (Fudge, 1997). These workers are poorly paid and employed in unstable jobs which more often than not fall outside the scope of collective representation or legal regulation. According to Standing there has been an "informalisation of work". He argues that "although the dichotomy of 'formal' and 'informal' sectors have always been misleading, a growing proportion of jobs possess of may be called informal characteristics, that is, without regular benefits, employment protection and so on" (Standing, 1999: 585). In both developed and developing countries this work is performed primarily by women (Fudge, 2005).

According to the three ILO studies, the increase in the number of unprotected workers can be linked to factors such as globalisation, technological change and transformations in the organisation and functioning of enterprises, often combined with restructuring in a highly competitive environment. The impact of these factors is uneven and in some countries they have energised labour markets and contributed to growth in employment and new forms of work. Enterprises have organised their activities to utilise their workers in increasingly diverse and selective ways including use of a variety of forms of contracts and the use of sub-contractors, self-employed persons and temporary employment agencies (ILO, 2003). Klare groups the current realities of labour market transformation under three headings. Firstly, technological advances and managerial innovation have transfigured the organisation of production. In particular, more and more paid work is performed outside of the employment relationship as conventionally understood. Secondly, the cultural context and meaning of work are in flux and the world of work has been altered by the massive entry of women in to paid employment. Thirdly, processes of "globalisation" have resulted in the intensification of international economic and political integration (Klare, 2002).

In some countries, the State is withdrawing from various forms of labour protection through legislative reform or a reduction of resources allocated to labour inspection or enforcement. Disputes or uncertainty concerning the legal nature of the employment relationship are increasingly frequent. Employment relationships may be disguised or objectively ambiguous. A disguised relationship is one in which the form of the relationship differs from its underlying reality in order to avoid labour protection. This

may be done by representing the relationship as a commercial arrangement involving self-employment or by designating an intermediary as the employer (ILO, 2003).

Two prominent British labour lawyers suggest that two employment practices are relevant to understanding the current identity of workers. The first is processes of casualisation flowing from the externalisation of workers from the productive enterprise. They also suggest that a more recent phenomenon has been an increased individuation of workers within enterprises with workers within a firm being subjected to more personalised incentives and risks than previously. The study also identifies two changes in the approach to the employment relationship – an emphasis of the management of the relationship by the employing entity rather than the conventional legal notion of the relationship as a mutual interaction and a special concern with the skills and capacities of workers as a species of economic goods (Davies & Freedland, 2004).

According to the ILO, the challenge in respect of triangular (externalised) employment relations lies “in ensuring that employees in such a relationship enjoy the same level of protection traditionally provided by the law for employers that bilateral employment relationship, without impeding legitimate private and public business initiatives” (ILO, 2005).

The ILO has proposed that national governments should develop national frameworks in consultation with the social partners concerning the application of labour law to non-standard employment. A framework should provide for enhanced and appropriate data collection, clear policies on gender equality and better compliance and enforcement (ILO, 2005: 53). The text of a Recommendation on this topic will be debated at the 2006 International Labour Conference.

6. Consequences of lack of protection

The absence of labour protection may have negative consequences for workers and their families, for enterprises and for society. The lack of labour protection may impact upon employers by undermining productivity and distorting competition to the detriment of those who operate within the law. Lack of labour protection may lead to a neglect of training. This may lead to decreased productivity both within enterprises and nationally. Increased use of workers has led to decreased levels of training. Where there is inadequate training in hazardous work, it may also decrease the level of worker and public health and safety (ILO, 2005).

An Australian study has suggested that eight forms of insecurity affect the lives of workers in the new economy:

- Employment security – workers can be dismissed or put on short-time without difficulty;
- Functional insecurity – workers can be moved or the content of jobs can be changed at will;
- Work insecurity – working environment is unregulated, polluted or dangerous;
- Income insecurity – earnings are unstable, contingency-based, not guaranteed or near poverty;
- Benefit insecurity – access to standard benefits is limited or denied;
- Working-time insecurity – hours are irregular or at the discretion of the employer or insufficient to generate adequate income;
- Representation – insecurity employers can impose changes and need not negotiate with worker representatives; and
- Skills reproduction insecurity- opportunities to gain and retain skills are limited (Owens, 2002).

There is now substantial and growing body of international evidence that job insecurity and contingent work arrangements have adverse outcomes in terms of occupational health and safety.

Studies reveal a significant rise in injury rates, diseases rates, hazard exposures and work-related stress. Workers such as temporary workers, subcontractors and self-employed persons tend to have a very limited understanding of their own responsibilities and those of other persons. In sectors with long-subcontracting chains such as construction there is considerable ignorance, confusion and blame shifting among small builders and subcontractors. Other studies show that non-compliance may not only be a result of ignorance but a calculated response to economic pressures and the perceived risk of detection.

Studies show that most OHS legislative regimes were designed and enforced with permanent employees in large workplaces in mind and are not meeting the needs of informalised workers. The growth of externalised and informalised work has also weakened participatory mechanisms. Contingent work also involves considerable additional administrative work in terms of identifying the employer and classifying the status of workers. The rise of these forms of work has also resulted in a decline in the coverage of worker's compensation schemes (Nossar, Johnstone & Quinlan, 2004:



137-141). The changing nature of work has a negative effect on the employability of workers, that is, the capacity of the employee to fit available types of employment. In unregulated work outside the boundaries of traditional labour law, the burden of employment security and maintaining employability is shifted onto the employee alone.

7. Evidence from developing countries

Studies of Latin America suggest that labour regulations do contribute to shape employer practices but that they do not seem to have influenced employment generation. The evidence allows for a rejection of simplistic argument that relaxing constraints on contracts and dismissals is sufficient to improve economic performance. Labour regulation is only one of the multiple causes relevant to job creation. A study on Argentina, Brazil and Mexicoⁱⁱ suggests that irrespective of the level of labour regulation, precarious wage employment (employment forms not complying with labour and social security law) has increased in all three countries in the 1990s. This involves an advance of flexibilisation via actual employer practice adopted mainly by smaller firms trying to survive in difficult economic contexts. This has been facilitated by a lack of control and enforcement (Marshall, 2003.) The same study suggests that labour market programmes contribute more concretely to alleviating the problems of the unemployed than “indirect incentives” such as dismantling labour protection. Programmes developed from the mid-1990s onwards in these countries include cash transfers, direct state employment creation, subsidies to the private sector in exchange for hiring additional workers, assistance to sectors with potential for employment creation, public employment services and supply-side measures such as training for the unemployed.

Labour law reform in Latin America in the 1990s addressed two issues – the reduction of wage costs and the increased flexibility in modes of contract and reasons for dismissal. Job growth has been in jobs of low quality in the informal sector and in micro-enterprises where workers do not have health protection or social security – 90% of these new jobs were in the services sector. The rise of the informal sector has led to the development of policies in countries such as Peru to lower the requirements for formal employment and allow for the integration of small and micro enterprises into the formal economy. However, there is a concern that providing workers with social benefits at a lower rate than provided in the formal sector would create an incentive for employers to sub-divide businesses in order to reduce the benefits of workers in the formal sector (Aparicio-Valdez, 2003).

There has been a steady trend of increased informalisation in Latin American countries in the 1980s and 1990s. Whether higher labour standards and *de facto* labour conditions in the formal economy lead to a greater share of informal employment has been a subject of debate. It has been suggested that an examination of this issue needs to distinguish between security rights and civic rights (collective bargaining, freedom of association and civil liberties). It is argued that that the drive to informalisation in several Latin American countries was driven by the desire not to add to a regular plant of workers that once hired can seldom be let go. These studies show that it is not high wages *per se*, but high wages to an immobile workforce that constitute the main incentive for widespread informalisation (Portes). A recent study concludes that countries with higher levels of civic rights have higher levels of formal employment (Galli & Kucera, 2003).

Recent studies of labour law in East Asia conclude that most of the developed or developing East Asian countries have adopted systems of labour law that to some extent reflect the form and content of systems in Western countries (Cooney, Lindsey, Mitchell & Zhu, 2002 and Kalula & Fenwick, 2004). This has been a result of the influence of colonial powers and more recently the International Labour Organisation, through its standard-setting and technical co-operation. However, there is a significant



domestic contribution to the character of labour law in the region. In most East Asian countries, courts have played a relatively minor role in developing labour law. This is a result of the constitutional allocation of powers in some countries and the lack of independence of the courts in others. Labour law has often been subordinated to political considerations to bolster political power in authoritarian regimes and has often been subordinated to the need of industrialisation strategies. It has been argued that countries that pursue export-oriented industrialisation of simple manufactured goods will need a workforce with some flexibility, basic skills development and high productivity. This implies a low-cost and well-controlled workforce and industrial relations policies and labour laws to match (Kuruvilla, 1996). Another factor limiting the contribution of labour law is the significant gap between law and practice. This has manifested itself in a number of ways including the fact that labour movements have not been sufficiently developed to oppose the state, low levels of collective bargaining and low levels of industrial action under legal procedures.

A key finding of the study of East Asia is that labour laws have very little to do with the construction and functioning of labour markets. This is a result of varying factors in different countries which include the fact that labour law may not apply to small enterprises in which most workers are employed or that labour is considered to be largely irrelevant in the informal sector. Minimum wages may be ignored in countries if they are perceived to be threatening the profitability and viability of enterprises or if firms are in broader economic difficulty and there is high unemployment. Countries which are net importers of labour have tended to expand the scope of labour regulation.

In his discussion of labour law in SADC countries, Kalula emphasises that a fundamental feature of new labour laws in the region is their ‘transplant’ nature. They are concerned with the regulation of formal labour markets to the exclusion of ‘irregular’ workers particularly those in the informal sector. In spite of the increasing size of the informal sector and the rise of atypical workers, the focus of emerging new systems of labour market regulation remains the formal employment sector. To the extent that vulnerable workers are targeted at all, this applies to limited categories with the vast majority of workers being left out. The future of labour law in southern Africa depends upon its capacity to “embrace the realities of deprivation and social needs” (Kalula, 2003: 5-6 and 2004: 287).

