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COSTING, COMPARING AND COMPETING

Developing an approach to the benchmarking of labour market regulation

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SECTION 1: INTRODUCTION

Since the advent of democracy in South Africa the regulation of the labour market has been a focus of ongoing debate because, in the first instance, such regulation had been central to the maintenance of *apartheid*.¹ To undo the *apartheid* legacy it was seen as imperative to adopt a suite of new labour legislation, which was to be the cornerstone of a new regulatory regime. This legislation, although often perceived as worker-friendly, was the outcome of an intensive process of tripartite negotiations, in which the social partners, specifically organised labour and business, were able to weigh the costs and benefits of its specific provisions.

At the same time, the economy as a whole has failed to generate jobs at a rate sufficient to keep pace with the population growth. Faced with an increasingly competitive economic environment as a result of South Africa's integration into the global economy, firms have been forced to cut costs. Labour is often the only significant cost over which firms have some control. Labour legislation unquestionably circumscribes how that control is exercised, and imposes costs that firms would not have in the absence of such legislation. In these circumstances it was perhaps inevitable that the costs of regulation have increasingly become a focus of concern.

In response to factors such as global competition and technological advances, firms have been restructuring their operations, and the structure of the domestic economy and labour market is changing. This is evident, firstly, from an increase in the numbers of persons in non-standard employment, primarily as a result of processes of externalisation.² Secondly, it is evident from the expansion of the informal economy, as increasingly more persons find themselves engaged in economic activities that are in fact largely or wholly unregulated and unprotected. This in turn has resulted in official recognition of the notion of a dual economy, corresponding to a formal-informal divide. While the existence of an informal economy is not new, all indications are that it has grown relative to the formal economy since 1994, specifically as a consequence of the relative decline of the primary sector and manufacturing.³

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¹ As the Labour Market Commission appointed in 1995 put it: 'Labour market policy was, arguably, the centrepiece of apartheid's mechanism of social control and of its economic growth strategy'. See the Preface to the Report of the Commission to Investigate the Development of a Comprehensive Labour Market Policy.

² See J.Theron, 2005. 'Employment is not what it used to be: The nature and impact of work restructuring in South Africa', in 'Beyond the apartheid workplace', Eds. E.Webster and K.Von Holdt, University of Kwazulu-Natal, 293-316.

³ See for example R.Devey, C.Skinner and I.Valodia, 2006. 'The state of the informal economy', in 'The state of the nation: South Africa 2005-2006', Eds. S.Buhlungu, J.Daniel, R.Southall and J.Lutchman, HSRC Press, Cape Town.

A third and related indicator of the changes that have taken place in the labour market is the employment growth that has occurred in the tertiary sector, in services, and in industries of a cyclical nature, such as construction. The expansion of the tertiary sector raises particular challenges for the existing regulatory regime. As is the case with the informal economy, workers in this sector are largely unorganised. However, more profoundly, the dynamic of employment in the tertiary sector is in many respects different from employment in the primary or secondary sectors. Nevertheless, labour legislation has been formulated largely in response to the experience of workers and employers in the primary or secondary sectors.

At the same time the growth of the informal economy and the tertiary sector enhance the importance of forms of labour market regulation other than labour legislation, such as social security legislation and other provisions that provide some protection to workers whose activities are not regulated by labour legislation. It is in this context that the question of the reform of labour market regulation arises. There is of course nothing uniquely South African about this question. However, labour market regulation in South Africa, as in any other country, is a product of its own particular history. A theme underlying global debates concerning the need for reform is thus the extent to which labour market regulation is path-dependent, in that its rationale is rooted in the history, political economy and institutional environment that drives it, or whether there is in fact a trend for domestic systems of regulation to converge, because of a common economic and technological environment.⁴

Endeavours to quantify the costs that labour regulation imposes, and to compare such costs across countries, bring a new dimension to these debates. The World Bank's 'Doing Business' (DB) survey is by far the most ambitious such study to date.⁵ The object of the endeavour is to benchmark regulation across different economies, and in so doing to stimulate labour market reform. Because the Bank is a global institution, this project has enjoyed a high profile. It can therefore be seen as lending impetus to a tendency for domestic systems or regulation to converge.

1.1 The objects and scheme of this paper

The scope of the DB survey is comprehensive. It encompasses a variety of topics that affect, or are perceived to affect, the costs of doing business in a country, including 'starting a business', 'dealing with licences', 'getting credit', 'paying taxes', 'enforcing contracts' as well as 'employing workers.' Labour regulation, the focus of this paper, is nevertheless an important component of the survey. One of the studies that has provided the intellectual inspiration for the DB survey is exclusively concerned with labour market regulation, by Botero, Djankov, La Porta, Lopez-de-Silanes and Schleifer (Botero et al).⁶ The object of this paper is to consider what approach South Africa should take to endeavours to benchmark labour market

⁴ See Bamber, G and Lansbury, R. 1998. 'International and Comparative Relations', Sage publications, London, 3rd edition, pages 13 -19.

⁵ The full title of the survey is '*The Cost of Doing Business*'. It is an annual survey of the World Bank, and the first report of the survey was published in 2004. In this paper we refer both to the survey and, with reference to its published findings, the report.

⁶ Botero, J, Djankov, S, La Porta, R, Lopez-de-Silanes, F and Schleifer, A. 2004. 'The Regulation of Labor' *Quarterly Journal of Economics* 1339.

regulation, and specifically to the DB survey. Furthermore, the paper aims to inform the debate about the need to reform labour market regulation in this country.

To quantify the costs of any form of regulation, however, is no simple matter. In section 2 we consider the methodological challenges that confront any attempt to cost regulation, let alone to compare regulation across countries, with specific reference to labour regulation. This discussion includes a consideration of previous endeavours to assess the impact of labour regulation in South Africa, as well as the methodology developed by Botero et al.

In section 3 we examine in more detail the outcome of the DB survey in the case of South Africa. Applying its own methodology, we suggest that the DB survey has in fact made some obvious errors in the case of South Africa. These errors, we suggest, are directly attributable to flaws in the methodology used, and the paradigm that informs this methodology. In this regard we consider institutional and academic critiques of the DB paradigm, as well as the relevance of the DB survey in informing an agenda for reforming labour market regulation.

We conclude that the DB survey is of limited value in informing an agenda for reform in South Africa because of problems with the methodology, the survey's simplistic conception of law, and because of the limited and selective scope of the topics assessed in the survey. In section 4 of the paper, in attempting to develop an alternative paradigm, we consider the categories that need to be scrutinised in any assessment of, or attempt to cost, labour market regulation. The categories we have identified are as follows:

- categories of protected employees and regulated employers;
- security of employment/dismissal protections;
- hours of work and other conditions of employment;
- collective labour law (collective bargaining and strikes/lockouts);
- social protection/social security law.

The paper concludes with section 5.

SECTION 2: METHODOLOGICAL CONSIDERATIONS IN COSTING REGULATION

The origins of the endeavour to cost labour market regulation can be traced back to the body of economic and political thought that gave rise to the project of ‘deregulation’, and that found its most influential adherents in the USA and the UK under the governments of Reagan and Thatcher. In South Africa, under the old regime, this project took the form of legislation to ‘remove restrictions on economic activity’, by creating industrial hives where labour legislation did not apply.⁷ It also took the form of limited initiatives to create a special dispensation for small business. Policies of deregulation were also actively implemented in the 1980s and early 1990s in highly regulated sectors such as mining and agriculture.

Argument for a special dispensation for small business resurfaced when the new regime came to power, and the impact on small business was at the centre of contention around the adoption of the Basic Conditions of Employment Act of 1997 (BCEA). This led to a government sponsored study testing employer perceptions of the new law. Although the study tended to suggest that the impact of the BCEA would not be significant, the Minister nevertheless enacted a special dispensation for businesses employing ten or less.⁸ The report motivating this dispensation referred to the limited capacity of the small business to comply with the new requirements, and argued that the climate around the new Act should be one of awareness building rather than rigid enforcement.

This was followed by a National Small Business Regulatory Review, conducted under the auspices of the Department of Trade and Industry.⁹ The object of the review was to assess the impact of the gamut of regulations affecting small business, including labour legislation.¹⁰ The rationale for privileging small business was however significantly undermined by the failure to define small business satisfactorily. In this regard, the definitions of small business proposed in the National Small Business Act proved impractical, at least for the purposes of assessing the impact of labour legislation.

A further study of employer perceptions in small, medium and micro enterprises (SMMEs) in Johannesburg was carried out in 2000 under the auspices of the World Bank.¹¹ By this stage the Skills Development Act (SDA) and Employment Equity Act

⁷ The Temporary Removal of Restrictions on Economic Activity Act, 1986.

⁸ The study was led by government’s Ntsika Enterprise Promotion Agency, and included a telephone survey of small entrepreneurs and qualitative interviews with small business owners. See also S.Godfrey with J.Theron, ‘Labour standards versus job creation: An investigation of the likely impact of the new Basic Conditions of Employment Act of small businesses’, 1999. Monograph, Institute of Development and Labour Law, University of Cape Town.

⁹ Ntsika, 1999. Ntsika enterprise promotion agency, 1999. National small business regulatory review, discussion paper, Pretoria.

¹⁰ The methodology adopted in this review was to constitute a number of ‘task teams’ each of which was assigned a different topic relating to regulations perceived to have an impact on small business. The topics included taxation, business regulations, procurement as well labour regulation. A report of the review encompassing the recommendations of the different task teams was presented in 1999. In the case of labour legislation it was apparent from this review that there was no empirical evidence regarding its impact on small business.

¹¹ Macroeconomics Technical Group, Africa Region, World Bank. 2000. ‘South Africa: Constraints to growth and employment, Evidence of the small, medium and micro enterprise firm survey.

(EEA) were also in force. The survey seeks to test the perceived effect on employment of each of the four labour statutes the new regime introduced (the BCEA, SDA, EEA as well as the Labour Relations Act (LRA)). Although the survey found that employment levels were relatively unaffected by any specific “regulation” (and regulation refers here to the statute concerned) it states that “their responses to the how [firms] adjusted to *all four regulations* as a *whole* suggests a preference for more flexible arrangements.”¹²

However any statute comprises a range of provisions, with very different effects. For instance, the LRA promotes the formation of trade unions and collective bargaining while also protecting employees against unfair dismissal. Certain of the provisions in the BCEA restrict the organisation of working hours while others promote flexible arrangements. Small businesses are excluded from key provisions of the SDA and EEA. It is therefore extremely difficult, if not impossible, to measure the impact of a statute as a whole, let alone four statutes, unless all that is being done is to measure perceptions. Measuring perceptions has validity insofar as perceptions shape conduct. But questions remain as to what these perceptions are of, and how they inform a response to the findings. There is no attempt to interrogate the accuracy of interviewee’s understanding of the content of labour laws in these studies. The more wide-ranging the provisions of the statute, the more likely the perceptions are to become a proxy for something besides the ostensible object of investigation.

A more recent investigation of the impact of regulation by the Small Business Project adopts a similar approach to World Bank study mentioned above. Firms were asked to identify: ‘What factors most discourage you from hiring more employees?’ Among a range of responses, 20 percent identified ‘labour laws/government regulations in general’, compared with 25 percent who answered ‘lack of confidence/demand in economy.’¹³ The fact that ‘labour laws’ are grouped together with a category ‘government regulations in general’ makes the responses practically worthless. They provide no information as to the specific manner in which legislation impacts negatively on businesses, and it is not possible to determine whether the perceptions of respondents are based on an accurate understanding of the law. Accordingly, they do not contribute in any way to identifying particular provisions in labour law that may require reform. Rather, they contribute to generalised proposals for deregulation of the labour market.

By the late 1990s the debate was arguably driven less by the real or imagined effects of the new labour legislation than by the changes in the labour market already alluded to. The SMME study, for instance, provides some evidence of this: between 33 and 60 percent of SMME firms hired temporary labour and between 37 and 42 percent of firms engaged in subcontracting. Subcontracting is a species of externalisation, as a consequence of which workers are not employed by the firm that ultimately utilises their goods or services. A consequence of this is that employment levels in SMME firms subcontracting out are reduced. It is not clear how this consequence is reconciled with the finding already referred to, that employment levels in the SMMEs concerned were relatively unaffected. Presumably the study does not take into account that whereas prior to subcontracting workers were all employed by the same core

¹² See note 8, page 30.

¹³ SBP, 2004. Counting the cost of red tape. Unpublished report, Johannesburg.

business, after subcontracting there were multiple employers. However, the labour regulation effects of this shift are profound.

The changes in the labour market in South Africa are not unique. There is an extensive and diverse academic literature about how the ‘world of work’ has changed, which for present purposes it is not necessary to review. The crisp issue, from the point of view of policy, is whether these changes necessitate the reform of labour market regulation, and what kind of reform is appropriate. Debates about the need for the reform of labour market regulation tend to be located on either side of an ideological divide. On one side are those that tend to regard labour market regulation as an impediment to economic growth, and see its demise as an inevitable consequence of economic globalisation. On the other side are those who see regulation as a necessary tool to redress situations of inequality, and whose primary concern is therefore to devise new regulatory strategies to meet new challenges.

In this context, the appeal of an endeavour to benchmark labour market regulation, along the lines advocated by Botero et al and adopted in the DB Survey, is obvious. It purports to be founded on quantitatively verifiable data, and can therefore be presented as objective. At the same time, it contains data that can be regularly updated, and is therefore current. There is no need to undertake dedicated research, with the inevitable time lag between the research findings and the appropriate regulatory response.

In 2007, the Department of Trade and Industry (DTI) has published an Investment Climate (IC) Survey.¹⁴ The Survey states that it contains “few objective indicators” of labour regulation, and therefore it relies on the DB survey to supplement data based on employer perceptions. The IC Survey is a survey of over 800 firms, conducted by a private agency in conjunction with DTI and the World Bank. On the question of labour regulation, it records that “when firms were asked whether certain areas of the investment climate were a problem for business, close to 33 percent said that it [labour regulation, presumably] was a major or very severe obstacle...” Elaborating on this finding, and relying entirely on DB Survey data, the Survey concludes that a comparison of “the burden of labor (sic) regulation” in an international context leads to a “quite sobering” assessment of South Africa’s competitiveness.¹⁵ However we shall later argue the DB data does not provide a basis for making this type of assessment – whether positive or negative.

