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WHY SHOULD THE STATE INTERVENE IN THE LABOUR MARKET: THE CASE OF SOUTH AFRICA

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ABSTRACT

Labour remains at the centre of political, social, and economic discourse in South Africa. Two broad perspectives dominate the political discourse as to why the state should intervene in the labour market. The first is the *laissez-faire*, free-market model, and the second, known as ‘social justice’ – a concept generally used to justify government intervention and the distribution of resources – is a perspective that stresses the need for social justice in the workplace in a variety of ways. This article explores which of these views will best protect workers – referred to in the context of the inadequacy of the contract as a mechanism to regulate the employment relationship – in an ever-changing South African labour market characterised by poverty, unemployment, inequality, the growth of the informal economy, an inflow of migrants, the digitalisation of the economy, and the impact of the Covid-19 pandemic. The author concludes by supporting the view that upholds social justice in the workplace.

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1. INTRODUCTION

Unquestionably the world of work has changed since the 1970s (Owens, 1995) This is a global phenomenon and is a direct result of changed socio-economic circumstances (Slabbert, 2003, Phillipova, 2023). The change in socio-economic circumstances, in turn, is a direct consequence of technological advancement and development (Coyle, 1999). South Africa has also had to deal with the Covid-19 pandemic. The huge socio-economic and political changes that have taken place during the past decades and the digital developments in South Africa have had a crucial influence on the South African labour-law dispensation (Brassey, 2000). In South Africa, labour law remains at the centre of political, social, and economic discussions on the nature and extent of labour market regulation. Two broad perspectives influence the political discussion as to why the state should intervene in the labour market. The first is the *laissez-faire*, free-market model and the second, is the social justice perspective that stresses, in different forms, the requirement for social justice (Davies, 2004) in the workplace. Certainly, there are different forms within each view, diminishing membership of trade unions (trade unions being regarded as the main channel through which to achieve social justice), and reduced collective bargaining power, which is the voice and mainstay of workers point to a shift in labour-power dynamics. In an era characterised by new forms of work and the digital economy, there is a need for the government to intervene in and regulate the labour market.

It is against this backdrop that this study seeks to determine why the state must intervene in the South African labour market to protect vulnerable workers who are often inadequately protected and other challenges impacting the labour market that require state intervention. The author argues that while there has been some legislative effort and other state endeavours to comply with obligations flowing from the International Labour Organisation (hereafter ILO) Conventions and the South African Constitution to regulate the labour market, more remains to be done.

The following text focuses on the inadequacies of the common law in South Africa, challenges facing the South African labour market, the socio-economic environment, the effects of the Covid-19 pandemic on the South African economy, labour migration and precarious employment in South Africa, the informal economy, new forms of work, the libertarian model, and the social- justice model.

2. INADEQUACIES OF THE COMMON LAW IN SOUTH AFRICA

Statutory intrusion into the common-law of employment was influenced by a general realisation that the law had fallen behind conditions in modern commerce and industry and not long ago, by recognition of fundamental human rights and their entrenchment in national constitutions (Constitution, 1996). It was recognised that freedom of contract was ill-suited to the collective relationship between employers and the unionised workforce that spread throughout the industrialised world in the nineteenth century (Grogan, 2011). In particular, the common law did not cater for the inherent inequality in bargaining power between employers as the owner of the means of production, and employees who were entirely dependent on supply and demand for their welfare and job security (Marais, 1995).

The common law also disregards the enduring nature of the employment relationship; it gives employees no legal right to demand better conditions of employment as time passes. By emphasising freedom of contract, the common law encourages or at least does not discourage, the exploitation of workers. Nor does the common law give workers any say in those management decisions which directly affect their working conditions and legitimate interests. Finally, the common law provides no effective protection for the security of employees (Brassey, 1987).

While market forces and competition may to some extent help to ensure that employees receive a return on their labour, in most cases employees need work more than the employer needs the services of particular individuals. This is especially true of those who enter the labour market without special skills, particularly in times of high unemployment. The unequal, often pre-contractual, bargaining relationship between aspirant employees and employers tempts unscrupulous employers to employ people under onerous conditions and at exploitative wages (Grogan, 2014).