The significance of the “translation: of law as an explanation for patterns of regulation was highlighted in a recent study which examined labour law in 85 countries. The conclusion of the study was that patterns of regulation across countries are shaped largely by their legal structure which arrived in most countries through the transplantation of legal systems (Botero *et al*, 2003). This study concluded that efficiency theories could not explain patterns of regulation as poor countries regulate labour markets more than rich countries, social security is not a substitute for labour law and labour law has adverse consequences for unemployment, labour force participation and economic activity staying official. The evidence was also inconsistent with a political theory in terms of which labour law is seen as being enacted by ruling parties to favour themselves and their allies.

In a broader context the absence of a generalised social security system can be seen as typical of “lean social democracies” whose distinctive feature is that they cultivate a system of rights but abrogate the responsibility of the state to provide universal system of social security support. This approach has been said to be found in India, South Africa and many countries in Latin America and Eastern Europe (Bhorat & Lundall, 2004).

8. Labour regulation and globalisation

The ILO's study of the social dimensions of globalisation recognises that globalisation is irreversible but that its adverse social impacts are not because it is the result of policy decisions made at national and international levels. A review of recent literature suggests that there is considerable empirical support for the report's appeal to make "decent work for all" a global goal (International Labour Review, 2004: 2). For instance, no evidence has been found to support the hypothesis that foreign investors favour countries with lower labour standards. Likewise, there are empirical findings that decent work can contribute to both human development and international growth.

A recent literature survey suggests that while national policy responses to globalisation vary, the following policy actions are common to all countries – (a) investment in education and training; (b) adoption of core labour standards; (c) the provision and improvement of social protection; (d) tackling rising national inequality and (e) facilities to discuss globalisation (Gunder & Van der Hoeven, 2004: 31-33).



9. Models for understanding contemporary employment

An influential approach to explaining evolving modes of employment is the 'transitional labour market' proposed by Gunter Schmid as a basis for arguing how unemployment could be combated in European economies (Schmid, 1995, 2002). This work has also been influential in Australian debates (Buchanan, 2001). This approach suggests that there are five types of major life course transitions. These are between:

- Education and employment;
- (Unpaid) caring and employment;
- Unemployment and employment;
- Retirement and employment; and
- Precarious and permanent employment.

In adapting this model for presentation to a South African audience, Clive Thompson suggests the additional of a further transitional factor: absence from the workplace to deal with health impairment (Thompson, 2004).

Transitional labour markets should provide institutional arrangements which support flexibility and security and are stepping-stones from precarious to stable jobs. The following principles would be important:

- Organisation of work that enables people to combine wages with other income sources;
- Entitlements or rights which allow choices between different employment statuses;
- Policy provisions which support multiple use of insurance funds for financing measures that enhance employability; and
- Public and private employment services which focus not only on the unemployed but also on those at risk of unemployment.

In term of this approach, social policy should move from passive social protection to the social management of risk. An example of this is a proposal to transform Unemployment Insurance to Employment Insurance which would provide income security during transitions between education, training and employment. New institutional arrangements should increasingly take account of the need for ongoing training, that the diversity of individual needs requires greater flexibility in the organisation of work and that atypical work call for reconsideration of the relationship between paid workers and other socially useful activities.

The approach suggests that intermediary institutions should be co-financed. An example of this approach is the Work Foundation in Austria which provides support to retrenched workers. It is co-financed by levy of employees in the enterprise who are not retrenched, the employer, a contribution from retrenched workers from their payouts and the government.

Another significant development has been the use of the Human Capability Framework derived from the work of Amartya Sen as a basis for understanding the complexities of the labour market. In the case of the New Zealand Government it is used to integrate policies on employment, labour markets and welfareⁱⁱⁱ.

The Supiot Report commissioned by the European Commission is an interdisciplinary assessment of the future of work and labour law. Its starting point is that the classic socio-economic model that underpinned labour law during the 20th century is in crisis. Labour law brought a range of democratic demands - equality (including gender equality), freedom, individual security and collective rights- into the socio-economic sphere. The Commission makes recommendations to maintain these in the light of the changing circumstances in the world of work.

The Commission proposes a number of reforms to labour law to deal with the growth of atypical, disguised and triangular employment. Labour law should be expanded to apply to all forms of work performed for others, and not merely to subordinate work.^{iv} In particular, the Report stresses the need for the status of temporary employment businesses to be clarified and certain aspects of labour law to be extended to workers who are neither employers nor employees.

In the light of the inevitable flexibilisation of the labour market, the Commission suggested a “redesigned notion of security” to prevent the working world being split in two. The elements of this notion are:

- Employment status should be redefined to guarantee the continuity of employment status in order to protect workers during transitions between jobs;
- New legal instruments should be designed to ensure continuity of employment above and beyond cycles of employment and non-employment; and
- Labour force membership should be determined on the basis of the broader notion of work.

The rights that would apply to the broadened labour force are rights inherent in employment, common rights connected with occupational activity (for example, health and safety protection) and rights ensuing from unwaged work. The Commission uses the concept of ‘social drawing rights’ to describe emerging rights not connected with employment in the narrow sense which may be exercised on a discretionary basis. These optional rights allow workers to deal with flexibility on an individual basis.

It has been suggested that these approaches (while developed to explain transitions in the European labour market) may offer a useful framework for understanding work within the informal sector in developing countries (Servais, 2004).



10. Protected flexibility/flexicurity

Increasingly, labour market policies are being devised that seek to achieve labour market security through labour market policies that promote what has been described as “protected mobility” associated with successful small European economies such as Ireland, Netherlands and Denmark. These policies of “protected flexibility” offer adaptability for firms and security for workers. Proponents of this approach argue that institutions and policies for protected mobility are necessary for efficiency and equity in labour markets in open economies as globalisation increases the need for insurance against labour market risks and transitions. Flexibility, stability and security are required for a productive economy and a well-functioning labour market for decent work (Auer, 2005).^v However, the use of social protection to promote employment creation is not confined to the most developed countries. The ILO suggests exceptionally good social security is one of the explanations for successful job growth in Central Europe, the Republic of Korea and Malaysia. An often-cited example of the use of social protection to boost employment is the Korean system of social security which combines unemployment insurance with an employment stabilisation programme and a skills development programme to prevent unemployment and stimulate re-employment (Harasty, 2004).

The Korean system, as well as Australia’s job network, are cited as examples of a successful linking of active labour market policies to unemployment assistance and unemployment benefits. In a country such as Denmark individual action plans are used to activate the training of unemployed persons.

The model of protected flexibility emphasises that social protection can be used both to stabilise employment and for employment promotion. A significant feature of policies in these countries is social Pacts developed in representative institutions. These seek to provide guarantees that enable people to accept change, particularly where this may involve determination.

The ILO notes that the lack of labour protection raises questions of equity on the one hand and flexibility or adaptability on the other. While new forms of contracting may be adopted to enhance competitiveness these may also lead to declining productivity. The study records the fact that a number of European countries have moved away from a situation in which flexibility creates insecurity to one in which security promotes flexibility.

According to Jacobs, (2003: 195-200), the Dutch form of flexicurity is an “explicit and well-considered trade off between forms of flexibility and forms of security’ which is a reflection of the high level of social partnership in the Netherlands.^{vi}

The law only slightly relaxed the laws on termination of employment. It significantly enlarged the scope to conclude flexible contracts of employment by relaxing limitations on the repetition of fixed term contracts and by abolishing existing restriction on hiring of employees from temporary work agencies. At the same time, new rights were created for employees on flexible employment contracts by limiting probation clauses in contracts of employment, introducing legal presumptions of employment and significantly improving the status of workers of temporary work agencies.^{vii}

The ILO (1995) in an international survey on working time describes the relationship between new forms of flexible working time and labour protection in the following terms:

“Flexibility in working time should not be equated with the dismantling of social protection as regulation is still necessary to protect safety, health and the well-being of workers and certain forms of flexibility will require the adaptation of existing regulations. The cost of measures to ensure social protection will not diminish the benefits of flexibility, but rather serve to reinforce.”



11. Labour market regulation and human rights

Hepple suggests a synthesis of traditional labour law theories with modern approaches of rights-based regulation and human rights theory. This approach would involve a dialogue between the various legal orders that shape power relations. Secondly, it would require a new conception of work that is not restricted to dependent or subordinated labour and embraces both employed and self-employed paid labour. Thirdly, he argues that the privileging of paid work above “family work” is incompatible with gender equality and that labour law will have to engage with the redistributive functions of welfare law. The fourth pillar is a notion of “social rights” which ends the traditional dichotomy between labour rights and human rights (Hepple, 2003: 188-190).

12. Exploring flexibility

A central concern of contemporary LMR is viewed as the reconciling of the competing demands for equality and efficiency. This is often portrayed as the debate between the requirements of labour standards (or security) on the one hand and the need for flexibility or adaptability on the other. The term ‘flexibility’ is often used loosely in these debates. As Sandra Fredman has commented:

“Flexibility is a flexible term and its advocates are often adept at shifting from one meaning to another” (Fredman, 2004).

Accordingly, any attempt to understand the significance of flexibility in contemporary labour debates must proceed from an understanding of the different forms of flexibility.

Standing suggests that the most common interpretation of flexibility is about extent and speed of adaptation to market shocks.^{viii} He argues that ultimately labour flexibility is about control – the capacity to make others make concessions. (Standing 2000.) Factors such as high unemployment or the absence of trade unions therefore tend to increase the employer’s capacity for flexibility and reduce the worker’s level of security.

For workers flexibility has implications of insecurity. Therefore one function of regulation is to provide workers with a range of security. There is a close linkage between flexibility and unemployment – thus in the South African context, unemployment has been described as the handmaiden of flexibility. Standing suggests that the introduction of new forms of flexibility gives rise to new forms of protective regulation to overcome new or more virulent forms of insecurity that may flow from flexibility (Standing, 2000).

Generally, it is accepted that there are three forms of flexibility – employment flexibility, wage flexibility, and work process flexibility. Forms of wage flexibility include individualisation of wages, various forms of performance-linked wages and productivity agreements.

