Getting regulation just right

There is a tendency for debates on the labour market to be ideological battles between proponents of regulation and opponents of over-regulation. **Paul Benjamin** writes that there can never be a total absence of regulation – the issue is to determine if regulation is appropriate.

Labour market regulation can be divided into categories such as minimum conditions of employment, collective bargaining and worker participation, the institutions which govern the labour market, dispute resolution and adjudication, promoting equality in the workplace, providing skills development and placement within the labour market and the provision of employment-linked social security.

But what is the purpose of labour market regulation? The old conventional wisdom was the statement by Otto Kahn-Freund in the 1950s: 'The main object of labour law has always been, and we must venture to say always will be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship'

In terms of this vision, labour law redressed the imbalance of power between employees and employers. It did so by two 'vintage' strategies – the promotion of collective bargaining and the enactment of minimum rights.

But from the early 1980s, labour lawyers began to reassess. Governments sought to re-regulate or deregulate labour markets to enhance the bargaining power of employers at the expense of workers and unions. It became widely accepted that labour law could be an instrument of economic policy, for instance, to control inflation. In societies with declining union membership, collective bargaining became increasingly less effective. Other situations emerged in which employees or unions had greater bargaining power than an employer.

There is now widespread acceptance that labour law is concerned with the broader regulation of the labour market – it can no longer just protect workers. Australian authors Gahan & Mitchell suggest that the appropriate starting point is that governments have various reasons for regulating labour markets. These may not be coordinated or harmonious and the different needs may be inconsistent and even conflictual.

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

- promoting allocative and productive efficiency and economic growth;
- macroeconomic management – by achieving wage stabilisation, high employment levels and international competitiveness;
- establishing and protecting fundamental rights;
- redistributing wealth and power in employment contexts.

THEMES IN EUROPEAN LAW

In an influential analysis, Collins has identified three key drivers for the new direction of employment law in the European Community. These are social inclusion, competitiveness and citizenship. (It is worth noting that of these three themes, only competitiveness has been explicitly articulated in South African labour law debates.)

Collins says that employment law functions, with other government policies, to reduce or minimise the social exclusion, which comes with unemployment. European laws about discrimination, dismissal, family friendly measures and improvements to employability can be justified by the need to address social exclusion in a market society.

Competitiveness is the attempt of governments to improve the competitiveness of businesses and national economies in an increasingly globalised economic system. But while attempts to improve business competitiveness have lead governments to deregulate or reduce employment laws, Collins suggests that deregulation has achieved little to improve long-term competitiveness.

Competitiveness needs systems of management that attract investments because they offer efficient production, innovative products and a highly skilled cooperative workforce. Employment law can be used to provide a framework but he suggests that competitiveness requires considerable flexibility and cooperation from work forces and this is best achieved through a certainty of fair treatment and employment security as well as mechanisms for worker participation in the management of businesses.

THE CHANGING NATURE OF WORK

Changes in the nature of work have resulted in situations where employment law does

not accord with the realities of working relationships. As a result, over the last two decades increasing numbers of workers do not enjoy labour protection. Growing informalisation has led to a situation where most of those in informal jobs have no regular benefits or employment protection.

According to the ILO studies, the increase in the number of unprotected workers can be linked to factors such as globalisation; technological change and changes to the way businesses are run, often in a highly competitive environment. The impact of these factors is uneven and in some countries have energised labour markets and contributed to growth in employment and new forms of work.

In some countries, the state is withdrawing from various forms of labour protection through legislative reform or a reduction of resources allocated to labour inspection or enforcement. Disputes or uncertainty concerning the legal nature of the employment relationship are increasingly frequent. Employment relationships may be disguised or deliberately ambiguous - such as the growth in contract work and the loopholes this finds.

The ILO has proposed that national governments should review application of labour laws to such non-standard employment.