3. CHALLENGES CONFRONTING LABOUR LAW IN SOUTH AFRICA

South Africa is an upper-middle-income state confronting serious structural economic challenges born, to a large extent, of the apartheid past which continues to define the country's socio-economic environment. The discussion in this article requires a brief synopsis of some of the challenges facing the South African labour market. From precarity to digital disruptions and the Covid-19 pandemic, South Africa has major socio-economic tasks to address.

3.1 Socio-economic environment: Poverty, income inequality, and unemployment

Poverty, inequality, and unemployment continue to be the greatest challenges facing South Africa. To elaborate on the point, the results of the Quarterly Labour Force Survey (Quarterly Labour Force Survey - Q2:2022) indicate that 648 000 jobs were gained between the first quarter of 2022 and the second quarter of 2022. The biggest job gains were recorded in Community and Social Services (276 000), Trade (169 000), Finance (128 000) and Construction (104 000). However, there were job losses in Manufacturing (73 000) and Transport (54 000). The total number of persons employed was 15,6 million in the second quarter of 2022.

The number of unemployed persons increased by 132 000 to 8,0 million in the second quarter of 2022 compared to the previous quarter. The number of discouraged work-seekers decreased by 183 000 (4,9%) and the number of people who were not economically active for reasons other than discouragement decreased by 452 000 (3,3%) between the two quarters resulting in a net decrease of 635 000 in the not economically active population.

The above changes in employment and unemployment resulted in the official unemployment rate decreasing by 0,6 percentage points from 34,5% in the first quarter of 2022 to 33,9% in the second quarter of 2022 – The unemployment rate according to the expanded definition of unemployment also decreased by 1,4 percentage points to 44,1 % in Q2:2022 compared to Q1:2022.

The results continue to show that youth remain vulnerable in the labour market. The second quarter of 2022 saw the total number of unemployed youth (aged 15-34) increase by 2,0% (or 92,000) to 4,8 million from Q1:2022. There was a noticeable increase of 7,2% or 370 000 in the number of employed youth during the same period. The increase in both employment and unemployment among the youth resulted in a decrease in the youth unemployment rate by 1,3 percentage points to 46,5% in Q2:2022.

Despite the drop in unemployment, the rate is still the highest on a list of 82 countries and the eurozone monitored by Bloomberg (Bloomberg, 2022). The International Monetary Fund Projects South Africa's unemployment rate will reach 35.2% this year, the highest in the world, though data for some countries is unavailable (United Nations, 2022).

The average Human Development Index (HDI) value for South Africa in 2022 was 0.709 points, leaving it in 114th place in a table of 189 countries published by the United Nations, which places it in the

medium-human-development category. The HDI is made up of three components of human development: longevity; education level; and living standard. The HDI indicates that many South Africans are living below the international poverty line.

South Africa remains one of the most unequal countries in the world. Linked to the high levels of poverty in the country, South Africa has a global score of 63 in income inequality – the highest in the world – in terms of the “Gini coefficient” which analyses the distribution of income among individuals and households.

3.2 Effects of the Covid-19 pandemic on the South African economy

The Covid-19 pandemic has had and continues to have, serious consequences for the South African labour market with many families earning little or no income. Estimates by the ILO show that assuming a situation without alternative sources of income, lost labour income will increase relative poverty for informal workers and their families by more than 56 points in lower- and low-income countries. (ILO Monitor, 2021). This includes workers in sectors such as accommodation and food services, manufacturing, wholesale, retail trade, and many more. Because those in the informal economy needed to work to survive, lockdowns and other containment measures were a source of social tension and led to the transgression of regulations which, in turn, endangered the government's efforts to protect the population and fight the pandemic (ILO, Covid-19, 2021). Furthermore, logistic challenges within supply chains – in particular, cross-border and domestic restrictions on movement – led to disruptions in the food supply which undermined precarious workers' food security (ILO Covid-19, 2021). One can only be thankful that for the present at least, lockdown and stringent measures are a thing of the past.