2.1 The question of legal context

The first obstacle any attempt to cost regulation must overcome is a proposition most lawyers and social scientists would regard as trite: that one cannot understand legislation or legal rules without reference to the historical, social and economic context from which they emanate. By the same token one cannot interpret or understand any aspect of the legal system of any country without reference to this

¹⁴ G. Clarke, B. Eifert, J. Habyarimana, M. Ingram, W. Kapery, D. Kaplan, M. Schwartz and V. Ramachandran, 2007. ‘South Africa: An assessment of the investment climate’, page 11. See www.dti.gov.za

¹⁵ See note 13 above, pages 67-68.

context. Yet national context is, by definition, something which one could not expect a comparative analysis to take into account. This does not of course invalidate a comparative analysis. However, it does suggest that one should not be overly ambitious in the claims one makes on the basis of such an analysis.

The relevance of national context is obvious in respect of labour market regulation in South Africa. Reference has already been made to the intensive tripartite negotiations that gave rise to the labour legislation adopted post-1994. This took place at NEDLAC, which was established in 1994 to formalise and expand the practice of social dialogue over labour market regulation that had emerged in the late apartheid era from 1988 onwards.¹⁶ While there was not consensus on all aspects, the fact that the legislation emerged from a tripartite process means that its core principles enjoy a high degree of legitimacy among the key stakeholders within the economy. This represents the successful articulation of ‘voice regulation’ in the policy and law-making process.

The study of Botero et al circumvents the complexities of national context, by means of a characterisation that holds that there is a distinction between common-law countries, which are essentially countries that have inherited the English legal system, and the civil-law tradition. Although other explanations for the regulation of labour market are not discounted altogether, it is legal origin, as understood in terms of this broad characterisation, that explains much of the content of such regulation.¹⁷ Legal origin, it should be noted, is also a convenient explanation for the protagonists of the radical reform of labour market regulation, for if the content of regulation is essentially arbitrary, and determined by colonial transplantation, it follows that there is no compelling reason for nation states to cling to it.

Thus decision-making in the common-law tradition is associated with juries and independent judges, and an emphasis on judicial discretion rather than codes. In civil-law systems it is characterised by less independent judiciaries, the relative unimportance of juries, and a greater emphasis on codes as opposed to judicial discretion. Furthermore:

Common law countries tend to rely more on markets and contracts, and civil law (and socialist) countries on regulation (and state ownership) ... [S]ince most countries in the world received their legal structures involuntarily, their approach to social control of business may be dictated by the history of transplantation rather than indigenous choice.¹⁸

The importance attached to legal origins by Botero et al has been sharply and convincingly criticised by a number of commentators. Simon Deakin points out that Botero et al’s characterisation ‘is not an accurate description of the common law /

¹⁶ This statute constitutes what is appropriately described as a regime in which the parties to NEDLAC have a determinative influence over ‘all proposed labour legislation relating to labour market policy’ and socio-economic policy. See section 5(b), (c) and (d) of Act 35 of 1994. Socio-economic policy is defined to include ‘financial, fiscal and monetary policy, socio economic programmes, trade and industrial policy, reconstruction and development programmes and all aspects of labour market policy, including training and human resource development.’

¹⁷ The other explanations for labour market regulation considered are efficiency considerations (for example that countries adopt heavier regulation to cure market failures, and lighter regulation to address distortions associated with government interference) and political power (leftist governments adopt more protective policies).

¹⁸ Botero et al, 2004, 7-9.

civil law divide, either in general terms or in the specific context of labour regulation'.¹⁹ Ugo Mattei has described the notion that civil law judges, in contrast to common law judges, are bound to apply the strict legal text of the Code as 'dramatically misleading, being based on a superficial and outdated image of the differences between the common law and the civil law.'²⁰

In addition, as David Pozen points out, Botero et al cannot identify the effects supposedly attributable to legal origins. This is because it is not possible to disentangle a country's legal system from many other extra-legal commonalities that countries within the same legal family share - historical, linguistic, geographical, and cultural - all of which might plausibly influence regulation-setting.²¹

Thus while legal origins are relevant, it is very difficult to see how labour market regulation, in its totality, could be attributed to legal origins. In the case of South Africa, very little of its system of labour market regulation can be directly attributed to legal origins, or its colonial past. Perhaps the only example is the relatively recent establishment of the judiciary as the ultimate arbiter of labour market regulation. This can indeed be ascribed to the ascendance of a common-law tradition.²² However, the ascendance of a common-law tradition, in this instance, had far more to do with the political constraints of the time than legal origin.

South Africa also illustrates the diminished importance of the civil-law/common-law divide in the contemporary world. The fact that since 1994 South Africa has been a constitutional state, in which all legislation enacted has to pass constitutional muster, appears to be a more significant characterisation of its legal system. The South African constitution is a hybrid, which owes more to German than American constitutional law, whereas the UK does not even have a written constitution. Germany is of course a country in the civil-law tradition.

2.2 The question of selection bias

The endeavour to benchmark legislation, we have seen, relies on selecting comparable provisions in the statutes of different countries. But the individual laws that make up the body of labour legislation need to be considered in relation to each other, and in relation to other legislation that has a direct bearing on their provisions. Thus the provisions of the BCEA, the SDA or the EEA cannot be considered in isolation from each other, or in isolation from the labour relations regime that the LRA in the first place constituted.

¹⁹ Atherling, B and Deakin, S. 2005. 'Labour Regulation, corporate governance and legal origin: A case of institutional complementarity?', European Corporate Governance Institute, Law working paper no. 72/2006.

²⁰ Mattei, U. 1997. 'Comparative Law and Economics', Michigan: University of Michigan Press, cited in S.Deakin, P.Lele and M.Siems, 'The evolution of labour law: Calibrating and comparing regulatory regimes' (International Labour Review, forthcoming).

²¹ David Pozen 'The regulation of labor and the relevance of legal origin.' *Comparative Labor Law & Policy Journal*, Vol. 28, pp. 43-56, 2007

²² The Labour Appeal Court, presided by a High Court judge, was established in terms of a 1998 amendment to the LRA. The institution of a Labour Appeal Court was retained in the LRA of 1995, although it was now composed of three judges, as a result of the introduction of a Labour Court presided over by a single judge.

Any investigation that focuses on particular topic or provision of the legislation, or on a particular law, must necessarily raise the question: ‘Why focus on this provision only?’ It must also address, in any analysis of the outcomes of such investigation, the relationship between the provision in question and the regime of which it is part. The latter point is an especially significant consideration if a comparison is to be made between one national regime and another. Thus an identical or similar provision in one national regime may have quite a different significance in another. All this makes it a hazardous enterprise to attempt to translate legal provisions into quantifiable data.

It is therefore important that the assumptions that have informed the topics selected for investigation are made explicit. In the case of Botero et al, there are explicit and detailed assumption about the kind of firms (the ‘standardized employer’) and the kind of workers (the ‘standardized employee’) that are the focus of their investigations. The worker is male and has been working for the same firm for twenty years. The firm is engaged in manufacturing, employs more than 200 workers, is wholly owned by nationals etc. However there is no attempt to justify or explain why these particular assumptions are made, beyond wanting “to make the scenario comparable across countries.”²³

In other words the implicit assumptions that inform the explicit assumptions made are not spelled out. Moreover the ‘strong’ nature of the explicit assumptions clearly has a bearing on whether the study’s findings are of general application. It is not clear, for example, why the study should make the assumption that a worker has twenty years service for the same firm, when this appears to be an unusual scenario even in developed countries.²⁴ Undoubtedly this assumption would affect a finding on the costs of retrenching such a worker, for example, as between one country and another. However it is surely fallacious in these circumstances to suppose that such a finding reflects the actual cost of retrenching workers.

It is also important to identify another set of implicit assumptions made by Botero et al that is no less important, about which we will have more to say in relation to the DB survey. These are the implicit assumptions that inform the topics selected for investigation, as well as the topics that are disregarded.

2.3 The distinction between law and practice

It is not possible to make a correct statement about a regulation in a statute without knowing how it is applied in practice. A particular provision may be a dead letter if it is disregarded in practice. So, for example, it would be absurd to compare workplace representation in South Africa and Germany on the basis of what the legislation provides, without mentioning that the provision for workplace forums is practically a dead-letter in the South African legislation.

²³ Botero et al, 2004, 13.

²⁴ The assumption of a worker with twenty years service, for example, has been criticized as highly unrealistic, whereas in a survey of fifteen EU countries only 17 percent of the working population had job tenure equal to twenty or more years. See J.Berg and S. Cazes, 2007. ‘The Doing Business indicators: Measurement issues and political implications.’ Economic and labour market paper 2007/6, International Labour Organization, 1-23.

Botero et al respond to the critique that they rely only on law as written down, and ignore the distinction between law and practice, as follows:

To us, this critique is not convincing. First, virtually all of labor law is statutory, even in common law countries, and deviations from statutes are an exception not the rule. Second, and more importantly, we construct several of our indices, such as the cost of raising workers hours and the cost of firing workers, to reflect actual economic costs not just statutory language. For these variables, the distinction between what is written down and what it actually costs to do something is minimised.²⁵

However all legislation has to be interpreted and applied. The proposition that 'deviations from statutes are an exception not the rule' cannot be accepted, since it assumes that there is a norm in terms of which laws are interpreted as intended by the law-maker, and applied to their full extent, and that instances in which this is not done are a deviation from this norm. It is suggested that, in contrast, all laws are applied to a differential extent depending upon a wide range of variables. These include the formulations adopted by the legislature, their judicial interpretation, the degree of enforcement by administrative authorities, as well as the response of employers, trade unions, workers and other actors.²⁶

The difficulty of determining the actual costs of dismissing workers in South Africa illustrates the point. Even though South African labour legislation is widely regarded as a model of clarity, and the maximum amount of compensation that may be awarded in a case of unfair dismissal is stipulated in the legislation, there are conflicting judicial decisions as to how these provisions should be interpreted where a worker is reinstated.²⁷ These different interpretations significantly alter the 'actual economic costs' of a dismissal.

Moreover, enforcement of regulation is a major issue in South Africa, as it is in any country that is constrained to keep employment in the state sector to a bare minimum. Where inspectorates tend to be under-resourced and with unfilled vacancies (as is the case in South Africa) it is likely that the gap between law on paper and in practice will widen. Moreover, the need for an effective inspectorate to prevent this gap from widening is likely to be a function of the level of education of the workforce, and their access to resources. In other words, where the workforce is relatively poorly educated,

²⁵ Botero et al, 2004,11.

²⁶ The American author Blumrosen usefully uses the term 'law transmission system' to describe the process by which a statement of policy is translated into 'real world' changes and socio-economic behaviour. The 'law transmission system' consists of those 'legislative, administrative and judicial actions which interact with regulated institutions, beneficiary organisations and individuals to achieve a real world response to a legislative standard.' A Blumrosen, *Modern Law: 'The Law of Transmission System and Equal Employment Opportunity'* (Madison, Wisconsin 1993).

²⁷ See the conflicting Labour Appeal Court decisions in *Krouwkam v. SA Airlink (Pty) Ltd* (2005) 26 ILJ 2153 (LAC) and *CWIU and others v. Latex Surgical Products (Pty) Ltd* (2006) 27 ILJ 292 (LAC), as well as the Labour Court decision in *SACCAWU and others v. Primeserv ABC Recruitment Pty Ltd t/a Primeserv Outsourcing Inc.* (2006) 27 ILJ 2162 (LC). See also W.Hutchinson, 2007. 'Judicial precedent revisited', *Contemporary Labour Law*, Vol 16, no 6, 68-70.

and there are few resources, it is likely that the gap will be wider than in the relatively well-educated, well-resourced workforces of OECD countries.²⁸

The gap between written law and practice is critical in another respect. No endeavour to benchmark or cost the impact of labour market regulation can claim to be scientific without considering the scope of application of the regulation, or to whom the regulations actually apply. This point has historical resonance in South Africa, where until 1980 most workers were excluded from the scope of labour legislation by virtue of the definition of employee. Workers may of course be excluded more or less explicitly, in a variety of ways. The methodology advocated by Botero et al is entirely impervious to subtleties of this nature.

2.4 The dynamic nature of law and the question of timing

Because there is a distinction between law and practice, the question of timing is critical in any investigation of the impact of labour legislation. Invariably the impact is only apparent after some time, and it will depend on the provision in question when it is appropriate to investigate its impact. In the case of workplace forums, for instance, it is still too early to say whether a provision that is practically a dead-letter at present will remain so.

From a legal perspective, five years is often too short a period in which to establish authoritatively how certain provisions will be interpreted. Yet in the interim the legislation is being interpreted in practice, possibly in a manner that was not intended. To illustrate, amendments to address unintended consequences of the LRA (and BCEA) were mooted in 2000, some five years after it was adopted. The amendments themselves were only adopted in 2002.

It has been suggested that the greatest limitation of the methodology of Botero et al is that it provides only a cross-section of the law as it stands at a given time, and says nothing about how law has developed (or is developing) over time. “The time-dimension is also critical to understanding the causal sequence between legal change and economic development: which comes first, and how does one influence the other.” Accordingly a more fruitful methodology may be to undertake a longitudinal analysis of labour regulation. ²⁹

2.5 Determining costs and benefits

²⁸ A number of commentators have pointed out that the gap between written law and practice is likely to be wider in developing countries. Pozen, for example, states that ‘compliance rates may be positively correlated with, and to some extent caused by, the wealth and institutional maturity of a jurisdiction, the longevity of a law’s existence, and the degree of a law’s compatibility with social norms – all of which are likely to be lower for developing countries as compared to developed countries with respect to labor regulations.’ See note 11 above, page 47.

