

Article

Beyond 'lean' social democracy: labour law and the challenge of social protection

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Introduction

Background

Establishing a new framework for labour market regulation has been one of the most significant achievements of South Africa's democratic government. The process of social dialogue over labour legislation that emerged in apartheid's latter years was institutionalised and broadened by the establishment of National Economic Development and Labour Council (NEDLAC) in 2004. NEDLAC became the forum for negotiations on a quartet of labour laws: the Labour Relations Act (LRA) of 1995; the Basic Conditions of Employment Act (BCEA) of 1997; the Employment Equity Act of 1998; and the Skills Development Act of 1999. In broad terms, these laws sought to establish core worker rights, facilitate South Africa's reintegration into the world economy and overcome apartheid's inheritance of a labour market marked by high levels of inequality and unemployment, and low levels of skill and productivity. The International Labour Organisation (ILO) has described the process of social dialogue development over these laws 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 unintended consequences for job creation and business.¹ 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 with organised labour blocking many of the reforms Government has set out to achieve. 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 2004-2009 emphasises the continuity of labour market policies. It stresses the need for the impact of legislation to be monitored and evaluated, for increased capacity to be devoted to implementing and enforcing existing laws, and for labour market policy to be harmonised with broader government policies on job creation.

However, the theme of review and adjustment was returned to in President Mbeki's February 11, 2005 *State of the Nation* address. He announced that as a result of a review of the regulatory framework applicable to small, medium and micro-enterprises, the government would implement during 2005 'a system of exemptions for these businesses with regard to taxes, levies, as well as central bargaining and other labour arrangements'.

This theme of exemption and de-regulation was continued with the circulation of an ANC policy paper, arguing for the introduction of a two-tier labour market in which businesses with fewer than 200 employees would be exempted from much (exactly how much is not specified) of the labour laws (ANC 2005). Following a high profile debate which began within the press and ANC policy-making circles, both these initiatives have been temporarily shelved pending further investigation and research. During this debate, it emerged that the regulatory review referred to by the President only dealt with the red-tape requirements of labour law such as registration and did not attempt to measure the benefits of labour regulation.

Themes

This article seeks to examine three inter-related issues that are central to policy-making on the future direction of labour market regulation in South Africa. The first of these is an examination of the impact of changes in the nature of work and the labour market on the efficacy of labour law. In particular, it will examine the implications of a 2004 report published by the Department of Labour, which shows that increased levels of informalisation in the labour market have eroded labour protection for South Africa's workers. This discussion is preceded by an examination of international debates on the impact of changes in the nature of work on labour market regulation for policy-making in South Africa.

A second concern is to examine the potential intersections between labour legislation and those laws that create the broader social security net.

This analysis draws on the characterisation of South Africa as a ‘lean’ social democracy in which labour market regulation has tended to encompass the constitutional and legal rights of employees at the expense of direct transfers of income and security benefits. (Bhorat, Lundall and Rospabe 2002) It will be suggested that effective labour market policy requires policies that span the divides between labour law and areas such as social security, as well as the traditional institutional divides within labour law, most significantly that between social insurance and skills development.

A third purpose of this article is to examine the effectiveness of the different regulatory strategies adopted in South African labour statutes to achieve their goals. Post-apartheid labour laws adopt a range of regulatory strategies to translate policy goals into change within the workplace and the labour market. It is now possible to examine the extent to which those strategies have succeeded in achieving goals such as combating inequality in the workplace or overcoming the skills deficit. In this regard, the paper draws on the study of how regulation is concerned with the use of law (and other mechanisms of regulation available to the State) to achieve the goals of social policy. This approach proceeds from the premise that states are able to make choices about the regulatory strategies that they adopt to influence industrial, economic or social activity. These strategies may include, for example, criminal prohibitions, economic incentives, rights to litigate, or polices of self-regulation (Baldwin and Cave 1999). This article seeks to highlight the significance of appropriate choice of legal strategies for labour law or any other form of social regulation to achieve its transformative goals.

Labour law and the changing nature of work

International developments

According to the International Labour Organisation (ILO 2000, 2003 and 2005), 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, over the last two decades increasing numbers of workers do not enjoy labour protection. The increase in the number of unprotected workers is linked to a range of 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. As a result, disputes or uncertainties concerning the legal nature of the employment relationship take place increasingly frequently. Increasingly, employment relationships may be objectively ambiguous, or employers adopt strategies to disguise them (ILO 2003).