An OECD study carried out in 1988 proposed the following categorisation of employment flexibility:

- External quantitative flexibility. This includes temporary work, short-term contracts, part-time work, call contracts, zero hours contracts, long probation periods, job-sharing, massive use of government sponsored schemes for the integration of youth in the labour force, etc.
- Externalisation. This includes subcontracting, putting out work, use of self-employed, buying instead of making components, on-site use of independent contractors or of employees “on loan” from other firms.
- Internal numerical flexibility. This includes the introduction of variable and flexible hours, new shift work patterns, including the increased use of night-work and overtime, week-end shifts, modulation, annualised duration of work to better adapt to the business cycle and modulate the volume of manpower used according to demand while keeping constant labour costs.

- Functional flexibility. This includes multi-skilling, pay for knowledge, abolition of craft barriers, on-the-job and formal training, manpower forecasting and provisional human resources management, improvement of the adaptability of employees to change and the performance of multiple tasks (Rojot, 2004: 380).

An analysis of patterns of flexibility in industrialised countries identifies three patterns for the introduction of flexibility:

- “Legislated flexibility”, where Government and/or Parliament decide that providing additional flexibility in the working of the labour market is sound public policy. Examples of this approach are Greece, Luxembourg and Portugal;
- “Negotiated and controlled flexibility”, where the emphasis is on collective bargaining rather than on statutory law. Examples of this approach include Belgium, Denmark, Italy and Spain; and
- “Individualised flexibility”, which may take place together with collective bargaining (as in Germany), or in the absence of much significant bargaining (as in France where it sometimes reaches the level of “informal” patterns of flexibility) (Rojot, 2004: 380).

The term flexibility is used in a different sense, that is, to convey the right of a worker to demand flexible working arrangements in order to achieve a better work/life balance. It has been suggested that a right to flexibility is gradually emerging in European Community Law (Collins, 2004).^{ix} But there are a number of unresolved problems. For instance, should all workers have this right or should it be limited to defined groups such as the parents of young children.

12.1. Flexibility and gender

Sandra Fredman (2004) seeks to examine the underlying reality of precarious work in UK. Despite the rhetoric of ‘flexicurity’ in European labour law, she concludes that ‘flexibility proceeds apace but security remains a rhetorical gesture’. The majority of the precarious workforce are women and their employment in the precarious workforce is characterised by low pay, low status and little job security, training or promotion prospects. She argues that the tenacity of the dissonance between ideal and reality can be attributed to two fundamental assumptions. The first is that ‘work’ is confined to paid work. The second is that the employer’s social responsibility only arises as a quid pro quo for the worker’s full commitment to the employment relationship. She therefore argues that employment rights should be divorced from the employment relationship and that rights should be afforded to all who participate in the paid workforce, however marginally. Women combine the dual obligations of paid and unpaid work by take on flexible employment. Yet the British courts continue to classify this ability to move in and out of employment as an autonomy or independence which deprives them of the protections of the employment relationship. In the UK a wider definition of worker has been used to determine the scope of minimum wage and working time legislation as well as new provisions implementing the European Part-time Work Directive. Likewise, employment equity policies are designed on the assumption of long-term jobs specialised descriptions and not fluid and contingent jobs or work in small businesses or self-employment. Accordingly, these developments threaten the benefits that are possible in terms of employment equity policies and likely to have particularly negative impacts upon women (Agocs, 2002: 24).

13. The internationalisation of labour law

Labour law theory is grappling with the growth of supra-national legal systems and institutions. Three international and transnational modes of labour regulation are forming beyond the state. These are the ILO's promotion of a set of core rights, which all states ought to comply with as a matter of international law. Numerous institutions are linking international labour rights with trade liberalisation initiatives and corporations are increasingly relying on codes of conduct to govern their employment relationships (Macklem, 2002). Klare suggests two features – that the boundaries between different sovereignties (for example, between the European community and a Member State) are indistinct and shifting and that the order of the hierarchies is often indeterminate (Klare, 2002: 27).

The European social charter enshrines a wide range of labour standards that all member countries must comply with and the European commission has the power to issue directives on labour standards applicable to all members' countries. In contrast, the North American Free Trade Agreement (NAFTA) does not call for regional harmonisation of labour standards but has a side agreement on labour calling for parties to enforce existing domestic labour laws and contains a dispute resolution mechanism for persistent patterns of abuse on issues of occupational health and safety, child labour and minimum wages.

In Southern Africa, the SADC Charter of Fundamental Rights adopted in August 2003 requires SADC members to ratify and implement the core ILO Conventions contemplated in the 1998 Declaration of Fundamental Principles and Rights at Work.^x The African Growth and Opportunities Act passed by the US Congress in 2000 provides duty-free access for certain products from African countries that meet qualification criteria that include “making continual progress towards establishing ... protection of internationally recognized worker rights” (Kalula, 2004: 281-4).

The ILO Declaration on Fundamental Principles and Rights of Work and its follow-up Declaration creates the obligation for its member states to adhere to core labour standards by adopting the ILO Declaration. The Declaration recognises the relationship between trade and labour standards and provides that labour standards should not be used for protectionist purposes. This reflects a concern that industrialised countries may exclude imports from developing countries by maintaining that these countries do not adhere to international labour standards. These protectionist arguments have been used by certain non-aligned states to argue that industrialised states try to raise labour costs, by insisting that developing countries adhere to core ILS, in order to reduce their international competitiveness that is largely based on lower wage costs.

Hepple argues that trade and investment sanctions against ‘social dumping’ in order to deter a race to the bottom is inadequate on its own to form the basis for a new approach to international labour regulation. First, the approach over-emphasises the role in labour costs about decisions of relocation. MNCs are not likely to relocate to another country with lower production costs if those costs simply reflect lower productivity of the workers in that country as this would not result in any net difference in unit labour costs. Secondly, there is no reason to believe that “comparative advantage does in fact flow from social dumping, whether this is through the violation of core labour standards or simply because of the comparative advantage of cheap labour” (Hepple, 2000).

Part two: South African perspectives

“South Africa has made great strides in introducing and amending labour laws that give employers and employees certainty and security in their employment relationship. The huge fall in person-strike-days bears testimony to the success of the policy. The balance between the degree of job security and the kind of labour market flexibility that encourages employers to take on new employees is still being negotiated amongst the economic role-players” (*Towards a Ten-Year Review*: 39).

The purpose of this section is to examine post-apartheid debates in South Africa concerning labour market regulation with a view to identifying areas requiring ongoing work and research.

The first term of the democratic Parliament reform saw the enactment of the 1996 Constitution and the establishment of the new labour legislation framework consisting of the Labour Relations Act, the Basic Conditions of Employment Act, the Employment Equity Act and the Skills Development Act. In broad terms, these laws sought to establish core worker rights, facilitate South Africa’s reintegration into the world economy and overcome the apartheid inheritance of a labour market marked by high levels of inequality and unemployment and low levels of skill and productivity. The development of these laws was marked by a process of social dialogue that has been described as “intense, constructive and effective”.

The second five-year Parliamentary term can be seen as a period of review and adjustment. The tone was set by President Mbeki’s opening address to Parliament in 1999, in which he announced a review of labour legislation to identify rigidities introduced by the new laws and any intended consequences for job creation and business.^{xii} The following year, the Government published proposals to amend the BCEA, the LRA and the labour provisions in the Insolvency Act. After extensive negotiations, these Acts were amended in 2002.^{xiii} In 2001, a modernised Unemployment Insurance Act was passed and in 2003 the Skills Development Act was amended.

The Department of Labour’s Programme of Action and Strategic Plan for 2004-9 emphasises the continuity of labour market policies as well the need for monitoring and evaluating the impact of legislation. The Programme emphasises the need for labour market policy to be harmonised with broader government policies on job creation.^{xiii} It also stresses the need to address institutional and capacity issues to ensure the effective implementation of the present framework. This period has also seen the distribution in the second half of 2004 of a highly significant report on the extensive process of informalisation within the labour market, which has triggered an important debate on developing an appropriate response.

The first section of this paper examines the regulatory approaches and debates concerning certain key aspects of the LRA and BCEA. Thereafter the issue of the informalisation of the labour market is examined. The paper then examines the other major areas of labour market regulation (equality, skills development, health and safety and social security) as well as certain other areas of regulation which are likely to impact on the labour market.

14. Key aspects of the LRA

14.1. Workplace forums

The Policy Paper that accompanied the initial draft LRA highlighted the role of legislation in seeking to balance the demands of international competitiveness and the protection of the fundamental rights of workers. The initial model of workplace forums as being a second channel for communication to promote joint problem solving which would allow work process flexibility to be developed could be developed without endangering employment security. Few workplace forums have been established largely because of trade union suspicion (Steadman, 2004). Proposals in the 2000 LRA to modify the system, including allowing the majority of employees to trigger workplace forums in non-unionised workplaces, were rejected by labour and not enacted. The theme of competitiveness retains its prominence in the Programme of Action and Strategic Plan for 2004-9 with the Department envisaging its role as being to facilitate a deepening of relationships between labour and capital to promote competitiveness.

14.2. Collective bargaining

The drafters of the LRA elected not to rely on a legally enforceable “duty to bargain” to promote collective bargaining. Instead, it seeks to achieve this purpose through an entrenching organisational rights and a protected right to strike. While this approach has justifiably been compared to the Italian worker’s statute (Hepple, 1999), the decision to opt for this approach lay not in a conscious comparativism but in an assessment of the trade union strategy and labour law in the preceding two decades (Benjamin, 2000).

The debate concerning flexibility also resonates through the Act’s regulation of collective bargaining. Bezuidenhout & Kenny (1999) suggest that the rejection of compulsory centralised bargaining shows a concern for flexibility. Baskin in an optimistic early assessment of the Act see its structures as tilting towards centralised bargaining while retaining voluntarism (Baskin, 1996). Likewise, Clive Thompson has commented that “the South African system flies in the face of global market forces. Collective bargaining is on the rise, strongly encouraged and supported by a bargaining friendly statute” (Thompson, 2004). As Baskin suggests the establishment of new bargaining councils has been a slow process with the establishment of the Chemical Industries Council and the consolidation of the various clothing councils into a national council being the major achievement (Anstey, 2004). More recently, press reports have indicated an advanced state of discussion on the establishment of a bargaining council in the mining industry.