²⁹ S. Deakin, P. Lele and M. Siems. 2007. ‘The evolution of Labour Law: Calibrating and comparing regulatory regimes.’ 1-44.

If the object of an investigation into the impact of legislation is not simply to deregulate, but to inform regulatory best practice,³⁰ then it is essential to identify the benefits it aims to achieve as well as the costs. It is not acceptable to simply leave the benefits out of the equation, simply because they are not easily quantifiable.

The shortcomings of conventional economic approaches to the costing of legislation are well described in the following passage by the American author Sanford Jacoby:

Yet tools like cost-benefit analysis and ‘scorecards’ that purported to show how the costs of government regulation exceeded its benefits were not as scientific or normatively transparent as their proponents claimed. Costs were easier to quantify and monetize than benefits, resulting in biased assessments. Distributive effects were usually judged irrelevant to efficiency considerations.³¹

Thus, for example, one could not consider the costs of a dispute resolution system, without taking into account the benefits of such a system, and what costs there might be in the absence of such a system. Regulatory best practice should rather seek to identify who in fact benefits from such a system, whether those who in fact benefit are the target group, whether the costs the system entails are commensurate with the benefits, whether costs can be trimmed, whether non-regulatory options are available, and related questions.

Clearly the costs associated with a statute, or any provision or set of provisions in a statute, are of different kinds. In the case of the dispute resolution system, one would firstly need to differentiate costs to the fiscus, where public money is required to maintain an institution such as the CCMA, and private costs, which are the costs borne by the parties utilising the system, one of which is business. One would further have to distinguish between the costs incurred in utilising or participating in the utilisation of the system, such as costs incurred in preparing for and attending hearings, and contingent costs, such as costs incurred as a consequence of an adverse finding (for example, an order to reinstate or compensate).

It appears the notion of ‘compliance costs’ that has been used in regulatory impact analyses is exclusively concerned with the costs to business of compliance with the legislation, but excluding administrative costs, which relate merely to bureaucratic compliance with the legislation. It also appears that the methodology used to determine such costs is to ask business to estimate them.³² In an OECD study, a postal survey was conducted. In a survey of South African businesses, businesses were randomly selected.

In principle there does not seem to be any reason why compliance costs should not be empirically verifiable. In the case of the dispute resolution system, for example, it is possible to compute the average period of time a hearing would take, or the

³⁰ SBP, 2004: 99-100.

³¹ S Jacoby ‘Economic Ideas and the Labour Market’, 2005(1) *Comparative Labour Law and Policy Journal* 43-78 at 56.

³² SBP, 2004. According to the SBP study, compliance costs are ‘about finding out what a regulation requires a firm to do, and then proving these things have been done...and includes the time spent by business managers and staff on understanding the rules and applying them, plus payment for expertise.’ (SBP, 2004,14)

probability of an adverse finding. It is possible to compute, on average, what the likelihood of reinstatement is, or the average amount of compensation awarded. It is difficult to see what weight can be attached to employer estimates in these circumstances. There are however costs that are not empirically quantifiable, although they may nevertheless be real. The SBP study refers to 'efficiency costs' which it defines as the costs to the economic system as a whole.

SECTION 3: THE WORLD BANK'S 'DOING BUSINESS' SURVEY

The DB survey uncritically applies the legal origin thesis advanced by Botero et al. Thus the survey report describes the difference between common-law and civil-law systems in the same terms, without providing an empirical basis for its assertions. As we indicate above, this description is little more than a caricature of the two systems. The DB survey is also premised on the same or similar explicit assumptions³³ about the 'standardized' employer and employee. Thus it is concerned with a firm employing more than 200 workers in the manufacturing sector in the country's largest city. In the South African context this is a relatively large firm, and certainly not the kind of business that has been the focus to the debate about labour market regulation.³⁴ In the context of most less developed country, this is also likely to be large firm: the type of business that a foreign investor might be interested in establishing.

The DB report, as its title suggests, seeks to be a guide for foreign investors. In addition, given the importance attached to foreign direct investment in most developing countries, it is designed to guide so-called 'investment climate reforms'. In this regard it is relied upon by other international agencies. The IMF's 2005 Article IV country report on South Africa specifically cites the indices derived from the DB survey as support for the proposition that reducing protection against unfair dismissal would be an effective tool for reducing the cost of labour and thus increasing employment.

The ambitions of the DB survey are captured in an analogy drawn between the framework developed for measuring national income and expenditure by J. M. Keynes in the 1940s and its own endeavours to benchmark regulation, in accordance with 'a growing consensus that the quality of business regulation and the institutions that enforce it are a major determinant of prosperity'.³⁵ This new methodology, the DB survey points out, simplified complicated transactions data into an overview of the economy and allowed economic performance and structure to be assessed with greater precision.. Once the methodology became an international standard, comparisons of countries' financial positions became possible. If only the same could be achieved for business regulation, the DB survey suggests.

Before considering whether the ambitions of the DB survey to set a new national standard are achievable it is enlightening to consider some of the comments about regulation that appear in its report: Cumbersome regulation is associated with lower productivity. Heavier regulation is associated with informality and corruption. Poor countries regulate business the most. Heavier regulation brings bad outcomes ('For example, rigid employment laws are associated especially strongly with fewer job opportunities.')

One size can fit all, in the manner of business regulation.³⁶ The sweeping nature of these propositions is striking, and gives rise to the question: What

³³ The DB survey is less comprehensive than Botero et al in its coverage of certain topics, such as alternative employment contracts, dismissal and collective bargaining.

³⁴ The National Small Business Act, 102 of 1996, identifies three sets of criteria for defining medium, small, very small and micro businesses. The simplest of these to apply is the 'total full-time equivalent of paid employees.' On this criteria, a medium firm employs up to 200 workers.

³⁵ WB, 2004: viii.

³⁶ WB, 2004:xi- xviii.

precisely is meant by regulation? Although the sub-title of the report is headed 'understanding regulation', no attempt is made to define what is meant by regulation. This in turn illustrates the fallacy of the proposition that 'poor countries regulate ... most'. For as the report acknowledges elsewhere these same countries have the least capacity to enforce regulation. It is misleading to analyse regulation in isolation from its enforcement.

The DB paradigm assumes that costs imposed on an employer have negative economic consequences for that employer and for the economy as whole. This fails to take account of the role of labour market regulation in requiring employers to internalise costs in order to prevent them passing harmful extra-firm costs onto society more generally. A number of the provisions that are specifically included in the index illustrate this problem. Inadequate limits on the daily or weekly hours of work may lead to adverse health costs associated with excessive hours of work borne by employees and their families and society more generally, and may well have adverse economic consequences for the individual employer. Likewise, an employer who does not give advance notice of a proposed retrenchment may provoke strike action which has adverse economic consequences.

Another premise on which the DB paradigm is founded is that poverty and high unemployment can be ascribed in whole or in part to labour market regulation, and that the reduction of regulation will lead to higher levels of investment and employment. However, there is an extensive body of literature indicating that these assumptions are unproven and not supported by the extensive literature on the subject. This literature suggests that the relationship between employment protection legislation (EPL) and employment levels is considerably more complex than the DB survey suggests.

The DB survey is inconsistent with other World Bank publications that examine labour market issues, such as the *World Development Report 2006: Equity and Development*. This Report concluded that 'Unlike the markets for many commodities, labour markets generally are not competitive. ... This can lead to unfair and inefficient outcomes when the bargaining position of the workers is weak.' According to the Report, 'unregulated markets often result in underpaid workers, hazardous working conditions, discrimination against vulnerable groups and do not protect workers adequately against the risk of unemployment' while appropriate market regulation 'can improve market outcomes and lead to significant equity gains.' DB takes no account of the capacity of labour market regulation to produce greater equity.

A recent joint study by the WTO and ILO has described the literature on the impact of labour market regulation on the functioning of labour markets and their participants as 'extensive and contentious'. Nevertheless, it suggests there is consensus on the proposition that job protection provisions may reduce restructuring. The increased cost of reducing employment may lead to few dismissals in an economic down-turn while at the same time leading to a smaller employment in response to positive economic shocks.³⁷ This conclusion is consistent with a 1999 OECD study confirming the results of prior studies that there appeared to be little or no association

³⁷ M Jansen and E Lee *Trade and Employment: Challenges for Policy Research* (WTO, ILO, 2007).

between strictness of EPL and overall unemployment.³⁸ A 2004 study by the OECD emphasised the need to look at the rationale for the existence of employment protection as well as at its welfare consequences.³⁹ Employment protection should be considered not just as an exogenous cost for employers but as a comprehensive policy instrument that is able to resolve certain market imperfections with potentially positive welfare implications. As employment protection is one of the instruments available to protect workers against labour market risks along with unemployment benefit systems and active labour market policies, the study cautions that it is difficult to analyse the role of labour legislation in isolation.

Significant regional studies conducted by the ILO of countries in Central and Eastern Europe⁴⁰ and Latin America⁴¹ also suggest that there is no statistical correlation between the strictness of employment protection legislation and levels of unemployment. In Central and Eastern Europe, the ILO concludes that stricter and/or better enforced employment protection laws can be linked to higher labour market participation in the formal economy and could therefore contribute towards formalising the informal economy. In respect of Latin America, that labour market programmes contribute more concretely to alleviating the problems of the unemployed than 'indirect incentives' such as dismantling labour protection.⁴²

The comprehensive report of the ILO's Socio Economic Security Programme published 2004⁴³ conceptualises security as comprising income security, labour market security, employment security, work security, skills security, job security and voice representation security. The Report develops three sets of indicators to assess the various dimensions of security –

(a) *input indicators* which measure the national and international regulations protecting the various forms of security;

(b) *process indicators* which can measure the mechanisms or resources through which such 'inputs' are realised (eg: number of inspectors to monitor compliance with regulations; and

© *outcome indicators*, which are the measures of the effectiveness of the input and process indicators.⁴⁴

In contrast to this comprehensive analysis, the DB approach concerns itself solely with a limited set of "input indicators".

³⁸ OECD *Employment Outlook 1999* Chapter Two .

³⁹ OECD *Employment Outlook 2004* Chapter Two .

⁴⁰ Alena Nesporova 'Towards policies to reconcile labour flexibility with social cohesion' summarising research published in Cazes, S. and Nesporova, A., *Flexicurity – a relevant approach for Eastern Europe?* (ILO Geneva, 2006).

⁴¹ J Berg, C Ernst and P Auer *Meeting the Employment Challenge: Argentina, Brazil and Mexico in the Global Economy* (International Labour Office, Geneva, 2006) 132.

⁴² Programmes developed for 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 (A Marshall 'Labour market policies and regulations in Argentina, Brazil and Mexico: Programmes and impacts' (Employment Strategy Paper 2004/13, International Labour Office, Geneva, 2004).

⁴³ International Labour Office, 2004. 'Economic security for a better world.' Geneva, pages 1-449.

⁴⁴ ILO, 2004, pages 50-51.

3.1 Does the DB survey measure the actual costs of regulation?

The methodology used in the DB reports is to develop indicators for private sector development, covering the following areas: business entry, employment regulation, contract enforcement, creditor rights, credit information sharing systems and bankruptcy. Within each indicator, certain questions are identified to which, in most instances, there is a positive or negative answer. Countries are then given a positive (0) or negative (1) rating according to the answers, and their scores are added up. Based on the score achieved, countries are then ranked as to how ‘business friendly’ they are. Local professionals experienced in the relevant field are utilised to do the ratings.⁴⁵

The DB project describes its methodology as follows:⁴⁶

The study of laws and regulations is only the first step in the analysis conducted by the Doing Business team. The second step is verification and input from local government officials, lawyers, business consultants, and other professionals with hands-on experience with administering or advising on legal and regulatory requirements. Therefore, the data presented by Doing Business reflects *the actual requirements and costs that businesses face*, rather than a simple description of written laws and regulations. (Our emphasis)

We now consider the claim that the DB survey measures the actual costs of regulation as well as examining other methodological issues raised by the survey. We then consider the application of this methodology in the case of South Africa.

The claim that the use of this methodology makes it possible to measure actual costs was made by Botero et al in respect of their study, and has been criticised by Deakin.⁴⁷ Deakin suggests that what Botero et al claim are actual costs are in fact inferences about the effects of laws upon the degree of flexibility available to the employer (or, conversely, the extent of protection for the worker). Thus if the law on dismissal, for example, restricts the grounds upon which termination may take place, the employer’s freedom of manoeuvre is less than if the law permits termination merely upon the giving of notice. However, as Deakin points out, the form taken by a particular law may not tell us much about the particular degree of flexibility available to employers. That may depend on factors outside the scope of the labour index, including social and cultural norms beyond the law which governs dismissal. Deakin suggests that the social or economic effect of a given legal rule can only be understood by seeing rule law as part of a system of interlinked norms, some of which are extra-legal in nature.

Aherling and Deakin, among others, raise a further difficulty. The construction of any index raises the question of the weighting given to the different factors. However, in

⁴⁵ The methodology used by both Botero et al and Doing Business has been described as being ‘based on a rather simple bivariate correlation analysis.’ See S.Lee and D.McCann. ‘Measuring working time laws: Texts, observance and effective regulation’, in D.Kucera and J.Berg, ‘Labour market institutions in developing countries’ (forthcoming).

⁴⁶ See its website: www.doingbusiness.org

⁴⁷ Simon Deakin ‘Labour Law and Economic Development’ address to 19th Annual Labour Law Conference, Johannesburg, July 2006.

the DB survey the measures are unweighted. There is no attempt to explain the significance of each indicator within the overall context of labour market regulation. Moreover, the significance of each indicator within the national context may be different.⁴⁸

We agree with these methodological objections. Concrete instances of the effect of having unweighted factors are discussed below. The DB index ignores the fact that many of the real impacts of a law may stem from the way it is interpreted or applied by functionaries such as arbitrators, judges, labour inspectors, stakeholders such as employers, employees and trade unions, as well as professionals such as labour consultants and lawyers. As we point out later, the World Bank has accepted that some of the costs of unfair dismissal law in South Africa arise from ‘misinterpretations’ of the law.