LACK OF PROTECTION

Absence of labour protection can have negative consequences for workers and their families; for enterprises and for society. The lack of labour protection can impact upon employers by undermining productivity and distorting competition. Lack of labour protection can lead to a neglect of training. This may lead to decreased productivity. Where there is inadequate training in hazardous work, it can also decrease the level of worker and public health and safety.

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

EVIDENCE FROM DEVELOPING COUNTRIES

Studies of Latin America suggest that labour regulations contribute to shaping employer practices but do not seem to have influenced employment. The evidence disproves arguments that relaxing constraints on contracts and dismissals is sufficient to improve economic performance. Labour regulation is only one of the matters relevant to job creation. A study on Argentina, Brazil and Mexico (the choice of these three countries is significant in that Argentina and Brazil undertook extensive labour law reform while Mexico did not) suggests that irrespective of the level of labour regulation, 'precarious wage employment' (employment not complying with labour and social security law) increased in all three countries in the 1990s.

The same study suggests labour market programmes help the unemployed more than 'indirect incentives' such as dismantling labour protection. Programmes developed from the mid-1990s onwards in these countries include cash transfers, direct state employment creation, subsidies to the private sector in exchange for hiring additional workers, assistance to sectors with potential for employment creation, public employment services and supply-side measures such as training for the unemployed.

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

Recent studies of labour law in East Asia conclude that most East Asian countries have adopted systems of labour law modelled on western countries.

In many East Asian countries, labour law has often been used to bolster political power in authoritarian regimes and has often been subordinated to the needs of industrialisation strategies. It has been argued that countries that pursue export-oriented industrialisation of simple manufactured goods will need a workforce with some flexibility, basic skills development and high productivity. This implies a low-cost and well-controlled workforce and industrial relations policies and labour laws to match. Another factor is the significant gap between law and practice. This has manifested itself in a number of ways including the fact that labour movements have not been sufficiently developed to oppose the state, low levels of collective bargaining and low levels of industrial action under legal procedures.

A key finding of the study of East Asia is that labour laws have very little to do with the construction and functioning of labour markets. This is a result of varying factors in different countries, which include the fact that labour law may not apply to small enterprises in which most workers are employed, or that labour is considered to be largely irrelevant in the informal sector.

In his discussion of labour law in SADC countries, Prof Evance Kalula emphasises that a fundamental feature of new labour laws in the region is their 'transplant' nature. They are concerned with the regulation of formal labour markets to the exclusion of 'irregular' workers particularly those in the informal sector. The future of labour law in southern Africa depends upon its capacity to 'embrace the realities of deprivation and social needs'.

The significance of the 'translation' of law as an explanation for patterns of regulation was highlighted in a recent study that examined labour law in 85 countries.

The study concluded that patterns of regulation across countries are shaped largely by their legal structure, which arrived in most countries through the transplantation of legal systems.

GLOBALISATION

The ILO's study of globalisation recognises it is irreversible but that its adverse social impacts are not because of policy decisions made at national and international level. A review of recent literature suggests that there is considerable support for the report's appeal to make 'decent work for all' a global goal.

No evidence has been found to support the hypothesis that foreign investors favour countries with lower labour standards. There are findings that decent work can contribute to both human development and international growth.

A recent literature survey suggests that while national policy responses to globalisation vary, the following policy actions are common to all countries – investment in education and training; adoption of core labour standards; the provision and improvement of social protection; tackling rising national inequality and facilities to discuss globalisation.

MODELS FOR UNDERSTANDING CONTEMPORARY EMPLOYMENT

Gunter Schmid proposed the following model as a basis for arguing how unemployment could be combated in European economies. He says there are five types of major transitions in life. These are between:

- education and employment;
- (unpaid) caring and employment
- unemployment and employment;
- retirement and employment;
- precarious and permanent employment.

In adapting this model to South Africa, Clive Thompson suggests the addition of a further transitional factor: absence from the workplace to deal with poor health.