As part of its report, the UN notes that the socio-economic consequences of the Covid-19 pandemic – which has led to more than two million job losses in South Africa alone – will likely intensify inequalities and cause the number of citizens languishing below the international poverty line to increase (United Nations, 2022).

Informal food markets play an essential role in ensuring food security in South Africa, both as a source of food and as a place for smallholder farmers to sell their produce. When lockdown and stringent measures were imposed in South Africa at the start of the Covid-19 pandemic, many South Africans doing business in the informal sector such as street vendors, home-delivery workers, etcetera, were unable to operate. This led to food insecurity. Thanks to the vaccination program and other health measures

introduced in South Africa to curb the pandemic, lockdowns are now a thing of the past and businesses are now operating normally.

For many South Africans doing business in the informal sector, their homes were their workplace and given the conditions described above, most workers in the informal economy – and particularly migrant workers – were very exposed to occupational health and safety risks, lack of appropriate protection, and an increased likelihood of illness, accident, or death. Covid-19 added to these risks; if they fall ill most workers, including migrants, (ILO Covid-19, 2020) have no guaranteed access to medical care and no income security in the form of sickness or employment injury benefits. As we study the effects of the pandemic on precarious workers, we must consider the additional challenges posed by new forms of work.

3.3 *Labour migration and precarious employment in South Africa*

Another challenge facing the South African labour market is extensive labour migration. The late nineteenth century saw a huge number of migrant workers employed in certain economic sectors in South Africa – particularly in the mining and commercial agriculture sectors. Workers came from Botswana, Lesotho, Malawi, Mozambique, Zambia, Zimbabwe, and Swaziland. South Africa remains southern Africa's most powerful and diverse economy and continues to attract the largest number of both formal and informal migrant labourers. Today, migrants not only come to South Africa from the states mentioned above but also from the entire African continent and the world over.

Since 1990 the number of labour migrants relocating to South Africa has increased. There are several explanations for this, including growing unemployment in the transfer states and decreasing government contributions to social services (ILO Labour Migration, 1990). Currently, the main reasons for migration include the huge differences between southern African states as regards income, standards of living, levels of unemployment, and political instability (Crush et al., 2005).

As observed by Mpedi and Smit, migrants can be divided into two main groups: documented migrants (permanent residents, temporary residents, refugees, and asylum-seekers); and undocumented migrants¹ Documented migrants are those who enter the state lawfully and have the host state's official authorization to work within its territory. Consent to work is granted based on an employment proposal

from an employer who must justify the need to employ a migrant based on his or her knowledge, abilities, skill, and proficiency in a specific profession (Mpedi & Smit, 2011).

Because South Africa closely scrutinizes applications for permission to allow migrants to work, applications are made only by establishments that are lawfully registered and comply (at least on the face of it) with the legislation regulating employment relations. Therefore, it is likely that most documented migrant workers work under favorable conditions like those of their indigenous colleagues. They have greater bargaining power and may rely on the protections afforded by labour legislation.

Notwithstanding, apart from workers who have permanent resident status, it is difficult for migrant workers to access state social security protection such as disability and unemployment insurance benefits (Dupper, 2007). The latter are workers who enter and work in the state illegally, or who enter legally (on a premise other than work) and remain in the host state and work without permission. They generally lack the education or skills that would justify the issuing of a work permit. They choose to work in jobs where they can escape the attention of the public authorities and, consequently, their choices are limited (ILO Decent Work and the Informal Economy, 2002). This means that they are susceptible to exploitation and abuse and will accept work where the circumstances and conditions are substandard, the wages low, and where there is little or no job security (Fenwick et al., 2007).

In addition, undocumented migrants are always vulnerable to substandard living and working conditions, live in fear of being deported, and are generally excluded from the social protection provided by the state (Dupper, 2007). There is a clear link between precarious employment and vulnerable workers. The problems facing precarious work are exacerbated by the concentration of vulnerable workers, including migrants, the youth, the elderly, and women, in many of these jobs.