It may be difficult to quantify or compensate for certain of the variables, or extra-legal factors, concerning the application of legislation. On the other hand, there are certain variables which are quantifiable. It should in principle be possible, for example, to quantify the time taken to resolve disputes, or the degree to which regulations are enforced. It should also be possible, albeit with more difficulty, to quantify the costs of litigation. Given the importance attached to legal origins and the predilection for common-law systems expressed in both the DB survey and the study by Botero et al, it is indeed extraordinary that there is no consideration given to the comparative costs of litigating in civil-law and common-law jurisdictions. Anecdotal evidence suggests that the latter may well be more costly.

Other studies of the impact of labour legislation do seek to measure the impact of both formal and non-formal protections. The studies of employment protection legislation (EPL) conducted by the OECD in its *Employment Outlook* publications seek to measure a variety of institutional arrangements that provide employment protection. These include the private market, labour legislation, collective bargaining agreements and judicial interpretation of legislative and contractual provisions. This approach has been utilised by the ILO in studies measuring the level of flexibility and security in the transition economies of Eastern Europe.⁴⁹ In a similar vein, a 2000 article in the *International Labour Review* points out that EPL indicators based on the legal constraints that apply in each country are ill-suited to tracking differences in the degree of enforcement of employment protection laws.⁵⁰ The authors point out that differences in enforcement may be more marked than differences in the content of regulations, and play a crucial role in the workings of labour markets. .

3.2 The DB methodology applied to labour legislation in South Africa

Questions of law are often not amenable to a simple positive or negative answer. Even among professionals, there may be scope for disagreement. In the section that follows, we shall examine how these questions were addressed in the case of South Africa.

⁴⁸ Aherling and Deakin, 2005. See note 10 above, page 19.

⁴⁹ See S Cazes & A Nesperova *Labour Markets in Transition: Balancing flexibility and security in Central and Eastern Europe* (ILO, Geneva, 2003).

⁵⁰ G Bertola, T Boeri & S Cazes ‘Employment Protection in industrialized countries: The case for new indicators’ 139 (2000) *International Labour Review* 57-72.

In what follows we consider how the DB survey has in fact been applied in the case of South Africa, in respect of what the survey terms employment regulation.

Employment regulation encompasses a range of topics relating to the individual contract of employment, and is distinguished from social security laws, industrial relations and workplace safety.⁵¹ The introductory comments on employment regulation are also illustrative of the general approach. On the one hand, employment law protects workers from arbitrary, unfair or discriminatory actions, and corrects ‘apparent market failures’. On the other hand, if employment regulation is too rigid, it lowers labour force participation, increases unemployment, and forces workers into the informal economy.⁵²

Three indices have been constructed to measure employment regulation, namely the ‘difficulty of hiring’ index, the ‘restrictions on expanding or contracting the number of working hours’ index, and the ‘difficulty of firing’ index which, curiously, is exclusively concerned with the situation of redundancy. The average of the three indices provides a ‘rigidity of employment’ index. Sub-Saharan Africa does not fare well on this index. Compared with a rating of 23 for East Asia and the Pacific, it scores 47,1. Within Southern Africa, South Africa scores 41, Swaziland 17, Mozambique 54, and Namibia 27.⁵³ A country report that became available on the web in October 2007 indicates that South Africa’s rigidity of employment index remains practically unchanged for the Doing Business Reports in 2006, 2007 and 2008 (it was at 41 in 2006 and is now 42). There has also been no change in its non-wage labour costs and firing costs .

3.2.1 The ‘difficulty of hiring’ index measures

According to the report, this measure is concerned with hiring by means of part-time or fixed-term contracts. Part-time work, it argues, is attractive to businesses where countries exempt part-time workers from the benefits that apply to full-time workers,⁵⁴ and because part-time contracts are easier to terminate.⁵⁵ At the same time they are attractive to employees who value flexible work schedules, such as students, women and youth. However, there is in fact no attempt to rate legislative measures intended to promote part-time work.⁵⁶

The focus of the enquiry is on fixed-term contracts, which merit two questions. As noted in the report, many countries allow fixed-term contracts only for specific tasks, notably countries in Latin America and Southern Europe, while others limit the duration of fixed-term contracts. It is against this background that the particular indices the Bank uses must be understood.

⁵¹ In the 2004 report, the WB promises that the 2005 report will cover social security laws, and the 2006 report will cover industrial relations and workplace safety.

⁵² DB 2004, report, 29-30.

⁵³ www.doingbusiness.org. These are 2006 scores..

⁵⁴ Namibia is cited as an example, along with France, Japan and Romania.

⁵⁵ No authority is offered for this proposition, although it may well be true in practice if not in theory.

⁵⁶ This is in contrast to the study by Botero et al.

(i) *Whether term contracts can be used only for temporary tasks*

South Africa is rated negatively on this question, as a country that permits fixed-term contracts only for temporary tasks. This is not correct. There is no prohibition in the law on the use of a fixed-term contract for any type of task and for any type of employment. For instance, widespread use is made of fixed-term contracts for probationary periods, in terms of which the employee is hired on an indefinite basis at the end of the probationary period. In addition, many employees are employed on fixed-term contracts in positions where it is considered appropriate that people should not occupy the post indefinitely. Widespread use is made of fixed-term contracts by temporary employment services, contract cleaning firms and security services, among other sectors, even where the employees concerned are in effect employed indefinitely. In addition, the SDA specifically allows fixed-term contracts to be used for employing unemployed persons parting terms of a learnership. These contracts terminate automatically on completion of the learnership.

In the light of this, we can only assume that the statement that South Africa permits fixed-term contracts only for temporary tasks arises from the fact that there are circumstances in which an employer's failure to re-hire an employee at the end of a fixed-term contract may amount to an unfair dismissal. However, this does not amount to a prohibition on the use of fixed-term contracts for tasks other than temporary tasks. An employee can only claim that the failure to renew a fixed-term contract amounts to an unfair dismissal if the employee is able to show that he or she in fact expected the contract to be renewed, and that the expectation was reasonable.⁵⁷ In the absence of these circumstances (which the employee is required to prove), the failure to renew a fixed-term contract is not an unfair dismissal.

Available evidence indicates that widespread use is made of fixed-term contracts by South African employers and that an extremely small percentage of decisions by employers not to renew contracts are, in fact, challenged as unfair dismissals.⁵⁸ This indicates that, contrary to the DB rating, employers in South Africa have a considerable level of *de jure* and *de facto* flexibility to employ workers under fixed-term contracts.

(ii) *The maximum cumulative duration of term contracts*

The incorrectness of the previous answer is also shown by the answer to the next question in the difficulty of hiring index, which relates to the maximum cumulative duration of term contracts. Here South Africa scores positively, since there is no such

⁵⁷ Section 186 (1)(b), LRA.

⁵⁸ An indication of the extent of the use of temporary employment contracts can be obtained from the Annual Report of the Commission for Employment Equity which analyses reports, which include information concerning terminations made by large employers, under the Employment Equity Act. The 2006 Report analysed reports made in October 2005 and the reports of 2085 employers employing a total of 2365259 employees with an average size of 1134 employees were analysed. This equates to approximately a quarter of those in formal employment as measured by the *Labour Force Surveys*. The October 2005 reports show that 23% of terminations (72 352 out of a total of 336 399) were occasioned by non-renewal of contracts. (Terminations include resignations). According to the 2004 Employment Equity Reports 85,754 (26%) out of a total of 329,077 terminations were due to non-renewal of contracts. In contrast, only 6% of the approximately 80 000 dismissal cases referred to the CCMA annually are identified as being about 'contract renewal'.

limitation. This is a further indication that the rating given to South Africa on the previous question is incorrect. If ‘term’ contracts can only be used for temporary tasks, then the maximum cumulative duration of term contracts logically must be period for which the temporary task endures.

The fact that the survey focuses on the issue of ‘term’ contracts in assessing the ‘difficulty of hiring’ is indicative of the fact that many European and Latin American countries had restricted the types of work that could be performed in terms of ‘term’ contracts. The removal of these restrictions was one of the key areas of labour market reform in these countries in the 1980s and 1990s. However South Africa has never sought to regulate fixed-term contracts in this manner. Its approach in this regard can perhaps be described as *laissez faire*.

The fact that two out of three questions that constitute the difficulty of hiring index deal with this issue reflects the importance attached to the regulation of fixed-term contracts in civil-law systems. In a country such as South Africa there are many other mechanisms by which flexibility can be (and is) achieved; these include hiring part-time workers or engaging workers through Temporary Employment Services. The failure to weight the questions regarding fixed-term contracts means that the result reflects whether a particular form of flexibility is available to employers and says nothing about the overall level of flexibility of hiring.

(iii) *The ratio of the mandated minimum wage for a trainee or first-time employee to the average value added per worker*

The apparent rationale for including this question as part of the difficulty of hiring index is that the lower the ratio between the wage that an employer is required to pay a new employee and the average value added per worker, the more likely an employer is to employ new employees. The average value added per worker serves as an indicator of productivity.

The average value added per worker can be determined from national statistics, although it is debatable how much store can be set by this calculation in developing countries where there is limited capacity to produce accurate statistics. But is there something in South Africa that could be described as a ‘mandated minimum wage for a trainee or first-time employee’? Bargaining council collective agreements and sectoral determinations do set minimum wages which would apply to all employees within their scope, including new entrants. Yet, as we indicate below, most employees are not covered by bargaining council agreements.⁵⁹

The only legislative provision that specifically applies to trainees is Sectoral Determination 5 which prescribes the minimum allowance payable to learners during a learnership, which is calculated as a percentage of the wage the learner would receive if qualified.⁶⁰ This would only amount to a “a mandated minimum wage” if there is an applicable bargaining council agreement or sectoral determination. There

⁵⁹ S. Godfrey, J.Maree and J.Theron. 2006. Presently there is only one sectoral determination applicable to the manufacturing sector which is for the clothing and knitting sector.

⁶⁰ There are 14 different scales, depending on what qualification a learner is seeking to attain. Section 3, Sectoral Determination 5.

are further reasons why the allowance for learners cannot be termed a mandated wage as contemplated by the DB survey. It is only applicable to a limited group of trainees and new entrants, namely, those employed in terms of a formal learnership agreement for the purpose of completing an approved learnership. The majority of new entrants and trainees are not employed as learners. Moreover the engagement of learners is very significantly incentivised. Employers may obtain subsidies from their SETA to cover both the costs of a learnership and the learner's allowance and there are significant tax incentives for employers who engage learners.⁶¹ Learners engaged in these circumstances do not acquire a right to employment beyond the period of the learnership. Accordingly, it is highly inappropriate that a scheme to incentivise employment of learners should be classified as a 'mandated minimum wage'.

It follows from this that it is not possible to state as a general proposition what constitutes the applicable mandated minimum wage for a trainee or first-time employee. The assumptions on which the question is premised are thus critical to ascertaining whether it has been correctly answered. This in turn has a bearing on the transparency of the index and the weight that can be attached to the answer. If the assumptions on which the DB survey purports to be based are in fact of limited application, then limited weight can be attached to the answer. This, we suggest, is the case of South Africa and may well be true of other countries that regulate minimum wages, but do not do so comprehensively.

The putative employer in the DB survey is assumed to be based in the largest city (ie Johannesburg) in the manufacturing sector. This employer is assumed for the purposes of the Survey to be subject to collective bargaining agreements if collective agreements cover more than half the manufacturing sector.⁶² Recent research establishes that within the manufacturing sector, only about 30 percent of those employed are covered by bargaining council agreements. But this is probably not known outside the community engaged in labour market research, which evidently was not consulted in the DB survey.⁶³ The best available answer is thus that the putative employer is not covered by a bargaining council agreement, and that there is therefore no 'mandated minimum wage'. On this basis, South Africa should have received favourable zero rating on this factor.

South Africa's ratio was calculated as being 0.46 in 2006 and 0.67 in 2007. The basis for this calculation is not apparent from either the reports or the website and there is no published or accessible information indicating what assumptions were made or why there is such a large increase between the two years. These difficulties indicate why the rating provides no guidance about the real difficulty associated with hiring employees.

3.2.2 The rigidity of hours index

⁶¹ 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.

⁶² If a collective agreement did apply, it would still beg the question as to which rates apply, in that there are different rates for entrants in different positions.

⁶³ According to the Labour Force Survey (March 2006) 1 726 000 were employed in manufacturing while less than 700 000 employees in manufacturing are covered by bargaining council agreements.

The DB survey identifies five issues concerning conditions of work amongst a potentially far more extensive list, in order to rate employment conditions. The report does not explain why these five issues were selected, or why the issues are treated in the particular way they are. Thus in the case of night work, there is no regard to the fact there is an international standard in the form of the ILO's Night Work Convention. In general, it appears the survey is oblivious to the prescripts of international law. On the other hand, in the case of annual leave, the survey implicitly assumed that 21 days is an internationally acceptable standard.

(i) *Whether night work is unrestricted*

In the DB reports this question is sometimes phrased as concerning whether night work is 'allowed' and on other occasions whether it is "unrestricted".⁶⁴ There is a very significant difference between allowing night work and restricting it. Certainly South Africa, like all other countries in the world, allows night work. If it did not do so, night work would be illegal. Yet it has scored a negative rating on this question, presumably because it restricts it.