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, Stone 2004). These workers are 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. This has led to an 'informalisation of work' with a growing proportion of jobs possessing informal characteristics, ie without regular benefits, employment protection etc (Standing 1999). In both developed and developing countries this work is performed primarily by women (Fudge 2005).

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 result in a neglect of training, leading to decreased productivity both within enterprises and nationally. In unregulated work outside the boundaries of traditional labour law, the burden of employment security and maintaining employability is shifted onto the employee alone. There is also now a 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, disease rates, hazard exposures and work-related stress among workers such as temporary workers, subcontractors and self-employed persons (Nossar, Johnstone and Quinlan 2004).

The ILO has proposed that governments should develop national frameworks in consultation with their social partners dealing with 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). The text of a Recommendation on this topic will be debated at the 2006 International Labour Conference.

Patterns of informalisation in South Africa

While increased informalisation within the labour market is an international phenomenon, the form that it takes varies between countries. While initial policy documents such as Department of Labour's Green Paper on Employment Standards noted the rise of non-standard employment relationship, South Africa's post-apartheid labour law framework retained the standard employment relationship as the normative model for employment (Godfrey and Clarke 2002). The key definition of an employee, which determines the ambit of the labour legislation, was imported virtually unchanged from its apartheid-era predecessor.

In June 2003, the Growth and Development Summit noted the need for 'measures to be taken to promote decent work and to address the problem of casualisation'. A research project by Department of Labour on the changing nature of work and atypical forms of employment tabled in NEDLAC in October 2004 showed that the growth of non-standard employment has eroded the quality of labour protection and that there is a need for a reappraisal of polices and legislative provisions (Department of Labour 2004 and 2005).

This 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 refers 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, as indicated above, 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 and contains recommendations to address the inadequacy of data collection.

There has been a rise in self-employment in both the formal and the informal sector in the last ten years. 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 (TESs). The wages of workers in externalised employment are significantly lower than those employed in the firms whom they supply with goods or services. Legislation may have provided an impetus for this development in two ways. First, the avoidance of legislation has provided the motive to externalise and the legislative provisions concerning TESs, which are discussed below, have provided the opportunity. Certainly, nothing in labour legislation has impeded the growth of labour broking.

Firms have restructured to reduce standard employment to a minimum. 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 who have been casualised (part-time or temporary workers), and between those employed by an enterprise and those employed by labour brokers or contractors. The provisions regulating labour broking are identified as a particular priority for policy and legislative reform.²

The report proposes an extensive package of possible legislative and institutional responses and acknowledges that any changes must take account 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).

Response to changes in the nature of work

Internationally, there has been a range of intellectual and policy responses to the impact of changes in the nature of work, on the efficacy of labour law and labour market policy. The starting point of the European Commission's Supiot Report (an interdisciplinary assessment of the future of work and labour law) is that the classic socio-economic model that underpinned labour law during the 20th century is in crisis (Supiot 2001). To prevent the working world being split in two, the report suggests a 'redesigned notion of security'. 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;
- labour force membership should be determined on the basis of a broader notion of work.

The Supiot Report proposes that labour law should be expanded to apply to all forms of work performed for others, and not merely to subordinate work. Certain aspects of labour law should be extended to workers who are neither employers nor employees. A more specific proposal is that the status of temporary employment businesses should be clarified.

Another influential approach to explaining evolving modes of employment is the 'transitional labour market' proposed by Schmid as a basis for combating unemployment in European economies (Schmid 1995). This work has also been influential in Australian debates (Watson et al 2003). 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
- precarious and permanent employment.

In adapting this model for presentation to a South African audience, Clive Thompson, mindful of the HIV/AIDS epidemic, suggests the addition of a further transitional factor: absence from the workplace to deal with health impairment (Thompson 2003).

Transitional labour markets should be developed to provide institutional arrangements supporting flexibility and security and to serve as stepping-stones from precarious to stable jobs. 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 calls for reconsideration of the relationship between paid work and other socially useful activities. In terms of this approach, social policy should move from passive social protection to the social management of risk. Social policy should promote social inclusion through jobs based on proper social standards, rather than merely alleviating poverty. For example, it has been suggested that unemployment insurance should be transformed to an employment insurance to provide income security during transitions between education, training and employment.