14.3. Extension of bargaining council agreements

The extension of bargaining council agreements has been a major topic of debate throughout the post-apartheid period. The Presidential Labour Market Commission expressed its concern about the ‘automatic’ extension provisions in the new LRA and proposed that the Act be amended to grant the Minister a greater discretion. No such amendment has been introduced. A more modest proposal in the 2000 LRA

Amendment Bill to allow non-parties an opportunity to make representations before the Minister considered an extension was strongly opposed by labour and hastily withdrawn. However, the extension provisions continue to be raised as a constraint on the growth of SMMEs and the DOL in its 2004-9 programme committed itself to undertaking an empirical study. The issue has been placed centrally on the agenda by the President's announcement in his State of the Nation address on 11 February 2005 that:

“Based on the review of the regulatory framework as it applies to small, medium and micro-enterprises, before the end of the year, government will complete the system of exemptions for these businesses with regard to taxes, levies, as well as central bargaining and other labour arrangements, enabling these to be factored into the medium-term expenditure cycle.”

Available figures indicate that a substantial majority of applications for exemptions are granted. In addition, non-parties who are refused an exemption have the right to appeal to an independent appeal board.

It has been suggested that bargaining council extension may exacerbate the employment problems by encouraging more capital intensive forms of production (Poswell, 2002). While the issue of bargaining council extensions is frequently raised in debates, it is important to bear in mind the limited coverage of bargaining councils within the private sector.^{xiv}

14.4. Security of employment

The new Labour Relations Act codified the protection against unfair dismissal developed prior to 1995^{xv} by the old Industrial Court while at the same time seeking to remove aspects of the industrial court's jurisprudence that were considered to be over-formalised. The Act sought to create effective industrial justice by providing for the expeditious resolution of disputes, particularly through the establishment of the CCMA. The Act's combination of core statutory provisions with a “soft law” Code of Good Practice sought to promote certainty while allowing for a flexible application of the law by permitting small businesses to comply with less formalised procedures.

However, the Code indicates that the strict requirements of procedural fairness developed by the industrial court prior to 1995 did not necessarily continue to apply. A survey of reported arbitration decisions indicates that many employers have not adjusted their disciplinary procedures and still apply the more formal old approach. Significantly arbitrators tend to apply a stricter standard than that required by the Code (Le Roux, 2004: 874).

This conclusion is confirmed by a 2003 study prepared for the IMF. The study suggests that many employers adopt an “ultra formalism” beyond the law's requirements. The study contains a “guesstimate” that dismissal procedures occupy 3.02-million man-days per year costing the country R14.71-billion.^{xvi} The study stresses the role of labour consultants who run hearings for employers and points out that more expeditious options are available such as the use of private arbitration and pre-dismissal hearings by the CCMA. It also suggests that guidance and training for arbitrators and judges would be of value (Levy, 2003). An ILO paper has suggested that the “hassle” factor associated with hiring employees has contributed to a perception of a rigid labour market among both local and international firms (Bhorat, Lundall & Rospabe, 2002: 55).

The Explanatory Memorandum to the 2000 LRA Amendment Bill argued that arbitrators and judges give insufficient recognition to the provisions for a probationary period in the Act and Code. The proposed changes to the Act are to set a six-month probationary period and clarify the applicable rules.^{xvii} The position in the LRA is often contrasted with the situation in countries such as the UK where there is a qualifying period of one year to receive unfair dismissal protection. Ultimately, the proposed amendment was not made and the issue was dealt with by rewording the Dismissal Code to emphasise that a termination during probation could be justified on “less compelling grounds” than would otherwise apply.

The 2000 LRA Amendment Bill contained a range of other provisions designed to expedite dismissal procedures and facilitate the operation of the CCMA. Among those that were enacted was the introduction of pre-dismissal arbitration to eliminate the necessity of holding both an internal hearing and an arbitration. However, proposals in the Bill to regulate the activities of labour advisers and to create disincentives for the inappropriate referral of cases to the CCMA through awards of costs were not included in the amending Act.

Approximately 100 000 dismissal cases are referred to the CCMA annually. These are not global figures and exclude cases referred to private arbitration or to bargaining councils. There has not been any analysis of the significance of the level of dismissals and disputes concerning dismissal.^{xviii}

14.5. The Basic Conditions of Employment Act

In the foreword that accompanied the Green Paper containing policy proposals for a new Employment Standards Act Minister Mboweni stated that the “first prize” was to be able to enact legislation that could set fair employment standards and promote the creation of new jobs. The Green Paper sought to articulate this vision through the notion of regulated flexibility, which would set and enforce a revised body of minimum standards while at the same time establishing rules and procedures for their variation. The Act would allow for greater labour market flexibility by removing inappropriate restrictions from the law, enabling arrangements to allow for the more productive use of working time and allow for variation through collective bargaining.

14.6. Hours of work

The proposals in the Green Paper concentrated on standardising limits on hours of work across the economy. However, the influence of international approaches to flexible work hours appears from the proposal that averaging of working hours (calculation over a longer period than one week) could be used to reduce working hours. The Green Paper notes that South Africans work high levels of overtime and proposes an increase in the overtime premium as a disincentive for employers to utilise overtime and also mooted the idea of annual limits of overtime to prevent the excessive regular use of overtime as a possible stimulus to job creation.

Despite the centrality of demands for the 40-hour week, the BCEA only introduced a modest standardisation of the working week to 45 hours. The Act contains a schedule setting out the procedures to be adopted to reduce working hours to 40 and creating a duty to negotiate on a reduction of working hours where this is introduced into collective bargaining. The schedule obliges the Department of Labour to monitor the implementation of the schedule and report on it to NEDLAC and Parliament.

The first report submitted by the Department of Labour was too early to note significant trends in hours of work.^{xix} However, it did record that in sectors with long hours such as mining, security and health care, the BCEA had been a factor in leading to a reduction of hours of work. In general, where hours had been reduced this had been achieved through collective bargaining. There was evidence to indicate that the reduction of hours of work had led to job creation, but where this had occurred additional casual workers had been taken on. In certain sectors, sub-contracting was associated with longer hours of work. A further report concerning the period up to 2002 will be tabled in the course of 2005 and this may serve to refocus the debate on this issue.

The Act introduced two forms for flexibility: averaging of hours of work of a period of up to four months and compressed work weeks. In addition, the overtime rate was increased from time and a third to time and a half. However, the formula for averaging working hours differed from that proposed in the Green Paper in that there was no reduction of ordinary hours of work. Adler characterises working time in South Africa as amounting to a vicious circle consisting of a smaller core workforce, increased overtime, increased intensification of work; increases in atypical employment and limited or no increases in permanent employment. The BCEA is criticised for missing the opportunity to establish a framework that would allow the reduction of hours of work to lead to the creation of more and better jobs and increase productivity through reduced hours of work (Adler, 2001).

14.7. BCEA and small business

An impact assessment of the BCEA carried out by Ntsika concluded that the overall impact on the greater South African economy would be marginal. However, the study did conclude that employers with less than 10 employees and, to a greater degree, employers with less than five workers would have difficulties complying with some provisions of the BCEA. Particular difficulties would occur for general dealers, catering and accommodation, service stations, transport and security services. The conditions of work that were identified as causing particular problems were working hours, overtime payments, Sunday pay and night work.^{xx}

The report cites the limited capacity of the small business to comply with the new requirements and said that the climate around the new Act should be one of awareness building rather than rigid enforcement. In November 1999, a year after the Act came into effect, the Minister issued a determination varying the application of the Act to businesses employing less than 10 employees. This allowed employees to work up to fifteen hours overtime per week; reducing overtime pay for the first ten hours to time and a third, permitting averaging of working hours by individual agreement and allowing family responsibility leave to be dispensed with by agreement. COSATU opposed the exemption suggesting that it could constitute unfair discrimination against employees of small businesses (COSATU, 1999).

14.8. Employment Conditions Commission (ECC), bargaining councils and minimum wages

South African labour law provides two mechanisms for the setting of minimum wages and other conditions of employment. These are the extension of collective agreements negotiated in bargaining councils by the Minister of Labour and the establishment of

minima in sectoral determinations. In making, sectoral determinations the Minister acts on the advice of the ECC. Both mechanisms provide for the setting of minimum wages and other conditions of employment. While, these two forms of wage setting existed in earlier legislation, the new Acts introduced significant changes to the process of wage setting.

The ECC was established by the 1997 BCEA to advise the Minister of Labour on making sectoral determinations establishing minimum wages and conditions of employment for sectors of the economy without organised collective bargaining. The ECC replaced the Wage Board although existing wage determinations remained in effect in terms of transitional provisions. The ECC also performs a general advisory function in respect of applications to the Minister to vary the Act. The criteria that the ECC must take into account when advising the Minister include the ability of employers to conduct their businesses successfully, the position of SMMEs and new businesses, the alleviation of poverty and wage differentials and inequality.

In keeping with the recommendations of the Presidential Labour Market Commission, the BCEA provides for the setting of sectoral minimum wages in unorganised sectors and there is no power to recommend a national minimum wage. Sectoral determination may set minimum conditions of employment for sector. This allows statutory minimum conditions to be adapted to the specific circumstances of a particular sector. Examples of this include the detailed regulation of housing conditions in the Agricultural determination. The capacity to vary statutory conditions of employment is constrained by the concept of core rights in respect of which variation is prohibited or limited. This applies to hours of work as well as protections such as maternity leave and annual leave.

A sectoral determination may provide for the establishment of retirement, health insurance or similar funds. The ECC has used this power to recommend the establishment of provident funds. Funds have been established in the security and contract cleaning sectors and the ECC has recommended that similar funds be established for agriculture, domestic workers and the taxi sector.

The operation of ECC has considerably increased the reach of minimum wage regulation. Minimum wages have been established for the first time for domestic workers and farm workers and will be adopted for the taxi sector and forestry during the course of 2005. In addition, minimum wages continue to be set for contract cleaning, wholesale and retail, private security and clothing and knitting in respect of which wage determinations were previously in force. The sectoral determinations provide for regional variations in minimum wages. The sectoral determination for agriculture has given rise to the highest level of controversy and a high level of requests for variations from the minimum wages has been received.

The Act empowers the Minister to extend sectoral determinations to person other than employees. However, limited use has been made of this power and in general the determinations retain the definition of an employee contained in the Act. While the domestic workers determination does apply to domestic workers who are independent contractors, this is unlikely to have much practical impact in that sector. The Retail Determination deals with the issue of part-time workers by allowing them an option to receive the same benefits as full-time employees or instead to be paid a premium.