Although this is not apparent from either the DB reports or its website, according to Lee and McCann a country is regarded as restricting night work if by law or mandatory collective agreement: (i) there are restrictions on the maximum hours of work that can be performed at night; and/or (ii) there are specific premiums for night-time work.⁶⁵ However, South Africa's BCEA does not impose any specific limitations on the number of hours that can be worked at night, nor does it require the payment of a 'specific premium' for work at night. It does however require that some compensation must be paid, which may take the form of 'an allowance, which may be a shift allowance, or by a reduction of working hours'. No specific level of allowance is stipulated and the precise formula for determining compensation for night work is determined by individual or collective agreement.⁶⁶

Accordingly, on the content of the BCEA alone, South Africa should not receive a negative rating for restricting night work. It could only receive this rating if a mandatory collective agreement either limited the hours of work that employees may work at night or set a specific night work allowance that employers must pay. There are some collective agreements that impose premiums for night work, but as indicated in the comments in the previous section, these do not apply to the majority of workers in the manufacturing sector.

South Africa's rating on this score illustrates the anomalies caused by the simplistic 'binary code' scoring system adopted by the DB survey. South Africa receives the same rating as a country that prohibits all work at night, or work by women at night, or in which legislation imposes a mandatory pay premium for night work in all sectors of the economy. This is the case even though South Africa does not limit the hours that can be worked at night, but seeks to ameliorate progressively the social costs associated with unregulated night work.

⁶⁴ See, for example *Doing Business*, 2004 at p 31.

⁶⁵ This formulation of the question is contained in S. Lee & D. McCann, note 45 above, at 9. It is not apparent from either Botero et al or any of the *Doing Business Reports* or its web-site.

⁶⁶ Section 17, BCEA, 1997.

The question posed in the DB Survey assumes that night work is either ‘restricted’ (in which case the country receives a negative rating) or ‘unrestricted’ in which case the country receives a positive rating. This fails to take into account that there are a gradation of approaches to the regulation of night work that range from its absolute prohibition for all or some workers to approaches that permit night work, seeking to minimise its negative social and economic consequences.

The 2007 DB survey announced a change of methodology for three of the topics surveyed, including the topic of employing workers at night. Apparently in response to criticisms of the type outlined above, it indicates that it is now possible for an economy to receive the highest score on the ease of employing workers and comply with all 187 ILO Conventions. Accordingly “restrictions on night work such as higher overtime premiums or limitations on scheduling work hours are no longer coded as rigidities.”⁶⁷ However, this has not led to a change in South Africa’s 2007 rating on the issue of night work even though South Africa’s approach closely reflects the requirements of the relevant ILO Convention. The fact that there has been this shift in approach strengthens the argument that South Africa is incorrectly rated on this question. Alternatively, it indicates that DB has still not yet fully appreciated the implications of the relevant ILO Conventions.

(ii) *Whether weekend work is unrestricted (Are there restrictions on ‘weekly holiday’ work?)*

South Africa is classified as restricting weekend work. These restrictions are found in section 15(1)(b) of the BCEA which provides that the weekly rest period must be on a Sunday unless otherwise agreed, and in section 16 which requires premium pay for Sunday work.

(iii) *Whether the work week can consist of 5.5 days*

South Africa receives a positive rating on this question, presumably because the working week can consist of 5.5 days, or even six days, depending on the hours worked.

(iv) *Whether the work week can extend to 50 hours or more (including overtime) for 2 months a year*

South Africa receives a positive rating on this question, presumably because the maximum number of hours an employee may work in any week is 45, and the maximum number of overtime hours is ten which can be increased to 15 by collective agreement for up to two months a year. However the reality is more complex, with some sectors having a lower maximum than 45. A recent study points out that on this issue the DB survey seems to confuse limits on normal hours (ie hours worked before overtime) and maximum limits (on all working hours, including overtime).⁶⁸ It has

⁶⁷ See www.doingbusiness.org/MethodologySurveys

⁶⁸ See S. Lee and D. McCann, note 45 above.

also been pointed out that as a result of the imprecision of the question, this is an instance where several ‘correct’ answers are possible.⁶⁹

(v) *Whether paid annual vacation is 21 working days or fewer*

South Africa receives a positive rating on this question, since the minimum paid leave prescribed by the BCEA is 21 consecutive days.

3.2.3 *The ‘difficulty of firing’ index*

We have already noted that this index focuses exclusively on situations of redundancy. This is in contrast to the study by Botero et al, which also encompasses dismissals without cause. We suggest that most employers would not expect redundancy to be the focus for an investigation into the difficulty of firing, in the South African context. Indeed a focus on redundancy appears to manifest the concerns of a foreign investor, concerned with ease of entry into and exit from an economy, rather than the costs employers in general face. There is strong evidence suggesting that in the South African context these costs are determined to a greater extent by cases of misconduct, rather than redundancy.

(i) *Whether redundancy is disallowed as a basis for terminating workers*

South Africa receives a positive rating on this question, since an employer is allowed to terminate employment for reasons of redundancy.

(ii) *Whether the employer needs to notify a third party (such as a government agency) to terminate one redundant worker*

South Africa receives a negative rating on this question. This rating is incorrect. The question posed is ‘whether the employer needs to notify a third party (such as a government agency)’. It is true that there is an obligation on an employer who is contemplating dismissing one or more employees on account of its operational requirements to consult with a trade union or workplace forum. Although there is no indication in DB as to what organisations are classified as ‘third parties’, the paper by Botero et al uses the term ‘third party’ to include government departments, enforcement and regulatory agencies, trade unions and structures such as works councils. This all-embracing concept of ‘third party’ assumes an equivalence between an obligation to notify a government department and an obligation to notify a trade union in order to initiate consultations, and is indicative of an approach that sees any restriction of employer prerogative as having negative consequences.

However in ascertaining the employer’s obligations under SA law, it must be borne in mind that one of the assumptions of the DB indices is that the employee is not a trade union member. The obligations to give notice in respect of proposed redundancies are set out in section 189(1) of the LRA. The only circumstances in which the employer would be required to give notice to a ‘third party’ in respect of the proposed redundancy of an individual employee who is not a union member would be if a workplace forum had been set up in the workplace. As virtually no workplace forums

⁶⁹ J.Berg and S. Caze, 2007.

have been set up, there is in practice no obligation on employers to consult with a third party as contemplated by the study.

A possible explanation for the rating received by South Africa is that the respondents did not take into account the fact that the employee concerned was a non-union member and, therefore, based their answer on the fact that an employer would have to give notice to a trade union of its intention to retrench a union member. This again illustrates the extent to which the particular assumptions affect the rating one way or the other.

(iii) *Whether the employer needs to notify a third party to terminate a group of more than 20 redundant workers*

South Africa receives a negative rating on this question. Whether this answer is correct depends upon factors that are not clarified in the survey. If, as in the case of the individual employee, it is assumed that the employees concerned are not trade union members then the answer is incorrect for the reasons set out in answering the previous question. The obligation to give notice to a trade union of impending retrenchments extends to notifying a trade union 'whose members are likely to be affected by the proposed dismissals'. If the employer is proposing to dismiss 20 non-union members there would accordingly be no such obligation. If on the other hand, some or all of the employees were trade union members, the employer would be obliged to notify the trade union.

(iv) *Whether the employer needs approval from a third party to terminate one redundant worker*

South Africa receives a positive rating on this question, on the basis that an employer is only required to consult regarding the necessity to dismiss for operational reasons. Approval is thus not required.

(v) *Whether the employer needs approval from a third party to terminate a group of more than 20 redundant workers*

South Africa receives a positive rating on this question, for the same reason as in the previous question.

(vi) *Whether the law requires the employer to consider reassignment or retraining options before redundancy termination*

South Africa receives a negative rating here. This is correct, insofar as section 189(2)(b) of the LRA obliges an employer to disclose to the parties that it is required to consult with over a retrenchment the alternatives that it considered before proposing to dismiss employees on account of operational requirements as well as the reasons for rejecting these alternatives. However, as the obligation on the employer is merely to consider reassignment or retraining options, there is doubt whether this constitutes an actual rigidity. An employer will only offer reassignment or retraining to an employee if it is economically rational for the employer to do so.

(vii) *Whether priority rules apply for redundancies*

South Africa receives a negative rating on this issue in 2006. Presumably, this is because section 189(7) of the LRA requires the employer to select which employees to dismiss in a retrenchment in terms of criteria that have either been agreed upon in consultations or which are fair and objective. In addition, the *Code of Good Practice: Dismissal* sets out criteria which are generally accepted to be fair, which include the principle of seniority articulated through the ‘last in-first out’ principle.⁷⁰ However the Code is permissive, and emphasises that each case is unique. The conclusion that South Africa has priority rules would appear to have been based on the case law interpreting the legislation, which is not permissible in terms of the DB methodology, and gives rise to a further question as to the efficacy of these rules were. In 2007, South Africa’s rating was changed on this issue to a positive rating.

The report gives no further indication of what is regarded as a ‘priority rule’. However, it appears that a country receives a negative rating if there is any restriction on the employer’s ability to select the employees who are to be retrenched.

(xiii) Whether priority rules apply for reemployment

South Africa receives a positive rating on this question. Although the assumptions on which the question is premised are not fully spelt out in the report, it is presumably to address a situation where an employer, having retrenched, decides to employ again. If the employer offers to re-employ some of the same workers who were retrenched, but fails to make the same offer to all of them, the employer could face a claim of unfair dismissal. The definition of dismissal contemplates precisely such a situation.⁷¹ Whether this constitutes a ‘priority rule upon re-employment’ is debatable. However it appears somewhat inconsistent to find that it does not, given the previous rating.

⁷⁰ See section 12(9) *Code of Good Practice: Dismissal*.

⁷¹ See section 186(1)(d), LRA.

3.3 Summarising the results of the ‘Doing Business’ survey

From our analysis of the DB survey as applied to South Africa, it appears that two out of the three ratings for the ‘difficulty of hiring’ index are incorrect, one out of five of the rigidity of hours is incorrect and three out of eight of the ratings in the ‘difficulty of firing’ index are incorrect. This is a significant level of error which could alter South Africa’s overall standing in the ‘rigidity of employment’ index.

Table One below follows the same format used in the DB report, and comprises two sections: The three indices that comprise DB’s ‘rigidity of employment index’ (discussed above) and a table in which certain ‘non-wage costs’ are listed. In the Table we compare the DB survey’s 2006 and 2007 scores in the case of South Africa with those of the authors as explained above.

There are two significant differences between the 2006 scores and those for 2007. As already indicated, the ‘ratio of the mandated minimum wage to the average value added per worker’ in the ‘difficulty of hiring’ index is significantly worse in 2007 than in 2006. However, no data is supplied to support such a score. The other difference is that the answer to the question on whether there are priority rules on redundancy, has changed from ‘yes’ to ‘no’ indicating that it had been incorrectly scored in previous years.

Where there is in the authors’ opinion room for debate regarding the correct answer to any question, the answer is marked with an asterisk. Where the score has changed from 2006 to 2007, as indicated above, this is indicated with a double asterisk.

	Answer	Score	Author’s Answer	Author’s Score
Difficulty of Hiring Index		44		?
Can term contracts be used only for term tasks?	Yes	1	No	0
What is the maximum duration of term contracts? (in months)	No Limit	0	No limit	0
What is the ratio of mandated minimum wage to the average value added per worker?	0.46**	0.33	No data	?
Rigidity of Hours Index		40		20
Can the workweek extend to 50 hours (including overtime) for 2 months per year?	Yes	0	Yes*	0
What is the maximum number of working days per week?	6	0	6	0
Are there restrictions on night work?	Yes	1	No	0
Are there restrictions on ‘weekly holiday’ work?	Yes	1	Yes	1
What is the paid annual vacation (in working days) for an employee with 20 years of service?	15	0	15	0
Difficulty of Firing Index		40**		20
Is the termination of workers due to redundancy legally authorized?	Yes	0	Yes	0
Must the employer notify a third party before terminating one redundant worker?	Yes	1	No	0

Does the employer need the approval of a third party to terminate one redundant worker?	No	0	No	0
Must the employer notify a third party before terminating a group of redundant workers?	Yes	1	No*	0
Does the employer need the approval of a third party to terminate a group of redundant workers?	No	0	No	0
Must the employer consider reassignment or retraining options before redundancy termination?	Yes	1	Yes*	1
Are there priority rules applying to redundancies?	Yes**	1	No*	0
Are there priority rules applying to re-employment?	No	0	No	0
Rigidity of Employment Index		41**		?
Hiring and firing costs (2006)		Score		
Nonwage labor cost (% of salary)		2.4		
What is the notice period for redundancy dismissal after 20 years of continuous employment? (weeks of salary)		4		4
What is severance pay for redundancy dismissal after 20 years of employment? (months of salary)		4.6		4.6
What is legally mandated penalty for redundancy dismissal? (weeks of salary)		0		0
Firing costs (weeks of wages)		24		

The extent of errors reflected in the above may indicate that the “local” professionals engaged for the DB survey were not properly briefed on the survey’s methodological assumptions, or that compliance with these assumptions was not monitored. However, the errors also reflect methodological problems with the survey: the simplistic notions of law that underpin the questions; the ‘either/or’ formulation of questions and the ambiguity of some questions, as well as the contrived nature of the assumptions that are made. If the indicators are so misleading in the case of a comparatively well-resourced country (by developing country standards), it is likely that answers from other countries are no less misleading.

As we have suggested, the questions in the survey, and the assumptions underlying those questions, reflect an identifiable bias. In the case of the ‘difficulty of firing’ index, it reflects a bias toward the issues that might concern foreign investors, rather than the actual costs to businesses more generally. Likewise, the issues interrogated by the questions concerning contractual arrangements in the ‘difficulty of hiring’ index likewise reflect a preoccupation with issues that have predominated in debates about labour market reforms within countries with civil-law systems and do not give a useful indication of the level of regulation within common-law systems. For these reasons, the Survey has little value in debates about the future direction of SA labour law.

3.4 'Doing Business' and labour law reform

One of the explicit purposes of the DB publication is to assist countries to introduce labour law reforms that would stimulate business activity and thereby attract investment. This is made explicit by the 2007 report which carries the sub-title 'How to Reform'. Yet despite the report's ostensible recognition of the need to assess the *quality* of regulation, its methodology is unable to take this into account. Instead, law is viewed from the 'outside' as an undifferentiated whole, and no account is taken of different regulatory strategies. Consequently the DB indices do no more than measure the *fact* of regulation, in respect of the issues it identifies as relevant.