It has been suggested that these approaches (while developed to explain transitions in the European labour market) offer a useful framework for understanding work within the informal sector in developing countries (Servais 2004). The emphasis on the need to identify the specific forms of insecurity encountered by workers engaged in marginal work or at points of transition in their working lives represents an important starting-point for assessing what protections are appropriate in a particular society. Where traditional labour law protects employees against these risks, a case can be made for extending protection to additional workers at risk. Where labour law does not protect employees against a particular risk, consideration will have to be given to developing new forms of protection. This may require new forms of protection to provide appropriate protection for previously unprotected workers.

Protected flexibility

The model of labour law adopted in South Africa is one in which employment security is primarily created through the establishment of enforceable rights for employees in employment. This security is often much diminished by the de facto flexibility that employers enjoy due to the high rate of unemployment and the over-supply of unskilled labour. An influential analysis has suggested that South Africa as well as India and many countries in Latin America and Eastern Europe (Bhorat and Lundall 2002) can be classified as 'lean' social democracies. The distinctive feature of these societies is that they cultivate a system of rights but abrogate the responsibility of the state to provide a universal system of social security support.

A contrasting development is the increasing tendencies for labour market policies to be devised that seek to achieve labour market security through labour market policies that promote what has been described as ‘protected mobility’ or ‘flexicurity’. These policies of ‘protected flexibility’ seek to 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). While these policies are associated with successful small European economies such as Ireland, Netherlands and Denmark, the use of social protection to promote employment creation is not confined to the most developed countries. The ILO suggests that exceptionally good social security is one of the explanations for successful job growth in some countries in Central Europe, the Republic of Korea and Malaysia. For example, 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, is seen as a successful linking of active labour market policies to unemployment assistance and unemployment benefits (Harasty 2004).

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 the existence of Social Pacts developed in representative institutions which set levels of flexibility and protection broadly across the economy. Policies of protected flexibility represent an attempt to move away from a situation in which flexibility creates insecurity to one in which security promotes flexibility.

In an influential analysis, (2003) Collins has identified three key themes driving the new directions of employment law within the European Community. These are social inclusion, competitiveness and citizenship (of these three themes, only competitiveness has been explicitly articulated in South African labour law debates). 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 lead 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 a 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.

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. These workers are 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. 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. This has led to an informalisation of work with a growing proportion of workers being without regular benefits or employment protection. In both developed and developing countries, this work is performed primarily by women (Standing 1999; Fudge 2006).

Evidence from developing countries

Studies of Latin America suggest that labour regulations do contribute to shaping employer practices but that they do not seem to influence employment generation. The evidence allows for a rejection of simplistic arguments 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 Mexico³ 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 2004). 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.

In contrast, studies of East Asia suggest that labour laws have very little to do with the construction and functioning of labour markets. 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. In general, there is a significant gap between law and practice. This has manifested itself in a number of ways, including labour movements, which have not been sufficiently developed to oppose the state, low levels of collective bargaining and low levels of industrial action under legal procedures (Cooney, Lindsey, Mitchell and Zhu 2002; Kalula and Fenwick 2004; Fenwick and Kalula 2005).

In his discussion of labour law in SADC countries, Kalula emphasises that labour laws in the region 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 within the formal employment sector. The future of labour law in Southern Africa depends upon its capacity to ‘embrace the realities of deprivation and social needs’ (Kalula 2003 and 2004).

Security of employment in South Africa

Security of employment

It is now widely accepted that the impact of labour legislation needs to be better understood. In order to understand the impact of legislation it is necessary to examine the ‘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 1993). In this section of the article, this proposition is explored further by examining the impact of the provisions in the LRA protecting employees against unfair dismissal.

The protections enjoyed by employees against unfair dismissal have frequently been highlighted as one of the major rigidities in the labour market. 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 accepts that perceptions that it is more onerous to employers are influencing labour market behaviour (Hayter, Reinecke and Torres 2001). A more recent paper reiterates 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 and Rospabe 2002). A useful insight in this regard is the Bezuidenhout and Kenny assertion that debates about flexibility in labour law are 'more about positioning interests than empirical realities' (Bezuidenhout and Kenny 1999). The challenge is to distinguish perception from reality.

The new Labour Relations Act codified the protection against unfair dismissal developed from the early 1980s onwards⁴ 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.

The Code indicates that the strict requirements of procedural fairness developed by the Industrial Court prior to 1995 did not necessarily continue to apply. However, a survey of reported arbitration decisions indicates that many employers have not adjusted their disciplinary procedures and still apply the more formal old approach. In addition, arbitrators apply a stricter standard than that required by the Code (Le Roux 2004). 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 R 14.71 billion.⁵ 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).