There has been no substantial study of the employment consequences of minimum wages in agriculture. However, the Department of Labour is of the view that claims for unemployment insurance indicate that dismissals have not been a response to the

introduction of minimum wages in agriculture or domestic worker. Blitz inspections in domestic employment reveal high levels of compliance with wages provisions but significant non-compliance with administrative requirements, in agriculture, and significant non-compliance with health and safety requirements and unemployment contributions (A Van Zyl & M Bergman, Department of Labour).

14.9. The impact of minimum wages

The presidential LMC investigated the potentially negative impact of wage levels and wage growth on job creation. It concluded that there was a long-run elasticity of approximately -0.7, meaning that a 10% increase in wages would be associated with a 7% decline in wage levels. This conclusion was based on a study by the World Bank as well as a study undertaken on behalf of the Commission. It also noted that these studies were subject to some controversy and had been criticised by the ILO Country Review.^{xxi}

A 2000 paper concludes that whether wage increases lead to a reduction in employment depends crucially on the policy reaction to inflation. The authors suggest that wage-led redistribution is feasible and wage increases need not have a significant impact on employment (Gibson & Van Seventer, 2000). The limitations of elasticity to explain job losses have also been pointed out. Other significant factors are technological factors within sectors, tariff liberalisation and globalisation. It has been suggested that there is a need for further research on the total wage bill to link wage hikes and employment consequences according to skills levels (Bhorat, Lundall & Rospabe, 2002: 25).

The most significant expansion of a floor of minimum wages has occurred among domestic workers and farm workers, the most vulnerable employees within the SA labour market. Bhorat predicted that a modest minimum wage aimed at reducing the incidence of poverty would have minimal poverty reduction consequences and minimal disemployment effects (Bhorat, 2000). A 2004 paper concludes that the minimum wages for domestic workers are making a difference despite substantial non-compliance. Figures show that hours of work have decreased and earnings have increased without a negative employment response (Hertz, 2004).

Another set of studies examine the impact of union membership (and therefore collective bargaining) on wage levels. Among African workers the trade union wage premium is set at 20% and among White workers at 10%. African non-union workers who are covered by bargaining council agreements receive a premium of 6% to 10% (Butcher & Rouse, 2001). The authors of this study suggest that to increase employment, policies in SA should focus on increasing competition among employers within sectors rather than increasing competition among workers by trying to reduce union power.

14.10. The flexibility debates

Bezuidenhout & Kenny suggest that the debate about flexibility in LMR is “more about positioning interests than empirical realities”. In a study of labour market policy debates between 1986 and 2000, they also argue that the language of flexibility used in labour law debates served to define the parameters of possible policy outcomes. They suggest that flexibility was introduced into labour market debates in the post-Fordist language of work process flexibility but by 1996 comes to mean numerical, wage and

work-time flexibility. However, they suggest that the term is used generally and uncritically to undermine worker interests. The 1999 ILO country study concludes that the South African labour regulatory environment is not particularly onerous when compared to other middle-income countries but accept that perceptions that it is more onerous to employ are influencing labour market behaviour (Hayter, Reinecke & Torres, 2001: 82). In contrast the most recent World Bank study refers without substantiation to the limited labour market flexibility as a factor increasing the cost of doing business in South Africa (IMF, 2004).

14.11. Understanding informalisation in South Africa

As the survey of international debates indicates, the question of who should receive the protection of labour law has become a central question as to the future direction of labour market regulation.

This issue was not raised during the negotiation of the LRA. The key definition of an employee, which determines the ambit of the labour legislation, was imported virtually unchanged from its apartheid-era predecessor.^{xxii} The consideration of the Act's application focussed on establishing a single legal framework applicable to all employees, including previously excluded groups such as domestic workers, and covering both the public and private sector.^{xxiii}

The Department of Labour's Green Paper that initiated the development of the new 1997 BCEA dealt explicitly with the rise of non-standard employment and its consequence for labour protection:

“The current labour market has many forms of employment relationships that differ from full-time employment. These include part-time employees, temporary employees, employees supplied by employment agencies, casual employees, home workers and workers engaged under a range of contracting relationships. They are usually described as non-standard or atypical. Most of these employees are particularly vulnerable to exploitation because they are unskilled or work in sectors with little or no trade union organisation or little or no coverage by collective bargaining. A high proportion are women. Frequently, they have less favourable terms of employment than other employees performing the same work and have less security of employment. Often they do not receive “social wage” benefits such as medical aid or pension or provident funds. These employees therefore depend upon statutory employment standards for basic working conditions. Most have, in theory, the protection of current legislation, but in practice the circumstances of their employment make the enforcement of rights extremely difficult.”

The Green Paper's proposal that part-time employees should be entitled to all protections in the Act, where appropriate on a proportionate basis, was included in the Act. A further proposal that part time employees employed for longer than two years should acquire preferential rights to fill vacancies was not included. The Green Paper also identified “permanent temporaries” (employees who work for long periods as “temporaries” and receive inferior benefits to permanent employees performing the same work) but did not propose specific amendments suggesting that these employees are adequately protected by the unfair dismissal and unfair labour practice provisions in the LRA.

The 1997 BCEA extends some protection to seasonal or intermittent workers allowing them to accrue benefits under the Act over several periods of employment.^{xxiv} An administrative capacity to regulate unprotected casualised work

was established by giving the Minister the power to apply provisions in the Act or sectoral determination to persons other than employees but the issue of substantive regulation of atypical work was not addressed.

The 2000 draft amendments to the LRA and the BCEA introduced a series of rebuttable presumptions of employment into both Acts. While these amendments did not change the definition of employee, they were justified on the basis that they would assist vulnerable workers assert their rights as employees. At the Millennium Labour Council negotiations, parties accepted the proposal, subject to certain riders. At Business's initiative, it only applies to employees earning less than a specified amount; at Labour's request, the CCMA can make advisory awards on the status of workers and NEDLAC must prepare a code of practice offering guidance on how to determine employment status.^{xxv}

The presumption can be seen as direct response to the practice of "converting" employees into independent contractors to avoid labour legislation promoted, in particular, by the Confederation of South African Employers (COFESA) (Mills, 2004). By the time, the Amendments Acts became law in 2002, the Courts had seen through this form of contracting describing it as a 'bizarre subterfuge' and a 'cruel hoax and sham' to deprive employees of the protection of labour law (Cheadle *et al*, 2002). The Explanatory Memorandum noted that the issue had constitutional dimensions as the Constitution gives all persons the right to fair labour practices and guarantees other labour rights to all workers. In addition, the Minister's administrative capacity to extend labour protection to non-employees was extended to all labour legislation.

Academic commentators welcomed the amendments while at the same time expressing the view that they do not go far enough to protect workers in non-standard employment. Godfrey and Clarke criticise the amendments for retaining the standard employment relationship as the normative model for employment. They also point out that much of the "flexibility" enjoyed by employers flows from the lack of enforcement of labour legislation (Godfrey & Clarke, 2002: 23-24). Theron, while expressing similar reservations, welcomes the new presumption as an opportunity to initiate a process of challenging the assumptions that underlie the traditional distinction the law draws between employees and independent contractors (Theron, 2002: 56). Mills criticises the 2002 Amendments for failing to make a holistic response to the scale of unregulated atypical work (Mills, 2004: 1232).

The Growth and Development Summit in June 2003 noted the need for "measures to be taken to promote decent work and to address the problem of casualisation". The findings of a research project by Department of Labour on the changing nature of work and atypical forms of employment were tabled in NEDLAC in October 2004. The study concludes that the growth of non-standard employment has eroded the quality of labour protection and that there is a need for a reappraisal of policies and legislative provisions.

The project's findings are likely to have a very significant impact on the future direction of labour law debate and reform and it is therefore worth dwelling on its conclusions in some detail. The report conceptualises the changes in work in South Africa in terms of two inter-related processes - casualisation and externalisation. Both represent shifts from the norm of the standard employment relationship which is understood as being indefinite (permanent) and full-time employment, usually at a workplace controlled by the employer. Casualisation refers to displacement of standard employment by temporary or part-time employment (or both). Externalisation is used to refer to a process of economic restructuring in terms of

which employment is regulated by a commercial contract rather than by a contract of employment. Informalisation refers to the process by which employment is increasingly unregulated and workers are not protected by labour law. “Informalisation” covers both employees who are nominally covered by labour law but are not able to enforce their rights as well as those who are not employees because they have the legal status of independent contractors. In the case of externalised work, this includes situations where the nominal employer does not in fact control the employment relationship.

The research attempts to quantify the extent of casualisation and externalisation and how this has eroded labour protection in South Africa. The report notes that these questions cannot be answered by reference to official sources of statistics because of the absence of relevant data for the period prior to 1999 and concerns about the reliability of subsequent data. This concern is most severe in respect of externalised work; only one question in the Labour Force Surveys conducted between 2000 and 2002 provides data on externalisation. The report contains recommendations to address the inadequacy of data collection.

The reports conclusions include:

- There has been a rise in self-employment in both the formal and the informal sector;
- Changes in the labour market have taken the form of externalisation rather than casualisation;
- The motor for the development of externalisation has been an exponential increase in the incidence of labour broking (temporary employment services). The study suggests that legislation may have provided an impetus for this development in that the avoidance of legislation has provided the motive to externalise and the legislative provisions have provided the opportunity. Nothing in labour legislation has impeded the growth of TESS;
- In all four sectors^{xxvi} studied firms have restructured to reduce standard employment to a minimum;
- The wages of workers in externalised employment are significantly lower than those employed in the firms whom they supply with goods or services;
- The primary benefit for employers has been to reduce labour costs and minimise risks associated with employment;
- Two forms of labour market segmentation have been produced – between those employed in an enterprise in full-time employment and those who have been casualised (part-time or temporary workers) and between those employed by an enterprise and those employed by labour brokers or contractors; and
- The provisions regulating labour broking are identified as a particular priority for policy and legislative reform. ^{xxvii}

The synthesis paper proposes an extensive package of possible legislative and institutional responses and acknowledges that any changes must take count of relevant costs and benefits to employers, workers and society. A NEDLAC process produced a consensus that atypical forms of employment were increasing and that some abuses in atypical forms of employment did exist and needed to be dealt with in appropriate ways, particularly by means of improved enforcement of existing measures. The parties also agreed that it would be beneficial to obtain more information on atypical

employment, particularly on successful responses, to identify the exact nature of the problems needing remedial action (NEDLAC, 2004.)