For example, a country is rated in the same way if it requires an employer to notify a labour inspector about possible redundancies or if it is required to consult with trade unions or workplace councils on redundancies. From the perspective of the DB survey, both requirements impact negatively on flexibility and therefore lead to the country receiving a negative score. The fact that an obligation to consult with trade unions over redundancies may lead to disputes being resolved by agreement, and historically has led to a reduction of strikes over redundancies (in countries such as the UK and South Africa), is not a factor that is (or can be) taken into account by the DB survey. As is pointed out above, the questions concerning night work are phrased inconsistently.⁷²

The inability of the DB survey to assess the quality of regulation or whether regulation is appropriate is in part attributable to its reliance on 'yes/no' answers to questions to which a graduated response is appropriate. As already indicated, 13 of the 16 indicators of labour market regulation elicit a 'yes/no' response. In each instance the existence of any regulation, in the circumstances envisaged in the assumptions on which the study is premised and irrespective of the content of that regulation, gives the country a negative rating.

The only way for a country to improve its rating in respect of these questions is to repeal its regulations on the topic. The effect is that the DB survey does not promote an informed debate on what the appropriate content of regulation should be. In effect it proposes wholesale deregulation on the topics it has selected to include in the survey.

The DB survey's role as protagonist of deregulation is clearly seen in the questions that comprise the rigidity of hours index. A country receives a positive rating if it provides employees with three weeks' annual leave or less annually. It receives this rating irrespective of whether the mandatory leave period is three weeks (as in the case of South Africa) or a shorter period or if employees have no entitlement to leave. Implicit in the question is an assumption that a statutory leave period of more than three weeks is unduly rigid. However, what is absent is an equivalent assumption as to what the minimum entitlement to annual leave should be. This failure is evident in the two questions about the length of the working week in which countries are given a negative rating if their level of regulation is too restrictive. But there is no equivalent

⁷² The question posed in the rigidity of hours of work index is sometimes phrased as: 'Are there *restrictions* on night work?' and sometimes as 'whether night work is *allowed*' (see, for instance, *Doing Business in 2005* at 28).

negative rating that applies to countries who fail to set an appropriate minimum standard or have no standard.

Likewise, a country that gives employees a weekly rest period of one or one and a half days receives the same rating as a country in which there is no entitlement to a day off per week. As a result, a country is penalised if it requires a weekly rest period that is too long (two days per week in the view of the report) but not if it fails to require a weekly rest period.

There is a clear inconsistency between the text of the DB reports and the design of the survey. The texts contain a number of statements about the nature of labour law which reflect broadly accepted notions of labour law held by all except the most extreme of free marketers. On numerous occasions the reports state that the purpose of employment law is to protect workers from arbitrary, unfair or discriminatory actions by their employers. Similarly, the 2004 report accepts that the fundamental principles of the ILO on freedom of association, collective bargaining, the elimination of forced labour and child labour and the elimination of discrimination in hiring and work practices are *necessary for the effective functioning of labour markets*.

However, the questions in the survey which lead to the scoring of a country do not interrogate whether regulation on a particular topic is in any way concerned with protecting workers from arbitrary, unfair or discriminatory actions by employers. Again it is useful to refer to a practical example. One of the questions posed as part of the difficulty of firing index is whether there are priority rules applying to redundancies. A country that has priority rules receives a negative score (1) while a country that does not have priority rules receives a positive score (0). Priority rules may take a range of different forms, ranging from the undifferentiated application of seniority to a requirement that redundancies are determined in accordance with objective criteria. The purpose of priority rules is to protect employees from arbitrary and discriminatory action by the employer. In the absence of priority criteria of some sort, an employer is free to select employees for redundancy on arbitrary and discriminatory grounds such as gender, race, disability or trade union membership. There are circumstances in which a particular formulation of priority rules may be economically irrational and accordingly too rigid. This would be the case if employers were required to apply seniority principles irrespective of the employer's need to retain skills.

The clear implication is that an index must be able to interrogate the actual content of priority rules to ascertain whether they are able to serve the twin purposes identified in the DB reports of protecting workers from arbitrary or discriminatory actions by employers, without at the same time imposing irrational economic costs on employers. In other words, do the particular priority rules of a given country balance the employee's need for security with the employer's need for flexibility? An index assessing the appropriateness of priority rules would therefore have to contain a series of questions addressed to the content of the rules. Questions would include:

- (a) Is the employer prevented from dismissing employees on discriminatory grounds?
- (b) Is the employer able to retain employees who have skills that the employer requires?

The DB index does not even purport to do this. Its concern is solely whether or not there are priority rules. Even priority rules aimed solely at preventing arbitrary or discriminatory actions by employers result in a negative rating on this question.

There is also a significant disjuncture between the acceptance in the text of the DB reports of the importance of core labour standards for the functioning of markets and the design of the labour indices. The DB indices take no account of the need for a legal system to address both the need for equity (such as protecting employees against arbitrary or discriminatory actions by employers) and economic efficiency. As a result, a country wishing to improve its rating would be required to repeal regulations even where those regulations are consistent with ILO core standards or are necessary to protect employees from discrimination or arbitrary decision-making.

According to the International Confederation of Free Trade Unions (ICFTU), the DB survey is used by the World Bank and IMF to pressurise countries to make hiring and firing decisions more flexible and to eliminate measures that have been put in place to implement core labour standards, such as programmes to end discriminatory practices.⁷³ The ICFTU points out that the recommended 'streamlining' of hiring and dismissal procedures in South Africa would South Africa to repeal its affirmative action rules to improve its rating.

The 2006 and 2007 editions of the DB report, launched in September 2005, contain an 'ease of doing business ranking' for all 155 countries surveyed, with countries being identified as 'best performer' and 'worst performer' in each category. The world's 'best performer' in terms of hiring and firing is the country that has the least amount of labour market regulation.

Deakin et al point out the clear implication of a ranking system is that countries with a lower rating will improve their economic performance if they abolish some or all of their labour laws. They conclude their article by stating that this conclusion "cannot validly be drawn from the present state of knowledge on the workings of labour law systems."⁷⁴

At the same time, the ratings are the ultimate proof of the intellectual poverty and deregulatory thrust of the DB Survey. Three illustrative examples from the 2007 Survey are –

- (a) Saudi Arabia, a country which does not allow freedom of association, the right to organize nor collective bargaining, in violation of ILO Fundamental Principles, has the best possible score of 0 for both Difficulty of Hiring and Difficulty of Firing on the Employing Workers index;
- (b) Georgia is singled out for making the "most far-reaching reforms" by easing the number of hours counted as overtime, discarding premium pay for

⁷³ Peter Bakvis 'Giving Workers the Business: World Bank Support for Labor Deregulation'; Bretton Woods Project 'Bank, Fund sidesteps labour standards, Promotes violation of worker rights'

⁷⁴ S. Deakin, P. Lele and M. Siems. 2007. 'The Evolution of Labour Law: Calibrating and comparing regulatory regimes.' 1-44

- overtime and eliminating the requirement to notify unions before firing redundant workers;
- (c) Small island nations such as the Marshall Islands and Palau, neither of which are members of the ILO, are including in the top ten countries for Employing Workers. The Marshall Islands have no legislation concerning maximum hours of work or occupational safety and health and Palau has no minimum age for employment.

In 2008, the Marshall Islands remain the “best ranked” economy for employing workers followed by Brunei, Georgia and Tonga. South Africa, a democratic country with a labour regime that is reflective of ILO standards receives a less favourable rating on the ‘rigidity of employment’ index than Swaziland, an absolute monarchy where trade unions are repressed.

These results are not anomalies. In the words of six US Senators who wrote a public letter to the President of the World Bank criticising the DB Survey, this amounts to “rewarding lax or non-existent labor standards”.⁷⁵

SECTION 4: DEVELOPING INDICATORS FOR SOUTH AFRICAN LABOUR MARKET REGULATION

For all its faults, it would clearly be short-sighted to simply disregard the DB survey’s endeavours to benchmark regulation. Any attempt to benchmark regulation will be subject to the limitations discussed in section 2, but this does not invalidate the endeavour altogether. One must also not lose sight of the methodological advance that the DB survey represents over other studies that enjoy a high profile in international debates: it is not based merely on perceptions.

In this section, we discuss what would, in our opinion, be appropriate issues or topics for which to develop indicators of labour market regulation. Such indicators could be developed as part of an investigation that seeks to be comprehensive and overarching, in the same manner as the DB survey is. An alternative approach would be to develop indicators within distinct and identifiable categories such as those identified in the introduction to this paper

In what follows we consider the indicators that are appropriate in the different categories of labour regulation.

4.1 Categories of protected employees and regulated employers

Labour legislation in South Africa applies to almost all categories of employees, as defined. However this was not the case in the heyday of apartheid, as already noted. Indeed the development of our current legislation is a history of its progressive extension to categories hitherto excluded, such as employees in agriculture and domestic service. Even so, not all employees are equally protected by labour legislation. Employees in triangular employment relationships and other forms of non-standard employment, such as short-term contracts, are not able to benefit from

⁷⁵ The letter by Senators Richard J. Durbin; Joseph R. Biden, Jr.; Byron L. Dorgan; Christopher Dodd; Paul S. Sarbanes; Daniel K. Akaka is accessible at <http://www.50years.org/cms/updates/story/342>

employment protection to the same extent as workers in standard employment. The number of workers 'employed' in the unregulated informal economy is also growing.

The scope of application of labour market regulation is an overarching issue of critical importance, which must inform any interpretation of data relating to the other categories. For example, one could not claim to measure the impact of provisions of the legislation if one disregarded the fact that important categories of workers were in fact excluded. Similarly, if in fact there are low levels of compliance with labour legislation, this is surely a relevant consideration in determining its impact.

There are thus two issues for which it would be appropriate to develop indicators. In any authoritative comparative survey, there must be an indicator testing the overall scope of labour market regulation. For example, an indicator testing whether there was legislation regulating collective bargaining in the agricultural sector of a country would be indicative of its scope. The second issue relates to the extent to which legislation extends to cover non-standard forms of employment and informal employment.

The considerable challenges involved in providing effective protection to the increasingly diverse range of workers and working arrangements in contemporary labour markets has been a subject of extensive debate at the ILO, which in 2006 adopted the Employment Relationship Recommendation No. 198. The text of the Recommendation has been adopted as part of the *Good of Good Practice: Who is an Employee?* adopted by NEDLAC in terms of the LRA in December 2006, indicating its acceptance by all three NEDLAC constituencies. The Recommendation provides a set of criteria for measuring the steps that a country takes to ensure the adequacy of the coverage of its labour laws.

The adoption of the Recommendation is significant because of its acceptance that the coverage and efficacy of labour laws needs to be reviewed and, where necessary, adjusted to ensure an appropriate coincidence between regulation and the realities of different forms of arranging work. This dynamic has already entered South African law with the adoption in 2002 of the presumptions of employment which can be seen as a response to the rise of fraudulent 'independent contracting'.

Having regard to the provisions of the Employment Relationship Recommendation, as well as debates within NEDLAC regarding the Department of Labour's research on the rise of casualisation and externalisation within the workforce, it is possible to identify a number of relevant criteria which provide a benchmark for evaluating the response of individual countries, which include:

- (a) whether mechanisms exist for regularly reviewing the scope of labour law (in the sense of the categories of employees and employers covered) to assess its coverage;
- (b) whether the law provides guidance to parties on effectively establishing the existence of an employment relationship, and on the distinction between employed and self-employed workers;
- (c) whether there are specific protections for specific categories of workers likely to be affected by the uncertainty as to the existence of an employment relationship, including women workers, as well as the most vulnerable

- workers, namely, young workers, older workers, workers in the informal economy, migrant workers and workers with disabilities;
- (d) whether there is protection for workers who are not in employment relationships, but are in dependent contractual arrangements;
 - (e) whether there are circumstances in which the user or client, in a triangular employment relationship or a relationship involving multiple parties, may be held liable;
 - (f) whether employment standards applicable to all forms of contractual arrangements establish should clearly state who is responsible for the protection contained therein.

4.1.1 Regulation of contractual arrangements

The regulation of contractual arrangements more or less corresponds to the DB survey's category 'flexibility of hiring.' The South African legislation grants employers and employees complete freedom to enter into any kind of contract, other than to contract out of the provisions of the legislation or of a collective agreement.⁷⁶ At the same time one of the functions of labour legislation has been to redress the inequality of power between employers and employees. There has thus been a social cost to this freedom, which is the increased use of fixed-term contracts by temporary employment agencies and other service providers in what is characterised as the triangular employment relationship.

It has been argued that other forms of flexibility, such as part-time work, are not as detrimental to the employee's security of employment. The sectoral determination for the retail sector is a precedent for making provision for a form of part-time work, and also for providing for lesser benefits than apply to full-time workers.⁷⁷ Indicators that establish to what extent there are provisions that accommodate part-time work would provide a counter-weight to indicators concerning fixed-term contracts.

4.2 Hours of work and other conditions of employment

The problem with a cross-country comparison of the regulation of hours of work, as well as certain other conditions of work, is that there are a considerable number of possible permutations of provisions regulating hours of work. It is possible for legislation to stipulate minimum hours as well as maximum hours. Indeed the DB survey has been criticized for failing to differentiate between them.⁷⁸ There are also other provisions regarding overtime hours, rest intervals and meal breaks, amongst others, that directly relate to the computation of hours of work.

⁷⁶ Section 199. LRA.

⁷⁷ The Determination provides two models for employing workers who work less than 27 hours a week. The employee and employer may agree that the employee receive a wage that is 25% higher than the prescribed minimum wage. Employees who conclude such an agreement do not qualify for a night shift allowance, paid sick leave, family responsibility leave and only receive two weeks of annual leave, while other employees receive three. Part-time employees who do not conclude these agreements receive all benefits on a proportional basis.