One of the focuses of debate in this area has been whether employees should have a reduced level of protection against unfair dismissal during initial probationary periods. In justifying proposed changes to the law in 2000, the Department of Labour 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 set a six-month probationary period and clarify the applicable rules.⁶ 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.

There is no doubt that much of the impact of security of employment legislation has its roots in the practices of employers rather than inappropriate legislation. Any reform will require a closer understanding of institutional practices among institutions such as the CCMA, employers and other actors in the labour arena such as labour consultants whose activities remain unregulated.

Security of employment and externalised employment

According to two leading British labour lawyers, the key feature of triangular employment relationships is that the 'task side of the employment relationship is not outsourced, but only the recruitment, dismissal and employment functions' (Davies and Freedland 2004). In other words, employers bring

in an intermediary to administer the employment relationship but retain the power to direct the worker's day to day working activities. As the previous discussion indicates, the temporary employment service (still more commonly referred to as 'labour broker') has become the primary mechanism for informalisation in South Africa.

A 'temporary employment service' is defined in the LRA and BCEA as an organisation or person that provides or procures employees for a client and retains the responsibility for paying those employees, irrespective of the period of employment. If these two criteria (procurement and payment) are met, the labour broker is the employer and the client has a default liability if the broker does not comply with its statutory duties. Crucially, this default liability does not apply in respect of the termination of employment.

On the one hand, this default liability has encouraged more responsible contracting patterns. However, the lack of any limitations in respect of time has allowed employers permanently to outsource recruitment and employment functions. Employees are without security of employment because the client's decision to terminate employment of work is conveyed from client to employment service and therefore falls outside of the employment relationship and beyond the reach of labour law. A statutory provision intended to facilitate the supply of temporary staff has therefore become a vehicle enabling permanent triangular employment of workers who are without any security of employment. This was most dramatically illustrated in October 2002 when workers at ERPM gold mine went on strike over the exploitative practices of the labour broker who recruited them.

The ANC policy paper – referred to in the Introduction – rightly identifies the proliferation of labour brokers as one of the unintended consequences of the Labour Relations Act and the Basic Conditions of Employment Act. It argues that companies outsource the 'hassle factor' in employment contracts to labour brokers. The solution to this problem, it argues, is to reduce the hassle factor associated with employing workers. The paper also argues that other unintended consequences include the use of short-term contracts and consultancies 'which distort jobs that in the absence of the legislation might be permanent positions' (ANC 2005).

This final quotation illustrates the contradiction at the heart of the paper's argument. It is precisely those provisions in the law that the paper suggests should not apply to many employers that create the security of employment under which jobs can be categorised as permanent. The

problem is not that there is too much regulation but rather the absence of appropriate regulation. This has created a situation in which the use of labour brokers has mushroomed, driven in particular by the desire to remove workers from the scope of security of employment protection. The deregulation strategy proposed in the document would, ironically enough, remove this incentive by depriving all workers in smaller businesses of protection against unfair dismissal.

To date, an appropriate regulatory environment that ensures the registration and control of labour brokers has not been put in place. 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 have bilateral employment relationships, without impeding legitimate private and public business initiatives’⁷ (ILO 2005). A starting point will be to identify appropriate boundaries between the legitimate use of TESs and their abuse, and NEDLAC has begun to debate this. It is suggested that the employees of labour brokers should have the same unfair dismissal protection as other employees. Where the worker is genuinely temporary, there will always be a justifiable reason for the termination based on the client’s operational requirements. Where this is not the case there is no reason why the client should not have to justify the termination on the normal grounds.

Laws dealing with equality and empowerment

Employment Equity Act

Inordinately high levels of income inequality remain a key feature of the post-apartheid landscape (Bhorat 2004). As indicated, the increasing informalisation caused by the trend towards externalising work is exacerbating patterns of inequality. In the light of this it is appropriate to examine the adequacy of the legal mechanisms put in place to redress inequality in the workplace.

The Employment Equity Act (EEA) was designed to achieve equity in the workplace by prohibiting unfair discrimination and by requiring employers to implement 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 therefore encompasses two distinct regulatory strategies: a negative prohibition on discrimination and a positive obligation to implement affirmative action.

The prohibition of discrimination, which includes harassment, is enforced by civil litigation instituted by an aggrieved party in the Labour Court. The Act does not criminalise unfair discrimination, and the onus of instituting (and bearing the cost of) discrimination-related litigation rests on the individuals who complain of discrimination. The Act prohibits discrimination against employees. Independent contractors and other persons not covered by labour law are protected against discrimination by the Promotion of Equality and Prohibition of Unfair Discrimination Act (PEPUDA). The obligation to implement affirmative action measures is restricted to larger employers, in the main those employing more than 50 employees.