14.12. Equality and empowerment

The Employment Equity Act was designed to achieve equity in the workplace by prohibiting unfair discrimination and by requiring the implementation of affirmative action measures to ensure the equitable representation of designated groups (blacks, women and disabled persons) in all occupational categories and levels in the workforce. The Act gives effect to the constitutional imperative for substantive equality in respect of the workplace.

An employer may justify otherwise discriminatory conduct on the basis that it was required to comply with its affirmative act obligations or because it was an inherent requirement of the job. Discrimination includes harassment. The prohibition of discrimination is enforced by civil litigation instituted by an aggrieved party in the Labour Court. The Act does not criminalise unfair discrimination.

The scope of the Act is confined to employees. Independent contractors and other persons not covered by labour law are protected against discrimination by Promotion of Equality and Prohibition of Unfair Discrimination Act (PEPUDA). The obligation to implement affirmative action measures is restricted to employers employing more than 50 employees and certain other categories of designated employers. Most employers with less than 50 employees are not obliged to implement affirmative action although they may register to do so voluntarily. The obligation to implement affirmative action applies in respect of employees. However, employees supplied to a client by a temporary employment services for an indefinite period or a period in excess of three months must be treated as employees of the client for the purpose of affirmative action measures.

The Act requires employers to analyse employment policies, practices and procedures consult with trade unions and employees to prepare and implement an employment equity plan. The affirmative action measures that an employer is required to take “include preferential treatment and numerical goals but exclude quotas”.^{xxviii} The Act’s approach is to establish a basis for consultation between employers, employees and trade unions so that these parties will set numerical goals and put in place measures to achieve equality which are appropriate to their own workplaces and experiences, without undermining the goal of a more representative and diverse workforce.^{xxix} Compliance with the Employment Equity Act is a requirement for employers to contract with the State to furnish or supply services.^{xxx} However, an employer complies with this requirement by compliance with formal requirements such as reporting.

As the preceding discussion indicates, the legislative schemes promoting affirmative action are highly self-regulatory. Legislation does not set targets in respect of employing or training members of designated groups. The speed of implementation has been criticised on many occasions, for instance at the GDS. In addition, recent court case has led to uncertainty as to the nature of an employer’s obligation to apply affirmative action when filling vacant posts.

Inordinately high levels of income inequality remain a key feature of the post-apartheid landscape (Bhorat, 2004). The capacity of anti-discrimination litigation, and in particular the EEA, to achieve greater levels of equality is a matter of concern.

Legal strategies have a limited capacity to effect transformation and are at best an adjunct to other redistributive strategies (Dupper & Garbers, 2002: 101). As the Green Paper indicates, it was envisaged that the anti-discrimination provisions should serve as the basis for claims concerning the payment of unequal wages and benefits to workers such as atypical and temporary workers. In addition, there are considerable difficulties in obtaining the evidence required to establish patterns of discrimination and considerable costs in bringing these cases (Horwitz & Jain, 2000: 240). Unlike many other countries, South Africa does not have a separate pay equity and the jurisprudence developed in the few pay equity cases that have been brought is inconsistent and unhelpful. At the same time, inconsistencies between the EEA's approach and that of PEPPUDA have been noted, for instance, the fact that PEPPUDA expressly permits class action suits while this not clear under the EEA (Mbabane, 2004).

14.13. The Broad-Based Black Economic Empowerment Act

The Broad-Based Black Economic Empowerment Act (BBBEE Act) is the centrepiece of the Government's economic strategy for transforming the economic inequality that is a hallmark of the South African economy. The inclusion of the term "broad-based" indicates the intention that empowerment should benefit all black people, not only a wealthy elite. The Act emphasises the need to facilitate ownership and management of enterprises by black women, rural communities and co-operatives. This has resuscitated debates concerning employee ownership as a vehicle for transformation.

The BBBEE Act creates an enabling framework for promoting and measuring empowerment. The Act seeks to leverage the State's economic power to promote and encourage empowerment and transformation within the private sector. As such it can be seen as a form of "contract compliance" in terms of which the incentive of doing business with the State is used to encourage transformation. The Act promotes the development of sectoral charters to promote and measure empowerment within particular sectors of the economy. While the charters are voluntary documents developed by the stakeholders in a sector, the Broad-Based Black Economic Empowerment Act enables the state to issue codes of practice make compliance with charter targets binding criteria for the evaluation of tendering and all other forms of competitive contracting in all spheres of government. The charters have adopted the balanced scorecard as a basis for measuring the following core elements of empowerment:

- Direct empowerment through ownership and control of enterprises and assets;
- Human resources development and employment equity; and
- Indirect empowerment through preferential procurement and enterprise development;

The inclusion of targets concerning the employment of black employees and learners dramatically enhances the incentives for employers to meet targets for employing and training black personnel. It has been suggested that the adoption of sector scorecards offers a "lifeline" for employment equity and argues for an alignment of the employment equity process with the empowerment framework to ensure an integrated and comprehensive approach (Mbabane, 2004).

14.14. Skills development

The Skills Development Act (SDA) and the Skills Development Levies Act (SDLA) create an enabling framework for developing the skills of the South African workforce. The Act's institutional infrastructure consists of the National Skills Authority, Sectoral Education and Training Authorities (SETAs), the National Skills Fund and the Skills Development Planning Unit and labour centres within the Department of Labour. Kraak has suggested that the new framework has replaced the previous "narrow, short-termist and voluntarist" model of enterprise training with a framework based on greater co-ordination and planning, greater stakeholder consensus and improved financial arrangements which improve the leverage of state and the SETAs over the direction of training initiatives (Kraak, 2004a: 116).

The Act also regulates the operation of private employment services and requires them to register. The term 'employment services' is sufficiently wide to include temporary employment services as contemplated in the LRA and BCEA.

The 2003 Amendments to the SDA have significantly increased the state's leverage over SETAs. These amendments are a response to the perception of mismanagement of certain SETAs and reflect a tension between the decentralised structure and governmental accountability. These amendments also introduced the concept of the lead employer as a basis for facilitating the involvement of small businesses in learnerships.

The objectives of the National Skills Development Strategy include fostering skills development in the formal sector, small businesses and promoting skills development for employability and sustained livelihoods through social development initiatives. A second five-year strategy aimed at addressing existing weaknesses and bottlenecks was published in March 2005. Kraak characterises the NSDS as a differentiated and hybrid training model that contains complementary strategies for upskilling of the low, intermediate and high skill sectors within the economy (Kraak, 2004b: 213). He further identifies there are inherent weaknesses in the new institutional regime. These include the strong emphasis on state planning in a context characterised by weak national information systems; a proliferation and bureaucratisation of new institutions with insufficient regard to capacity and a continuation of voluntarist and short-term mindsets among employers towards enterprise training (Kraak, 2004b: 232).

Learnerships provide a flexible framework for skills development by employees and by new entrants into the workforce. Learnerships are established by SETAs and consist of a structured learning component and a practical work experience. They must lead to an occupationally related qualification recognised by the SA Qualifications Authority. A number of incentives exist for employers to engage persons who are in work as learners. The Sectoral Determination for Learners published in June 2001 provides a simplified framework for employing unemployed persons as learners and prescribes minimum allowances. Learners engaged in these circumstances do not acquire a right to employment beyond the period of the learnership. Employers may apply to their SETA for subsidies to cover both the costs of a learnership and the learner's allowance. In addition, there are significant tax incentives for employers who engage learners^{xxxi}. Learnerships and internships for unemployed persons have been identified as a key aspect of growth and development strategies of the second economy. Kraak suggests that the reliance on learnerships, rather than ongoing short-course semi-skill training programmes, may be one of biggest limitations of the training system (2004a: 123).

Employers are required to pay a skills levy equivalent to 1% of their wage bill. 80% of levy funds are distributed to SETAs and 20% to the National Skills Fund. Employers who develop skills development plans may apply to their SETA for a mandatory grant equivalent to 50% of their levy. The balance of SETA funding is used for administration and to provide discretionary grants for training-related activities. Revised regulations identifying the permitted categories of discretionary grants were published in May 2005. The criticism has been made that some employers do not develop plans and regard the levy as a form of taxation. The criticism that the SDA focuses on the needs of employers rather than the consequences of apartheid for employees and that it is driven by the approach of individual companies echoes the comments by Kraak referred to above (Naledi, 2003: 5 and Maserumule & Madikane, 2004: 30). The GDS commitments set a target of 80 000 learnerships. The employment of black learners is a factor in the transformation scorecards and, as with employment equity, this is likely to increase the focus on skills development.

The scope of the Act is limited to employees and employers accordingly do not pay a levy in respect of non-employees. Likewise, learnerships are posited on the existence or establishment of an employment relationship. Other workers and unemployed persons may take part in skills programmes. However, it has been noted that there are severe difficulties in providing skills development programs within the informal sector (NALEDI, 2004).

The simultaneous existence of a skilled labour shortage and unskilled labour surplus, points to the importance of adhering to a policy framework that emphasises both the need to enhance economic growth and ensure that the characteristics of the suppliers of labour match those in demand by growing sectors (Bhorat, 2004).^{xxxii}

14.15. Occupational Health and Safety (including workers' compensation)

The principal responsibility for administering occupational health and safety legislation lies with the Department of Labour which administers the country's primary preventive statute, the Occupational Health and Safety Act and the Compensation for Occupational Injuries and Diseases Act. The Department of Minerals and Energy Act administers the Mine Health and Safety Act, 1996 (MHSA) which seeks to prevent occupational accidents and diseases in the mining industry. A number of specialist regulators have responsibility for safety regulation in specific sectors of the economy (railways, aviation) or in respect of specific hazards such as the nuclear hazard.