Migrants frequently work in the informal economy – agricultural harvesting and construction labour forces – and perform undeclared work. The youth and undocumented immigrants are particularly in peril because of their economic dependence, the absence of assistance, and their fear of lodging complaints with the regulatory authorities (McLaurin & Liebman, 2012). Migrants generally engage in hazardous work and also work in sectors in which precarious employment arrangements are commonplace (Rizvi, 2015). Many studies have failed to examine these correlations, a notable exception being the study on hotel housekeepers (Seifert & Messing, 2006). Because of their precarious position, migrants cannot benefit from the protection afforded by labour laws. Many migrant workers have no form of social

protection while working in South Africa (Olivier & Kalula, 2007). Migrant workers, particularly those who are undocumented, thus find themselves in conditions akin to precarious employment.

3.4 *The informal economy*

According to statistics South Africa, Quarterly *Labour Force Survey (QLFS)* in Quarter 1 of 2021, there were 2,9m South Africans employed in the informal sector (excluding agriculture), but these data do not indicate how Covid-19 may have impacted informal enterprises.

The informal economy sector in South Africa has a tiny, yet notable, total share of employment, with an increase in the *informal sector* employment in Quarter 4 of 2020 by 65 000 workers, (Statistic South Africa, 2022) The informal sector has invariably been deemed a temporary shield for the poor (Mohlakoana, de Groot, Knox, Bressers, 2019).

It is worth noting that in South Africa the formal economy is not all-inclusive, rather it has vast discrepancies regarding inequality and excludes most of the black people who are impacted by soaring levels of unemployment and poverty (Ndulo, 2013). This has propelled many poor South Africans into marginal circumstances and compelled them to create survival plans which include participating in the informal economy (Skinner, 2016). This sector has persistently and permanently shown growth everywhere in the country. Despite these vulnerabilities, informal economy workers in South Africa are not typically covered by social protection programs.

This lack of social protection contributes significantly to the vulnerability of this category of worker. The absence of at least a basic level of income security traps many of these workers in a vicious cycle of vulnerability, inequality, poverty, and social exclusion. This constitutes a huge challenge to their well-being and enjoyment of human rights, in particular, the right to social security. In light of these vulnerabilities mentioned in the above paragraph and limited ways of assessing the needs of the informal sector as evidenced in the Covid-19 pandemic, the South African government needs to revisit its social protection programs.

3.5 *Informalisation of work in South Africa*

The growth in non-standard work (i.e., employment that differs from the conventional or standard work relationship where work is generally full-time and anticipated to continue until standard retirement age, or until either party gives notice of termination), often gives rise to informalisation in South Africa

(Mills, 2004) and the separation of the worker from his or her place of work. Features such as globalisation, socio-economic and technological developments, and amendments to legislation to adapt to increasingly competitive surroundings, have added to the informalisation of the workplace in South Africa (Theron, 2003).

This process of informalisation, by which workers are obliged to move from conventional employment to the informal economy results in deregulation; workers move beyond the protective scope of labour law (Fenwick et al., 2007). Informalisation in the South African context relates to the situation where "employees who are *de jure* covered by labour law but who are *de facto* not able to enforce their rights, as well as to those employees who are *de jure* not covered by the South African labour law because they are independent contractors"(Fenwick et al., 2007).

3.6 *New forms of work and the future world of work*

Disruptive technological changes and increasing socio-economic imbalances have recently impacted the entire world (Du Toit, 2019). The fourth industrial revolution (4th IR) is characterised by the blending of the digital, physical, and biological worlds, as well as by an increasing application of novel technologies such as artificial intelligence, robotics, and wireless technologies. These developments have heralded a new period that has accelerated the process of disruption by making room for new forms of precarious work (Du Toit, 2019). Notwithstanding the positive results that technological developments may have had on the economy and the growth in new jobs, they have also had negative results.