The Act establishes 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 equity which are appropriate to their own workplaces, without undermining the goal of a more representative and diverse workforce. Employers are required to analyse their employment policies, practices and procedures and thereafter consult with trade unions and employees to prepare and implement an employment equity plan containing numerical goals. The affirmative action measures required of employers must 'include preferential treatment and numerical goals but exclude quotas'.⁸ While compliance with the EEA is a requirement for employers to contract with the State, employers satisfy this requirement by complying with the Act's formal requirements such as filing a plan and report.

The legislative scheme promoting affirmative action is 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 Growth and Development Summit (GDS). In addition, a recent a court case has led to uncertainty as to the nature of an employer's obligation to apply affirmative action when filling vacant posts.

The capacity of anti-discrimination litigation, and in particular the EEA, to achieve greater levels of equality in the labour market 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 and Garbers 2002). Unlike many other countries, South Africa does not have separate pay equity legislation. Bringing anti-discrimination litigation is extremely expensive and there are considerable difficulties in obtaining the evidence required to establish patterns of discrimination, particularly in the

case of wage discrimination (Horwitz and Jain 2002). The lower wages paid to employees in externalised employment raises the issue of whether it should be classified as discrimination for an employer to pay employees engaged through labour brokers at lower rates than other employees (Theron 2005).

The Broad-Based Black Economic Empowerment Act

The efficacy of the Employment Equity Act has been thrown in sharp relief by the enactment of the Broad-Based Black Economic Empowerment Act (BBBEE Act). 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 Act enables the State to issue codes of practice, make compliance with charter targets binding, and set 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;
- indirect empowerment through preferential procurement and enterprise development.

The inclusion of targets concerning the employment of black employees and learners dramatically creates an overlap with the EEA and the Skills Development Act (SDA) respectively. This has greatly enhanced the incentives for employers to meet targets for employing and training black personnel and has ensured that these topics receive a level of corporate attention that was previously lacking. It has been argued that the adoption of sector scorecards offers a 'lifeline' for employment equity and the employment equity process should be aligned with the empowerment framework to ensure an integrated and comprehensive approach (Mbabane 2004). At a broader level, the use of an incentive-based regulatory framework to drive corporate transformation raises the issues of how the 'big carrot' of

doing business with the State could be used to drive a wider range of transformation initiatives.

Skills development and social insurance

This paper argues that post-apartheid labour legislation is premised on a conventional notion of the employment relationship, which has the effect of excluding many workers from the protection of labour law. In this section, the impact of this approach on two other laws: the Skills Development Act and Unemployment Insurance Act of 2001 will be examined. It will be suggested that the limitation of these laws to employees in conventional employment relations restricts the efficacy of social protection and minimises the capacity of labour market regulation to contribute to economic development through skills development. However, the debate on the impact of informalisation has to date largely focused on the more high profile laws such as the LRA. In addition, it will be suggested that the fact, that for largely historical reasons, the schemes for social insurance and skills development operate in isolation from each other further limits their effectiveness in a transforming labour market.

Skills development laws

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 Acts' institutional infrastructure consist 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. This new framework 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). However, it has been suggested that 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).

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.

Learnerships provide a flexible framework for skills development for both existing employees and new entrants into the workforce. Learnerships are established by SETAs and consist of a structured learning component and 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.⁹ Learnerships and internships for unemployed persons have been identified as a key aspect of growth and development strategies of the second economy. However, it has been suggested that the reliance on learnerships, rather than ongoing short-course semi-skill training programmes, may be one of biggest limitations of the training system (Kraak 2004a).

Employers are required to pay a skills levy equivalent to one per cent of their wage bill. 80 per cent of levy funds are distributed to SETAs and 20 per cent to the National Skills Fund. Employers who develop skills development plans may apply to their SETA for a mandatory grant equivalent to 50 per cent of their levy. The balance of SETA funding is used for administration and to provide discretionary grants for training-related activities. The criticism has been made that some employers do not develop plans and regard the levy as a form of taxation and that the SDA focuses on the needs of employers rather than the consequences of apartheid for employees (Maserumule and Madikane 2004).

The scope of the SDA 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. It has also been noted that there are severe difficulties in providing skills development programs within the informal sector (Braude 2004).