The Leon Commission whose recommendations led to the MHSA found that the level of occupational injury and disease in the mining industry was unacceptable and made extent recommendations for reform in 1995. The commission rejected arguments for a self-regulatory approach to health and safety advocated by the Chamber of Mines. The Commission found that the historical failure by mines to tackle the causes of occupational accidents and diseases could be attributed to past policies of self-regulation.^{xxxiii}

The absence of a consistent national institutional structure and policy in respect of OHS has been a concern of government policy documents since the start of the democratic era. The DOL's 1994 Five-Year Programme of Action set the goal of developing an overall national health and safety policy and strategy and the establishment of a National OHS Council. The White Paper on the Transformation of

the Health Services (1997) recommended the introduction of new legislative framework establishing a co-ordinating OHS agency with national and provincial components to provide a forum for policy-making and standard-setting. In 1999 the Cabinet gave its imprimatur to this approach by deciding that OHS legislation and competencies in respect of both prevention and compensation should be integrated and consolidated.

In 2002 the Department of Labour tabled a Green Paper setting out a framework to implement the Cabinet decision. The Green Paper estimated the direct and indirect costs of occupational accidents and diseases to be equivalent to at least 3.5% of the GDP.^{xxxiv} The costs of occupational disease and injury are not reflected in the costs of production and are borne disproportionately by workers and their families (Hermanus (2001) at 51). Compensation for disabled workers is often inadequate an access to rehabilitation is extremely limited. The severity of the impact of occupational accidents and disease will be exacerbated by HIV-Aids. The Green Paper also argues that labour market trends such as the growth of SMMEs and the informal sector and the widespread use of non-standard employment and sub-contracting are associated with increased OHS problems.

OHSA regulates the health and safety at work of all employees, except those covered by specialist or sectoral legislation. It applies to both the formal and in the informal sector and regulates the responsibilities of self-employed persons. The definition of an employee in the OHS Act is wider than that contained in other labour legislation. The MHSA makes the mine-owner responsible for the health and safety at work of all persons who work on a mine, including contractors.

The Committee of Inquiry into a Comprehensive System of Social Security identified the major problems in the provision of compensation for occupational injuries and diseases as:

- The exclusion of large number of persons such a domestic workers, independent contractors, person in the informal sector and self-employed persons from the application of COIDA;
- The absence of any prioritisation of labour market integration or reintegration as manifested by the absence of any compulsory rehabilitation or vocational training programmes;
- The failure by the compensation system to promote prevention; and
- The lack of linkage with other social insurance and social assistance schemes. This results in the duplication of payments (double-dipping) which seriously undermines the financial soundness of the respective funds and serves as a disincentive to access or return to the labour market (Olivier, Smit & Kalula, 2003: 495.)

14.16. Social security

South Africa's workplace-based social safety net consists of a mixed economy of statutory funds and contractual schemes. The principle statutory institutions are the Unemployment Insurance Fund and the Worker's Compensation Fund, discussed above. In the formal sector, there is very substantial coverage of contractual retirement and health insurance funds.

14.16.1. Social insurance

The most significant post-apartheid social insurance enactment was the passage of Unemployment Insurance Act 2001. The Act modernised the existing system of benefits of unemployment, maternity and illness benefits but remains a scheme providing temporary relief to the unemployed. The Act's scope was extended to high wage earners as well to include domestic workers, which has resulted in some 600 000 private employers registering with the Fund. The Act's extension to public service employees is still under discussion. The Act introduced a new system for collection of contributions which has contributed to the improved solvency of the Fund.

Despite its updating, the Act still reflects its origins as an Act designed to deal with cyclical unemployment in the 1940s (Cooper, 2000). According to the Taylor Report, it retains the form of a Fund designed to cater for the limited requirements of a historically privileged workforce not seriously threatened by unemployment (Chapter 5). The leading legal text on social security has criticised the Act for its failure to provide benefits for partially employed, the failure to provide measures to integrate and reintegrate the partially employed and failure to provide measures to promote employment (Olivier, Smit & Kalula, 2003: 458). Employees who resign may not claim benefits under the Act. While this was introduced to stop abuse, a consequence is that employees who leave employment to undergo further education or training cannot claim benefits. The Fund has moved in a comparatively short period from being in deficit to having a significant surplus and this raises issues of whether additional benefits could be provided.

The Taylor Committee argues that the notion of social protection has to be more comprehensive to minimise the negative effects of unemployment on social cohesion. Its recommendations include the extension of social insurance where administratively feasible, social grants and indirect social protection through the facilitation of favourable labour market transitions. The Commission concludes that there are close linkages between direct (conventional social security measures) and indirect (active labour market-type policies) protection and institutions to co-ordinate these policies in the long-term should be constructed (Chapter 5).

14.16.2. Pension and provident funds

Contributory Pension and provident funds constitute a significant aspect of workplace-based social safety net. The coverage of these funds within the formal sector is extremely widespread. Contributions are regulated by collective agreement or contract. These funds (with the exception of certain bargaining council funds) are regulated by the Pensions Act and fall under the jurisdiction of the Pensions Adjudicator.^{xxxv} A significant development has been the establishment of provident funds in the security industry and in contract cleaning through sectoral determinations. The ECC has further recommended that further funds be established in agriculture, domestic service and the taxi sector.

The National Treasury has issued a Discussion Paper on Retirement Fund Reform as a basis for initiating a discussion process before the enactment of new legislation. The Report notes that international experience has shown that the cost of participation in contributory retirement funds can be a disincentive for employers in the informal sector to enter the formal sector. It proposes a new regulatory framework for retirement funds. A range of its proposals, for instance those concerning the preservation of funds, are likely to impact on the operation of funds established by collective bargaining. At the same time, the proposed framework may offer the

potential for achieving greater social protection outside of the formal sector. The paper proposes establishing a contributory National Savings Fund which would be accessible to persons outside of formal employment (Treasury, 2004).

14.16.3. Social safety policy

The GDS agreement commitments records the Government's commitment to publish a comprehensive social safety policy, including social wage and social grant issues.

14.17. Corporate law and insolvency

The protection of workers in the event of employer's insolvency illustrates the complex interaction between corporate law and labour market regulation. Two amendments to the Insolvency Act have been developed through the NEDLAC consultative process. The first sought to improve the protected status of employee claims for amounts owing on insolvency. Claims by other workers are less. The second attempted a more extensive integration of labour law and insolvency law. The need for this latter amendment was necessitated in part by inconsistencies between insolvency legislation and the provisions in the LRA regulating transfers between businesses. Two academic labour law commentators suggested that while the amendments serve to highlight the significance of labour law and job security with in the insolvency framework, South Africa requires the development of a proper business rescue regime (Boraine & Van Eck, 2003: 1868). A draft Insolvency and Business Recovery Bill was approved by Cabinet in 2003 as the basis for future legislation and in May 2004 policy paper on the future reform of corporate law was published by **the dti**.

14.18. Regulatory review

The review estimates that the compliance costs of complying with bureaucratic requirements in legislation to be R79-million. Labour law is seen as being a time-consuming regulation but less so than VAT and tax administration. It also suggests that both efficiency and compliance costs are a reason for businesses being reluctant to hire more staff. The Review does not attempt to measure the benefits of regulation and contains no empirical material that would allow for a review of labour law, except in respect of purely red-tape requirements such as registration. It proposes the establishment of a Regulatory Impact analysis capacity in government and a systematic review of the costs and benefits of the existing regulatory environment (SBP, 2004).

15. Conclusions

The first 10 years of democracy has seen the development and refinement of a very significant program of labour market regulation. In only one core area – Occupational Health and Safety – does regulation depend upon pre-1994 legislation. The new regime extended a considerable range of rights to virtually all employees and established structures to overcome the apartheid deficits.

It has been suggested that the social democracy within the South Africa labour market has tended to encompass the constitutional and legal rights of employees at the expense of direct transfers of income and security benefits (Bhorat, Lundall & Rospabe, 2002: 40.) As has been noted above, South Africa has been described as “lean” social democracy, the distinctive feature of which is that they cultivate a system of rights but abrogate the responsibility of the state to provide universal system of social security support. This approach has also characterises labour market regulation in India and many countries in Latin America and Eastern Europe (Bhorat & Lundall, 2004).^{xxxvi}

However, the new Acts were constructed primarily on a foundation of the conventional employment relationship. Trends towards informalisation which were already present by 1994 have accelerated and a very significant proportion of the workforce earn their livelihood through insecure and unprotected work in which employer power is unrestrained. This is an international trend that is now well documented and it poses a range of challenge for the provision of labour and social protection. Effective regulation will have to be built of an informed understanding of the new forms of segmentation among the workforce. The new models of the employment relationship developed in the context of the developed world do contain significant insights into the possibilities of enhancing security and assisting workers to enhance their employability.

The enactment and revision of the new legislation has not brought closure to a range of issues on which the social partners’ positions remain significantly different. The recent and anticipated publication of a range of reports and policy positions are likely to produce a fresh round of social dialogue that may give rise to further regulation. Likewise, the public emergence of a debate over labour market regulation within the ANC is an indication that the debates that dominated the second Parliament are likely to be revisited in the near future.

In many ways, the reform of labour regulation preceded the reconstruction of other aspects of the regulatory environment. The next few years will see a range of policy initiatives in adjacent areas such as corporate law, social protection and insolvency which have the potential to enhance or undermine the level of security in both the formal and informal sectors of the labour market.

There is no doubt that labour market regulation under went massive and innovation reform, particularly in the first five years of democracy. At the same time, it is worth reflecting on the extent to which the weight of the past continues to be reflected in law and policy. Two areas in which this tendency is identified in this paper is the application of labour legislation (the definition of an employee) and the category of social insurance benefits provided through the Unemployment Insurance Act.

The legislative framework contains a variety of regulatory strategies. Again the great pace of reform has meant that these were developed in isolation from each other. Levels of enforcement and compliance with labour standards remain too low and that implementation is now a major stated priority of the State. This raises questions as to the efficacy of the regulatory regimes and strategies.

16. Gaps and future research

16.1. Information

As the synthesis report indicates, official statistics contain minimal information on the patterns of informalisation in the SA labour market. This is exacerbated by the fact that patterns of informalisation that have been identified are sector specific. The state's capacity to respond to patterns of informalisation has been constrained by a lack of information. This creates the need for research to establish patterns of informalisation and to update that information on a consistent basis.^{xxxvii}

16.2. Minimum wages

The publication of sectoral determinations has led to a significant increase in the coverage of minimum wages, particularly in respect of farm and domestic workers. The extension to farm workers has been the most contentious and its job implications have not yet been studied.