⁷⁸ Lee, S and McCann, D. 2006. 'Measuring working time laws: Texts, observance and effective regulation', in 'D.Kucera and J.Berg, 'Labour market institutions in developing countries', ILO (forthcoming).

Yet other conditions of work, such as provisions relating to payment for over-time work, night work, and the various forms of leave to which workers are entitled, are commonly seen as part of a package of rights of which hours of work are a part. A problem with the DB survey is that it focuses on select provisions, and ignores their inter-relationship. Surprisingly, it also disregards the range of options open to businesses who for one reason or another wish to depart from legislated norms. In the South African case there is, for example, the possibility of variation provided in the BCEA.

We have already pointed out that in the case of hours of work and related conditions of work, it is essential to understand the policy goals of the regulation ie the benefits as well as the costs. More obviously, perhaps, than in the case of other regulations, long working hours are associated with negative effects on health and productivity. Moreover, workers working these long hours may be oblivious to these effects.⁷⁹

In the case of hours of work the disjuncture between the actual provisions of the legislation and what occurs in practice is also critical. For this reason, under the auspices of the ILO, a new ‘effective regulation index’ has been developed, to compare and measure both the statutory limit on hours of work, and the rate of observance.⁸⁰ The notion of effective regulation entails averaging the normalised values of statutory hours and observance rates, which range between 0 and 10. The notion of ‘observance’ is intended to be broader than conventional notions of enforcement, in that it captures the variety of ways in which legal norms can influence actual practice. At the same time it is distinguished from ‘compliance’, in that it does not require adherence to the technicalities of national laws and also recognises that legal standards may influence firms to whom legislation does not strictly apply.⁸¹

A measure such as this is clearly needed to take account of the complexities of the regulation of hours of work in South Africa, and the whole ‘package’ of conditions as well as its different components. At the same time it is also clear from this example that one could only arrive at such a measure by a process of dedicated research, which takes account of the complexities of the national context. The object ought, therefore, to be to produce indicators that are able to reflect these complexities. A rating arrived at by such a process is far more likely to influence a process of reform credibly. If, however, one is looking for a discrete comparator, it will necessarily have to be one that, considered in isolation, does not misrepresent the situation that actually prevails in the country concerned.

The most obvious such indicator is the number of days a year which a business is permitted to operate, or alternatively a worker is permitted to work, at normal rates of pay.

4.3 Security of employment and unfair dismissal protections

There is little doubt that perceptions that South African labour law is rigid are crucially bound up with the law on unfair dismissal and the capacity of the CCMA, in

⁷⁹ S. Lee and D. McCann, note 78 above.

⁸⁰ S. Lee and D. McCann, note 78 above.

⁸¹ S. Lee and D. McCann, note 78 above, 14 –15 and 18-19.

particular, to manage effectively the high level of dismissal disputes. For this reason any endeavour to measure provisions regulating security of employment and the resolution of dismissal disputes merit careful consideration. At the same time the issue of employment security illustrates certain dangers inherent in attempting to subsume it within an overarching investigation of labour market regulation.

This is firstly because a significant amount of information concerning the CCMA's case-load and its administrative achievement is available from the CCMA's CMS data-base. In addition, recent analyses of arbitration awards have sought to expand the information available on the outcome of arbitrations.⁸² This allows for an increasingly in-depth analysis of the impact of unfair dismissal law. Key information drawn from the CCMA's Annual Report and supplemented by information obtained from surveys of arbitration awards is set out in Table One.

Secondly, the approach to unfair dismissal in the LRA has the hallmarks of a 'trade-off' between the respective interests of labour and capital that emerged from the intensive tripartite negotiations that produced the Act. Trade unions were attracted by the notion of quick arbitrations without the expense of lawyers and that offered the real possibility of reinstatement to their members. Employers saw their gains as including the relatively short referral period, a simplification of their obligations in respect of internal disciplinary inquiries, and a cap on compensation awards. Both organised labour and business supported the new institutional arrangements that established the CCMA as an independent parastatal organisation governed by a tripartite governing body.

The post-apartheid reform of unfair dismissal law sought to protect worker rights while at the same time reducing costs of disputes and promoting industrial peace by ensuring that dismissal disputes did not trigger strikes. 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. Arbitration may be conducted under the auspices of the CCMA, an accredited bargaining council, or, by agreement, a private arbitrator. Arbitration was intended to provide 'cheap, accessible, quick and informal' dispute resolution.

In 2002, a number of changes were introduced to facilitate the handling of unfair dismissal cases. Employees were given the option of referring individual operational requirements dismissals to arbitration. The *Code of Good Practice: Dismissal* was amended to clarify that a termination for poor performance during probation could be justified on 'less compelling grounds' than would otherwise apply. Two significant reforms aimed at expediting the resolution of dismissal disputes were introduced. These were 'pre-dismissal' arbitration which, when agreed to by the parties, eliminates the necessity for both an internal hearing and an arbitration and 'con-arb' which allows an arbitration to commence immediately after the end of the conciliation phase.

⁸² See *Tokiso Review 2005-6 and 2006-7* and Community Agency for Social Enquiry (CASE) & Paul Benjamin *CCMA Awards Analysis* (unpublished, 2007).

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 employ in South Africa are influencing labour market behaviour.⁸³ This point is also made in a subsequent paper that suggests that the ‘hassle’ factor associated with hiring employees has contributed to a perception of a rigid labour market among both local and international firms.⁸⁴ The disjuncture between perception and labour market reality is borne out by a recent paper by Simon Deakin which compares the rankings allocated to labour regulation in different countries by a publication such as the World Economic Forum’s *Global Competitiveness Report*, which is based on the perceptions of groupings such as business executives with indices that seek to measure the level of labour market regulation by an examination of the content of the laws.⁸⁵ This comparison reveals that in studies based on the perceptions of business people, South African labour legislation is rated as among the most inflexible in the world.

A recent comparative study commissioned by the HSRC confirms earlier assessments that the unfair dismissal protections in South African law are not more stringent than the equivalent provisions in Brazil and India, but points out that in these latter two countries they are ‘observed in the breach in large parts of the economy’.⁸⁶ These comments are consistent with comments in a recent ILO publication that Brazilian workers infrequently contest employer decisions to dismiss through the judicial system, because of the long time involved in such challenges, a lack of knowledge of their rights and weak trade unions.⁸⁷ Significantly, in South Africa there is a high level of referral of dismissal disputes to the CCMA in both unionised and non-unionised sectors.⁸⁸

A 2003 study prepared for the IMF by Andrew Levy estimates that dismissal procedures occupy 3.02 million man-days per year, costing South Africa R14.71 billion.⁸⁹ While this guesstimate has received considerable mileage, it is little more than a thumb-suck and is unsupported by empirical research. The study does point out that many employers adopt an ‘ultra formalistic’ approach in processing dismissal disputes, which goes beyond the law’s requirements. The study also notes that the practice of groups such as employers, labour and labour consultants impact negatively on dispute resolution and suggests that guidance and training for arbitrators and judges would be of value.⁹⁰

⁸³ Hayter, S, G Reinecke & R Torres *Studies on the Social Dimensions of Globalisation South Africa* ILO, Geneva, 2001 at 82.

⁸⁴ Bhorat H, Lundall P & Rospabe S, ‘The South African Labour Market in Economic and Legislative Considerations’ *ILO Employment Paper 2002/32* at 55.

⁸⁵ Simon Deakin ‘Labour Law and Economic Development’ address to 19th Annual Labour Law Conference, Johannesburg, July 2006.

⁸⁶ G Edgren ‘How Different is the SA Labour Market? International Perspectives and Parallels’ (HSRC/Sida, 2005) at 35.

⁸⁷ J Berg, C Ernst and P Auer *Meeting the Employment Challenge: Argentina, Brazil and Mexico in the Global Economy* (International Labour Office, Geneva, 2006) 132-3.

⁸⁸ Benjamin and Gruen (op cit).

⁸⁹ 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.

⁹⁰ Levy (2003).

This study has influenced more recent IMF comments on labour market regulation in South Africa. The IMF's 2005 Country Report concludes that although South Africa's labour market institutions are in some ways similar to the OECD average, South Africa scores lower than comparator countries in areas such as how difficult it is to dismiss a worker. It therefore recommends that:

The government could stimulate job creation by further streamlining dismissal procedures, as well as by educating stakeholders on the legal requirements for dismissal; reportedly some of the costs arise from misinterpretations of the law.⁹¹

Its claim that a streamlining of dismissal would stimulate job creation is, as pointed out earlier, based on the methodology of the DB reports. Its recommendations are therefore based on highly generalised assumptions and information and do not engage with the available information on the CCMA which points to a much more complex picture.

By the end of the apartheid era the Industrial Court was dealing with several thousand dismissals a year; the court was under-resourced and cases took up to 3 years to resolve. It was initially estimated that the CCMA's caseload would be in the vicinity of 40 000. However, the CCMA's current caseload is in the vicinity of 100 000 cases annually, of which more than 80 percent are dismissal cases. At the same time, the first decade of the LRA's operation has seen a significant decline in the level of strikes over dismissals, and strikes on this issue, which were a dominant feature of apartheid-era labour relations, have become a rarity.⁹²

A number of features of the operation of the CCMA, as well as the practice of the stakeholders, have been seen as contributing to a situation in which the capacity of the CCMA to deliver on its mandate is being undermined.⁹³ These include:

- the high level of referral of disputes, which places considerable pressure on the CCMA;
- the failure of many employers to adjust their disciplinary procedures since the 1995 LRA came into effect, and the fact that they still apply the more formalistic approach associated with the pre-1996 Industrial Court;⁹⁴
- the considerable inconsistency in the approach of arbitrators to the procedural requirements expected of employers when dismissing, as well as the level of

⁹¹ IMF Country Report 05/345 (September 2005) at 64.

⁹² According to Department of Labour figures, days lost to strikes declined from a peak of 4 million working days per year in the early 1990s to 650 000 working days in 1997. Since 2002 there has been an upsurge in strike activity due to prolonged wage strikes in sectors such as security. The extent to which strikes over dismissals have declined is also shown by the figures on the causes of strikes: in 1979 -1984 31% of strikes were caused by dismissals while in 1998 15% of strikes were caused by disciplinary issues, grievances and retrenchments. (Du Toit *et al Labour Relations Law* (5ed) (Butterworths, 2006) at 50-1.

⁹³ For a fuller account see P Benjamin "We can see (more) clearly now: the Emerging Picture of the CCMA" Address to SASLAW Annual Conference, Cape Town, October 2007.

⁹⁴ PAK Le Roux 'Dismissal for Misconduct: Some Reflections' (2004) 25 ILJ 868; A Levy 'Some Notes on South African Labour Legislation and its Effect on the Cost of Employment' Prepared for the IMF, May 2003 49.

- compensation awarded in cases of procedural unfairness. Some arbitrators tend to apply a stricter standard than the *Code of Good Practice* requires;⁹⁵
- the low level of awareness of the requirements for fair dismissal, particularly among smaller employers;
 - the fact that employees bring dismissal cases that are without merits in the hope of receiving a financial settlement;
 - the failure of NEDLAC to update the ‘soft law’ *Code of Good Practice: Dismissal* and the fact that the Code does not give adequate guidance to employers, particularly small employers, about the requirements of the law;⁹⁶
 - the high level of review applications brought in respect of arbitration awards, which delays the finalisation of disputes by 23 months on average and the fact that most reviews are not processed;
 - the inconsistency of decisions by Labour Court judges on key aspects of the conduct of arbitrations;
 - the fact that employers and employees do not utilize the more expeditious options that are available, such as private arbitration, pre-dismissal arbitrations by the CCMA and con-arb, thus increasing the time spent on resolving these cases;
 - the increasingly technical and legalistic nature of proceedings at the CCMA;
 - the low level of voluntary compliance with financial awards requiring employees to institute enforcement proceedings;
 - the fact that many employers are advised by labour consultants, a profession whose activities are not regulated by any professional body, and who often advise employers to adopt formalistic procedures.

Significantly, these shortcomings flow from the interpretation and implementation of the law, rather than its content, and there is considerable scope for the CCMA to become more efficient within the current legislative framework.

Despite these shortcomings, the vast majority of cases referred to the CCMA are resolved within a short period of time. Compared to the old Industrial Court, the CCMA has provided swift dispute resolution. On average, the first conciliation meeting is held within 26 days of the dispute being referred,⁹⁷ and 52 percent of cases are settled through conciliation. Arbitrations are completed, on average, seven months after the dispute has first been referred to the CCMA for conciliation. On average, arbitrations commence within 47 days of the referral to arbitration (which must be made within 90 days of the failure of the conciliation) and are completed within 71 days of the referral to arbitration.⁹⁸ A merged conciliation-arbitration process (‘con-arb’), introduced in 2002, which allows arbitration to start immediately after conciliation, has significantly reduced the period taken to resolve disputes. Some 40 percent of arbitrations are conducted in terms of the expedited ‘con-arb’ process. In the remaining 60 percent of cases, one of the parties, often on the advice of a lawyer or labour consultant, has objected to the ‘con-arb’ thus requiring the employee to submit a separate referral to arbitration.

⁹⁵ Andre van Niekerk *Assessing Procedural Fairness: A Review of CCMA Arbitration Awards*.

⁹⁶ H Cheadle ‘Regulated Flexibility: Revisiting the LRA and the BCEA’ (2006) 27 *ILJ* 663.

⁹⁷ CCMA Annual Report 2005-2006.

⁹⁸ CCMA Annual Report 2005-2006.

The settlement rate of more than 50 percent for processing disputes is a very significant achievement and compares favourably with the old Industrial Court, the current Labour Court, as well as labour courts in other countries. This significant achievement in dispute resolution is not a factor that plays any part in the assessment of South Africa in the DB report.