The application of the conventional boundary of labour law to the arena of skills development exacerbates the inequalities between the formal sector and the rest of the economy. The absence of access to skills development outside the formal sector means that businesses will have to continue to rely on factors such as low wages and long hours rather than enhanced productivity to maintain competitiveness. However, the extension of these schemes will require the development of new models for facilitating access to training.

Social insurance and social security

The Report of the Taylor Committee (2002) recommends 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. This raises the challenge of how labour law can engage with the social security systems to extend forms of protection to those who currently work outside of the social safety net or to provide more appropriate protections for protected workers.

South Africa's workplace-based social safety net consists of a mixed economy of statutory funds and contractual schemes. Participation in the statutory Unemployment Insurance Fund and the worker's compensation fund is compulsory but restricted to employees. Since the 1980s, collective bargaining has driven a process of creating widespread coverage in the formal sector of contractual provident, retirement and health insurance funds. This significant 'social wage' element coupled with the cost of contributions to statutory funds is cited as a significant reason for employers cutting back on their workforce or using sub-contractors.

The Unemployment Insurance Act 2001 is the most significant post-apartheid social insurance enactment. 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 as to 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 through the SA Revenue Services (SARS), which has contributed to the improved solvency of the Fund. The Fund has moved in a comparatively short period from being in deficit to having a significant annual surplus of approximately R3 billion and this raises issues of whether additional benefits could be provided.

Despite its updating, the Act retains the form of a Fund designed to cater for the limited requirements of a historically privileged workforce not seriously threatened by unemployment (Taylor Committee 2002). The leading legal text on social security criticises the Act for its failure to provide benefits for the partially employed, its failure to provide measures to integrate and reintegrate the partially employed, and its failure to provide measures to promote employment (Olivier, Smit and Kalula 2003). Those who become self-employed or establish their own businesses lose their coverage. 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. This hampers job mobility and prevents employees undergoing training that may enable them to become self-employed, and the expansion of benefits, whether on a voluntary or compulsory basis, requires investigation. A concept of employment insurance which allows persons to draw on accumulated rights at times of transition or insecurity may provide a framework within which benefits can be extended to this sector.

While the incorporation of the employers of 600,000 domestic workers in the scheme has been a very significant achievement, domestic workers remain without access to benefits such as medical aid and pension and provident funds.

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 pension legislation. The Paper 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. The paper proposes to establish a contributory National Savings Fund accessible to persons outside of formal employment, which offers the potential for achieving greater social protection outside of the formal sector (National Treasury 2004).

Conclusions

The first ten years of democracy have seen the development and refinement of a very significant programme of labour market regulation. The new regime extended a considerable range of rights to virtually all employees and established structures to overcome the apartheid deficits. 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 poses a range of challenges for the provision of labour and social protection. Effective regulation will have to be built on 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. This requires that regulatory strategies are developed to deal with the changes in working arrangements.

After 1994 South African labour law was debated and reconstructed one statute at a time. The challenges of regulating a changed labour market increasingly point to the points of potential intersection between the different statutes and to the shortcomings of the models inherited from the past. The reconstruction of labour law preceded the reconstruction of other aspects of the regulatory environment. More recent initiatives such as the black economic empowerment framework are having a significant impact on labour market actors. The next few years will see a range of policy initiatives in adjacent areas, particularly social protection and pensions, which have the potential to enhance or undermine the level of security in both the formal and informal sectors of the labour market. Labour law debates will have to intersect with these areas.

Guy 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 1999). The challenge for South Africa is that new forms of insecurity are emerging at a time when the goals of our post-apartheid labour market regime have only been partially achieved. This is not a justification for deregulation. Nor should current laws be retained if they are inappropriate or ineffective. Our new phase of labour market reform will require an understanding of the capacities and limitations of regulation to protect and achieve change.

Notes

1. 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 as issues requiring consideration.
2. For a summary of the research see Theron (2005).
3. The choice of these three countries is significant in that Argentina and Brazil undertook extensive labour law reform while Mexico did not.
4. For an account of the development of the Industrial Court's unfair dismissal jurisprudence, see van Niekerk (2004).
5. 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.
6. For an academic commentary see Cohen (2003).
7. The protection of temporary and agency workers is a central aspect of flexicurity in the Netherlands. The status of workers of temporary work agencies a collective agreement giving these workers phased access to labour and social protection dependant upon their length of service (Jacobs 2003).
8. 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.
9. 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.

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