16.3. Monitoring

The monitoring of the impact of labour legislation is one of the strategic objectives of the DOL's current policies. To date, impact assessment, has been confined to the "red-tape" consequences of labour regulation and to its impact on SMMEs.

16.4. Informalisation

The extensive process of informalisation within the labour market has led to a significant (and growing) portion of the workforce being unprotected or inadequately protected. There is a need to identify the specific forms of insecurity experienced by these contingent workers as a basis for identifying possible regulatory responses.

16.5. Job creation and hours of work

The initial policy documents that led to the BCEA raised the possibility of the reduction of hours of work serving as a basis for job-creation and enhanced productivity. The publication of the DOL's 40-hour report in the course of 2005 may provide an opportunity for a re-examination of this issue.

16.6. Social protection

Workplace-based social insurance provision is confined to the benefits provided by the Unemployment Insurance Act. International experience reveals the possibility of a wider range of benefits being provided to cater for the range of transitions that many workers will undergo during their lifetime as well as a closer linkage of these funds with skills development programmes. The current surplus in the UI Fund raises the issue of whether benefits of this type are feasible. An additional question is whether

the provision of additional social protection would contribute to a situation in which a relaxation in particular aspects of labour law might become more palatable to organised labour.

The interaction of labour market regulation with broader government policies dealing with the social safety net raises the prospect of enhancing stability and security for workers in formal and informal sectors. At the same time, these proposals are likely to have an impact on the largely contractual regulation of the 'social wage' within the formal sector and there is likely to be extensive engagement by the NEDLAC parties with this process. An issue raised by international debates is the extent to which these funds can support an active labour market policy aimed at improving employability and productivity.

16.7. Dismissal and security of employment

The high level of dismissal as evidenced by the high levels of referrals to the CCMA is inadequately understood. There is a need for an investigation to ascertain the causes of this. For example, is it symptomatic of an inappropriate regulatory regime, in adequate implementation of laws or of more fundamental problems within the economy? Likewise, there is a need to understand what the consequences of a relaxation of the regime would be on other aspects of labour market behaviour.

The rise of externalised (triangular) employment relationships has had the result of depriving many employees of effective security of employment and there is a need to develop an appropriate regulatory response.

16.8. Incentives

Post-apartheid labour legislation adopts a range of regulatory strategies to achieve compliance. The high profile accorded to the Broad-based Black Economic Empowerment Act raises the issues of whether incentive-driven "contract-compliance" schemes could be utilised to drive a wider range of outcomes. Likewise, there is a significant international debate concerning the use of incentives to produce better occupational health and safety compliance and thereby reduce the social costs of accidents and disease at work.

These issues raise the broader issue of the appropriateness of the regulatory strategies adopted to achieve compliance with labour market regulation.

16.9. Social plans

The Presidential Labour Market Commission made various proposals in respect of the introduction of social plans which have not been implemented. The significance and feasibility of social plans particularly in respect of the mining industry, is a topic that merits revisiting.

16.10. Equality

The promotion of equity in the workplace remains a major priority with levels of inequality remaining inordinately high. In addition, informalisation has produced new forms of inequality between different categories of workers. The capacity of the affirmative action system to achieve workplace change as well as its integration with the broader economic empowerment framework will require significant attention. Secondly, the adequacy of the current litigation driven model to deal with wage inequality as well as other forms of workplace discrimination is likely to be an issue of concern. Likewise, a failure to regulate may give rise to claims that the legislative framework does not meet the Constitutional imperative of substantive equality or fails to give effect to the right to the constitutional labour rights. In the light of these factors, it is appropriate to re-examine the assumptions underlying legislation promoting equality.

16.11. Social pacts

The topic of a broad social pact has been raised in respect of labour market debates, particularly by the President. The successful implementation of policies of “protected flexibility” is associated with social pacts that address the overall level of flexibility and protection present in society. There is a need for detailed analytical work identifying the range of issues that could be dealt with in this type of pact.

16.12. Active labour market policies

International experience suggests that the impact of globalisation on national economies necessitates the adoption of active labour market policies to influence the impact of globalisation on particular economies. The efficacy of such policies in other developing countries and the feasibility of their application to South Africa merits investigation.

A key aspect of contemporary labour market policies is the coordination between different forms of labour market regulation as well as the coordination of policies across government as a whole (“joined up government”). With regard to the former, there is no doubt that the different areas of labour market policy have been developed in relative isolation from each other and that a closer linkage might allow for the development of effective policies in the contemporary context.

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Endnotes

- i It is worth noting that of these three themes, only competitiveness has been explicitly articulated in South African Labour Law debates.
- ii The choice of these three countries is significant in that Argentina and Brazil undertook extensive labour law reform while Mexico did not.
- iii Available at <http://www.dol.govt.nz>.
- iv At least three European countries (France, Portugal and Italy) apply portions of their Labour Code to economically dependant workers, regardless of the existence of an employment contract (ILO 2005). For a discussion of UK law, see Davidov (2005).
- v See, for instance, P Auer “Protected Employment for employment and decent work: Labour market security in a globalised world” (ILO Employment Strategy Paper 2005/1).
- vi These are found in the Flexibility and Security Act of 1998.
- vii The protection of agency workers was achieved primarily by a collective agreement these workers phased access to labour and social protection dependant upon their length of service.
- viii Bezuidenhout & Kenny in their study of the language of flexibility in South Africa use the approach that labour market flexibility concerns the ability of companies to adapt the use of labour to changes in other markets.
- ix In Germany, for instance, there is a limited right for employees to request to become part-time workers (see Fuchs (2001) at 2163).
- x This requires the ratification of 8 Conventions dealing with the Abolition of Forced Labour: Freedom of Association and Collective Bargaining: the Elimination of Discrimination and Child Labour.
- xi The speech specified probation, remedies for unfair dismissal, dismissals for operational requirements, the extension of the bargaining council agreements and certain unspecified provisions in the BCEA.
- xii For a discussion of the amendment Acts see Bosch (2003), Le Roux & Van Niekerk and Boraine & Van Eck.
- xiii The connection between labour market regulation and other aspects of government policy has been emphasised on several occasions by representatives of government. According to Mr Trevor Manuel, Minister of Finance, “it is not sufficient for us as government to only consider the importance of labour rights. For one thing because labour rights themselves do not translate into any particular level of income or productivity, but rather enable a framework of regulation and negotiation that can over time achieve better distribution and stability of income. From that perspective labour rights and labour regulation are two different but interdependent things. They both, however, need to reflect the broader system of education, skills development, and employment creation – and how these fit into the investment climate. If they do not do so, then they run the risk of being inconsistent with other elements of the endeavour to reduce poverty and achieve the MDGs” (Manuel, 2005).
- xiv There are 51 bargaining councils covering some 2.3-million workers. Over 60 % of these workers fall within the five public service bargaining councils (1 075 969), local government bargaining council (196 000) and a council covering a single parastatal Transnet (184 788) in which the issue of extension does not arise. It is estimated that there are approximately 300 000 employees employed by non-party employers to whom council agreement could be extended. The largest council is the Metal & Engineering (272 796

- covering a total registered employees of whom 121 672 are employed by non-party employers). The equivalent figures for the other large council are Motor (154 655; 68 339); Clothing (116 949; 53 789) Chemical (64 242; 0) and Road Freight (53 019; 22 702). (The figures are sourced from Godfrey, Theron and Maree (2005).)
- xv For an account of the development of the Industrial Court's unfair dismissal jurisprudence see Van Niekerk (2004).
- xvi An issue which has not been explored is the extent to which employer's financial costs in respect of termination are borne by the fiscus because expenditure on lawyers and consultants is a tax-deductible expense.
- xvii For an academic commentary see Cohen (2003).
- xviii An indication of the extent of the problem can be gauged from the fact that in a mature labour market such as Australia of roughly 7 million workers, there are approximately 7 000 dismissal cases annually. (Personal communication: Breen Creighton)
- xix Department of Labour, *Towards a 40 hour week* (undated).
- xx For a fuller discussion see Godfrey and Clarke (2003).
- xxi At paras 153 and 154.
- xxii According to the initial Explanatory Memorandum, the draft Bill defines employee "to include the various forms of atypical employment but to exclude independent contractors".
- xxiii Pre-1994 policy debates had started to grapple with the issue. For instance, three reports commissioned by the Department of Transport between 1986 and 1992 recommended that the Department take steps to regulate maximum driving hours. The Department rejected this proposal on the basis that hours of driving were a matter for labour legislation and collective bargaining. (See Henwood, 1998: 33-4.)
- xxiv One explanation offered for this shift is the publication of the macro-economic strategy document "Growth, Employment and Redistribution" on 14 June 1996. Although this has been intensely criticised by the trade union movement for promoting labour flexibility, the policy does support a labour market policy that extends "the protection and stability afforded by (the) regulatory framework to an increasing number of workers" (at page 6).
- xxv The Code is currently being negotiated at NEDLAC.
- xxvi Retail, mining, household appliances and construction.
- xxvii For a summary of the research see Theron & Godfrey (2005).
- xxviii Section 15(3) of the EEA. A quota is a requirement to hire a fixed number of persons within a specified period or the reservation of a specified number or percentage of positions for designated groups.
- xxix Explanatory Memorandum, Employment Equity Bill.
- xxx Section 53.
- xxxi These are a tax rebate of R25 000 on concluding a learnership agreement and a further rebate of R25 000 on completion of the learnership.
- xxxii The Immigration Act 2004 seeks facilitate the entry of persons with skills not available in the country.
- xxxiii Commission of Inquiry into Safety and Health in the Mining Industry at p. 84.
- xxxiv In 1996 terms, this amounted to approximately R17-billion.
- xxxv A proposal to require all bargaining council funds to comply with the Pensions Act was included in the 2000 LRA Amendment Bill but withdrawn.

^{xxxvi} See H Borat and P Lundall “Employment and labour market effects of Globalisation: Selected issues for Policy Management” (ILO Employment Strategy Papers 2004/3).

^{xxxvii} In 2003, the International Labour conference adopted a resolution recommending that countries should collect statistical data and undertake research a periodic reviews in the structure and patterns of work at national and sectoral level as part of a national policy framework.