Developing indicators

Debates concerning security of employment play a central role in the labour market policy debates in South Africa. There is an increasing awareness that the economic impact of dismissal laws arises largely from the manner in which the law has been implemented and the practice of parties.⁹⁹ Many reforms and initiatives that could significantly impact on the operation of the CCMA are administrative or resource-related or lie within the powers of tripartite institutions such as the CCMA's governing body and NEDLAC. Indicators such as the DB survey which deal purely with the formal content of law are of no relevance to the search for solutions to improve the efficacy of the CCMA. Moreover, as in the case of hours of work, the issue of employment security underscores the need for indicators informed by dedicated research.

Undoubtedly, the data for constructing such an index could be improved. But much of it can be extracted from the CCMA's CMS data-base, which is intended to provide a basis for monitoring the efficiency of the institution on an ongoing basis and comparing the performance of different regional offices. Equivalent information is not available on the processing and outcome of cases that fall within the jurisdiction of the Labour Court, such as collective operational requirements dismissals, and this is an area requiring further study.

The fact that institutional architecture of the CCMA has had a significant impact on labour law reforms in the Southern African region may allow for the development of indicators within the region. Lesotho (2000), Swaziland (2000), Botswana (2004), Tanzania (2004) and Namibia (2007) have enacted laws to establish specialist dispute resolution institutions that promote the role of mediation and arbitration as the primary mechanism for the prevention and settlement of labour disputes.¹⁰⁰

Such indicators would have to reflect the relative significance of dismissals on account of operational requirement (redundancy) and for reasons of misconduct. It would also have to take account of the extent to which fixed-term contracts are utilised, and reflect the relative significance of dismissals as opposed to the termination of fixed-term contracts.

4.4 Collective labour law (collective bargaining and strikes/lockouts)

It is noteworthy that the DB survey makes absolutely no reference to collective labour law. However it is surely incontestable that, until at least the mid-1990s, of all the

⁹⁹ Halton Cheadle 'Regulated Flexibility: Revisiting the LRA and the BCEA' (2006) 27 *ILJ* 663; Paul Benjamin, 2007 (op cit).

¹⁰⁰ Mozambique is in the process of enacting similar reforms.

provisions of labour regulation, it was those that regulated collective labour law that were the greatest concern, so far as business in this country was concerned. This was because South Africa was seen as a country with a high incidence of strikes. Also, because of a comparatively strong trade union movement, and a demand to negotiate wages and conditions of work at a central level, wages in South Africa were perceived to be relatively high. This was particularly the case in respect of wages for unskilled work.

Moreover, it is in the area of collective labour law, more than any other, where the fact that South Africa's legislation emerged as a result of a tripartite process is of critical importance, because this process, as indicated, involved a weighing of costs and benefits to employers, trade unions and society. Concerning a perception that these aspects of labour market regulation are worker-friendly, it is worth noting that in the tripartite negotiations, organised labour was unsuccessful in achieving two key demands. The first concerned the removal of a duty to bargain, introduced into law via the 'unfair labour practice jurisdiction' developed by the Industrial Court. The second demand concerned a proposal to provide for national industry-wide bargaining.¹⁰¹

The agreement eventually struck at NEDLAC was that bargaining would be voluntary, and there would be no statutory duty to bargain over terms and conditions of employment. Accordingly, participation in the bargaining council system, which was essentially the same system as had been in operation previously, should remain voluntary. Although the declared preference of the LRA is for centralised bargaining at sectoral level, in fact the number of bargaining councils in the private sector has diminished since the LRA came into force. The scope of coverage by bargaining council agreement is confined to a few sectors of the economy, and even in those sectors, outside the public sector, it is limited.¹⁰²

In the tertiary or services sector, where most new jobs are supposed to have been created since the LRA was introduced, there are no national bargaining councils outside the public service. At the same time a provision for statutory councils, where union(s) or employers' organisation(s) are not sufficiently representative to form a bargaining council, has not proved effective.¹⁰³ Nor have the organisational rights provided in the LRA, about which there were also sharp differences at NEDLAC, ameliorated labour's position to any significant extent.¹⁰⁴

¹⁰¹ This proposal is worthy of more detailed exposition. Industry wide bargaining would be achieved by NEDLAC demarcating the scope of each bargaining council (the new name for industrial councils), which would then be established 'in law'. All employers would be 'required to be represented at council level', and any trade union with 30 percent membership would be entitled to representation, although bargaining could take place only once the union side had achieved a 50 percent+1 level of representivity. The extension of agreements would be unnecessary under this schema, as there would no longer be non-parties.

¹⁰² Godfrey et al, 2005.

¹⁰³ s 39(1) and (2). The application for registration follows the same procedure as that for a bargaining council, which means that NEDLAC may demarcate the sector and area for registration of a statutory council [s 39(3) read with s 29(8)].

¹⁰⁴ The draft Bill presented to NEDLAC proposed that 'hard' thresholds be set for certain of these rights but left the quantification of the thresholds to NEDLAC. Business, however, argued against 'hard' thresholds, preferring instead the more flexible notion of 'sufficient representivity'. This notion ultimately prevailed. See also Collins 'The LRA: where do the parties stand?' (1995) *South African Labour Bulletin* 19(3) 31.

The provisions regarding strikes are of course a critical element of collective labour law. However, differences in the negotiations that gave rise to the LRA were confined mainly to questions of procedure, the right of employers to replace striking workers, the question of sympathy strikes, and whether strikes over political or economic issues should be prohibited. Although organised labour succeeded in realising certain of its demands in this regard, the proof of any dispute resolution system is whether it is perceived to be effective in practice. This is usually reflected in the national statistics in person-days lost to strike action. Presumably it is for this reason that the DB survey chooses to ignore this issue.

On the other hand, it is difficult to conceive of any endeavour to reform labour law that ignores collective labour law. Ironically, in the South African context, the issue that attracts the most attention in this context pre-dates the LRA of 1995, namely, the extension of bargaining council agreements to non-parties. Whether there is such a provision is also an important indicator of the collective bargaining system in place. However, it should not be viewed in isolation. Whether or not there is a minimum wage in force affects the significance of such a system, as does the potential for wage competition or under-cutting in the absence of either a minimum wage or a system of extensions.

In the above regard the absence of bargaining councils in the services sector has been noted. This is related to the peculiar difficulties trade unions face in organising the sector, and maintaining representation. This is compounded by a definition of the workplace that does not take account of the fact that, in the case of many services, the workplace is that of a client. Indicators that reflect the state of collective bargaining or measure collective labour law need therefore to take account of the distinction between services and the secondary sector.

4.5 Social protection/social security law

The increasing informalisation of the labour force has resulted in an increased focus on the linkages between labour market regulation and social security as mechanisms of protecting workers from risks and insecurity associated with precarious employment, partial employment, labour market transitions and unemployment. The publication in early 2007 of a Treasury Discussion Paper on Social Security and Pensions provides a window for this debate to impact on the future shape of social security and, in particular, its capacity to provide increased security for the increased number of informal workers.¹⁰⁵

The OECD's *Employment Outlook 2004* argues that employment protection is one of the instruments available to protect workers against labour market risks along with unemployment benefit systems and active labour market policies. In a 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. The future of labour law in Southern Africa, he argues, depends upon its capacity to embrace the realities of

¹⁰⁵ National Treasury of South Africa *Social Security Retirement Fund: Second Discussion Paper* 2007.

deprivation and social needs, and to treat social protection as a central objective.¹⁰⁶ Similarly, Lund argues for an approach to social security that sees economically active people placed along a continuum from formal to informal employment, which includes a gendered and sectoral analysis of access to social security, and also maintains a role for multiple stakeholders to extend social security coverage to formal and non-standard workers.¹⁰⁷

The diversity of forms of work within the informal economy makes it difficult to assert on a generalised basis what measures are required to introduce greater security. A study by Lund and Ardington¹⁰⁸ of security in relation to work and employment concludes that the self-employed were generally more vulnerable than those in wage employment, and women were more likely to be self-employed than men, and earning less than men. However, those in the least formal wage employment were more vulnerable in a number of respects than the self-employed. Employment status determined access to risk management mechanisms such as savings and insurance; most of those with low incomes (both self-employed and wage workers) tended not to have work-related risk coverage and could not get services from formal or informal financial service providers. In general, the income security of self-employed people is exceptionally vulnerable to illness, and this will become an increasingly severe constraint in the context of Aids-related illnesses.

As the authors point out, increasing numbers of people work on the borderline between self-employment and waged employment with the result that the simple distinction between 'formal' and 'informal' conceals a great deal of variation. A recent study of low-wage workers in South Africa has demonstrated that there is a considerable level of churning (movement) between the formal and informal sector among low-wage workers.¹⁰⁹

This research bears out the recommendation of the Taylor Committee (2002) 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 concluded 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.¹¹⁰

¹⁰⁶ E Kalula 'Beyond Borrowing and Bending: Labour Market Regulation and Labour Law in Southern Africa' in C Barnard, S Deakin and G Morris, *The Future of Labour Law: Liber Amicorum Sir Bob Hepple QC* (Hart, Oxford and Portland, 2004) 275, 287.

¹⁰⁷ F Lund 'Social Security and the Changing Labour Market: Access for Non-Standard and Informal Workers in South Africa' *Social Dynamics* (2002)28:2 177-206.

¹⁰⁸ Lund and Ardington "Employment Status, Security and the Management of Risk: A Study of Workers in Kwamsane, KwaZulu-Natal" UKZN Centre for Development Studies: Working Paper No.45, 2006.

¹⁰⁹ Valodia, I, L Lebani and C Skinner "Low Waged and Informal Employment in South Africa", 2006 *Transformation: Critical Perspectives in Southern Africa*, 60.

¹¹⁰ Taylor Committee *Transforming the present-Protecting the Future Report of the Committee of Inquiry into a Comprehensive System of Social Security for South Africa*, 2002.

While the Unemployment Insurance Act 2001 is the most significant post-apartheid social insurance enactment, it provides (as the 2007 Treasury Discussion Paper points out) only limited income protection to those with a record of formal employment and does not address the substantial income security gap in the labour market, particularly for work-seekers without past employment experience. The Act has been criticized 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.¹¹¹ Edgren argues the unemployment insurance system does not provide a safety net offering the unemployed the opportunity to return to the labour market through skills improvement and mobility incentives. He suggests that 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.¹¹²

The Taylor Committee also identified the major problems in the provision of compensation for occupational injuries and diseases :

- a) the exclusion of domestic workers, independent contractors, persons in the informal sector and the self-employed;
- b) the absence of any prioritisation of labour market integration or reintegration as manifested by the absence of any compulsory rehabilitation or vocational training programmes;
- c) the failure of the compensation system to promote prevention;
- d) the lack of linkages with other social insurance and social assistance schemes.¹¹³

The Treasury's 2007 proposals for social security and retirement reforms envisage the introduction of a multi-pillar system in 2010. The elements of this system are:

- a) Social assistance grants, funded from general government revenue, with the means test threshold either removed or significantly increased, providing a safety net against poverty in old age, and providing basic support to the disabled, children and care-givers.
- b) Mandatory participation in a national social security system, up to an agreed earnings threshold, providing basic retirement, unemployment, death and disability benefits. This will aim to close the wide gap between social assistance grants and current private sector provision.
- c) Additional mandatory participation in private occupational or individual retirement funds, for individuals with earnings above the threshold, ensuring

¹¹¹ Olivier, M, N Smit & E Kalula *Social Security: A Legal Analysis* 2003

¹¹² Edgren, G "How Different is the SA Labour Market? International Perspectives and Parallels" (HSRC/Sida, 2005).

¹¹³ Olivier, Smit & Kalula, (2003) at 495.

that individuals at all earnings levels make appropriate provision for insurance coverage and income replacement in retirement.

- d) Supplementary voluntary savings, permitting individuals to choose how they allocate income throughout their lifetime.

It is proposed that this new system would be supported by a number of additional reforms including a wage subsidy to offset the costs of social security contributions for low-wage employees and to encourage employment creation.

While the implementation of this new system may provide more comprehensive cover for those in formal employment, only one aspect, the voluntary savings scheme, would appear to apply to those in informal work. The approach of the Discussion Paper reflects conventional notions of the employment relationship reflected in labour law and utilises the conventional categories of social protection found in traditional social insurance and social security schemes. The proposals do not as yet engage with the need to provide different categories of coverage and benefits to respond to the diversity of types of work and the need to protect employees during periods of transition between different employment situations.

4.5.1 Developing indicators

Any attempt to understand the level of security enjoyed by particular categories of labour market participants in South Africa must examine the protection that they receive as a result of their employment (both from labour law and through contractual arrangements) and from the social security framework. These protections include both the legal protection they receive while at work (hours of work, security of employment etc) but also during periods of transition (entry into the labour market, unemployment, training etc) as well as after retirement age. This exercise will have to be undertaken separately in respect of workers enjoying different degrees of formality in their working arrangements and should cover both the formal and informal sectors.

SECTION 5: CONCLUSIONS

To the extent that the DB survey is lending impetus to systems of labour market regulation to converge, it is likely to be convergence at the level of the lowest common denominator, which is tantamount to deregulation. An endeavour to benchmark labour regulation need not have such a result. It ought to be possible to compensate for the methodological problems identified in this paper, and to remedy some of the errors.

However, the necessity for labour market regulation should be acknowledged in the construction of the paradigm on which such investigation is based. Further, such investigation should utilise existing scholarship measuring the impact of labour regulation, rather than supplant it. Otherwise such an investigation is bound to fall into what Simon Deakin and Frank Wilkinson have described as the ‘sterile opposition of rights and efficiency’. The alternative to this sterile opposition, these authors suggest, is for economic insights to shift policy away from deregulation towards ‘the design of labour legislation with economic policy goals in mind.’¹¹⁴

¹¹⁴ S Deakin and F Wilkinson ‘Labour Law and Economic Theory: a Reappraisal’ in H. Collins, P Davies & R Rideout *Legal Regulation of the Employment Relation* (Kluwer, 2000) 29 at 62.