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

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

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

The approach suggests that intermediary institutions should be co-financed. An example of this is the Work Foundation in Austria, which provides support to retrenched workers. It is co-financed by levy

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on employees in the enterprise who are not retrenched, the employer, a contribution from retrenched workers from their payouts and the government.

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

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

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

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

The rights that would apply to the broadened labour force are rights inherent in employment, common rights connected with occupational activity (e.g. health and safety protection) and rights ensuing from unwaged work.

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

PROTECTED FLEXIBILITY/FLEXICURITY

Increasingly, labour market policies are being devised that seek to achieve labour market security through labour market policies that promote what has been described as 'protected mobility' associated with successful small European economies such as Ireland, Netherlands and Denmark. These policies of 'protected flexibility' offer adaptability for firms and security for workers. Proponents of this approach argue that institutions and policies for protected mobility are necessary for efficiency and equity in labour markets in open economies as globalisation increases the need for insurance against labour market risks and transitions.

Flexibility, stability and security are required for a productive economy and a well-functioning labour market for decent work. However, the use of social protection to promote employment creation is not confined to the most developed countries. The ILO suggests exceptionally good social security is one of the explanations for successful job growth in Central Europe, the Republic of Korea and Malaysia. An often-cited example of the use of social protection to boost employment is the Korean system of social security, which combines unemployment insurance with an employment stabilisation programme and a skills development programme to prevent unemployment and stimulate re-employment.

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

The model of protected flexibility emphasises that social protection can be used to stabilise employment and to promote employment.

The ILO notes that the lack of labour protection raises questions of equity on the one hand and flexibility or adaptability on the other. While new forms of contracting may be adopted to enhance competitiveness these may also lead to declining productivity. The study records the fact that a number of European countries have moved away from a situation in which flexibility creates insecurity to one in which security promotes flexibility. According to Jacobs, the Dutch form of flexicurity is an 'explicit and well-considered trade off between forms of flexibility and forms of security' which is a reflection of the high level of social partnership in the Netherlands.

The law only slightly relaxed the laws on termination of employment. It significantly enlarged the scope to conclude flexible contracts of employment by relaxing limitations on the repetition of fixed term contracts and by abolishing existing restriction on hiring of employees from temporary work agencies. At the same time, new rights were created for employees on flexible employment contracts by limiting probation clauses in contracts of employment, introducing legal presumptions of employment and significantly improving the status of workers of temporary work agencies. The protection of agency workers was achieved primarily by a collective agreement, which gave these workers phased access to labour and social protection depending on their length of service.

Policies of 'protected flexibility' involve an explicit trade-off between the levels of labour protection and social protection for the purpose of enhancing economic performance. This approach can be contrasted with what have been termed 'lean social democracies'. These are societies that they cultivate a

system of rights but do not provide a universal right to social security system. This approach has been said to be found in India, South Africa and many countries in Latin America and Eastern Europe. The contrast between these two approaches offers a valuable insight into the extent to which enhanced social protection can create the conditions for improved economic performance.

LABOUR MARKET REGULATION AND HUMAN RIGHTS

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

EXPLORING FLEXIBILITY

A central concern of contemporary labour market regulation is the reconciling of the competing demands for equality and efficiency. This is often portrayed as the debate between the requirements of labour standards (or security) on the one hand and the need for flexibility or adaptability on the other.

The term 'flexibility' is often used loosely in these debates. Accordingly, any attempt to understand the significance of flexibility in contemporary labour debates must proceed from an understanding of the different forms of flexibility.

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

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

It is this dynamic that should drive the ongoing evaluation of the appropriateness of labour market regulation. LB

This is an edited version of the first part of a paper entitled 'Labour market regulation: International and SA perspectives' presented at an HSRC seminar in Pretoria on 15 July. Benjamin is adjunct professor at the University of Cape Town and is also a director of Cheadle, Thompson & Haysom. The unedited version with references can be obtained from the HSRC.