Convoluting networks make the problem of identifying the parties to the employment relationship an international concern (Du Toit, 2019). In the words of Weiss, "digitalisation contains many risks but it also is a chance to improve working and living conditions to the benefit of workers. It is not an apocalyptic evil but something which needs to be shaped." The question regarding digitalisation is, to couch it in a somehow simplistic formula, whether labour law, the legislator, and the collective actors will succeed in ensuring that human beings will not become slaves to this new technological phenomenon (Weiss, 2020).

Labour and social security protection are accessed through an employment relationship. However, the nebulous line that separates the situation where there is an employment relationship and that where there is independent contracting has been a matter of discord.

The application of labour law in its narrowest sense does not include either the self-employed or independent contractors. As a result, persons engaged in modern forms of work, such as on-demand platform work, may not be viewed as employees and as such do not fall within the safety net of labour law (Du Toit et al, 2019). However, the government has a very significant role to play in addressing the situation as illustrated in the NMWA. This Act applies to all workers and their employers and given that the expanded definition of a worker includes "any person who works for...", the Act covers "independent contractors" – including casual labourers – who personally undertake to perform work or services. The NMWA has been positioned as an active policy response to some of South Africa's most urgent concerns. Income inequality has risen since 1994, household poverty levels remain stubbornly high, low wages pervade the labour market, and private sector union membership has tumbled (Development Policy Research Unit).

Although data from research on NMWA conducted by (Bhorat, Lilenstein, & Stanwix, 2020) suggest that the effects of the law, at least in the short term, have been far more moderate than expected, the majority of workers' hourly wages do not appear to have increased substantially. Accordingly, at the end of 2019 levels of non-compliance with the NMWA are relatively high, although not significantly different from aggregate non-compliance with the Sectoral Determination Minimum Wages in the past. Specifically, at the national level, 43,5% of workers reported earning wages below the National Minimum Wage at the end of 2019. This notwithstanding, the author contends that the implementation of the NMWA remains the best avenue by which to address South Africa's poverty, unemployment, and inequality and that it is too soon to view this as a dysfunctional policy.

The digital-platform economy, typified by online suppliers of goods and services such as Uber, represents a vital stage in this development. The question is whether the reversal of the eroding effect of new forms of work, such as Uber, lies solely in broadening the definition of employee. Uber drivers in South Africa, like their counterparts in many other countries, have attempted to access labour-law protection through the gateway of classification as employees.

In *Uber South Africa Technology Services (Pty) Ltd v NUPSAW and SATAWU obo Tsepo Morekure*, the Commission for Conciliation, Mediation and Arbitration (CCMA) held that Uber drivers whose services were "deactivated" were employees in terms of the LRA. However, in a disappointing development, the South African Labour Court upheld an application for review and concluded that the CCMA commissioner had conflated the roles of Uber SA and the foreign mother company, Uber BV. The

drivers had not contracted with the applicant (Uber, SA), and so could not succeed in their case. The question remains open whether Uber drivers will be classified as employees of Uber BV.

The future world of work can unlock opportunities, improve the quality of working life, and bridge the gap between citizens when it comes to socio-economic inequalities. It can, however, also lead to a reduction in the workforce. As a result, the Director-General of the ILO established the Global Commission on the Future of Work. The Global Commission's report calls for a human-centered approach to the future of work. The idea is to place people and their work "at the center of economic and social policy and business practice."

This approach is forward-looking and aims to develop humans to cope in a digital world and at strengthening social dialogue to improve employees' quality of working life. The report contains three pillars: the promotion of investment in people's capabilities; investment in the institutions of work; and investment in decent and sustainable work (ILO Global Commission on the Future of Work, 2019). As is shown below, the struggle to regulate new forms of work and achieve social justice and workplace democracy lies at the heart of the ILO's goals. After investigating the socio-economic situation in South Africa amid the Covid-19 pandemic and the 4th IR, it is crucial to explore some of the views advanced in the academic literature.

4. THE LIBERTARIAN OR FREE-MARKET MODULE

The libertarian or free-market model regards the contract of employment and the individual bargaining that it represents as the only lawful mechanism by which to regulate the employment relationship. Advocates (Friedman, 1997) of this approach regard labour legislation with the contempt generally reserved for an invasive plague such as the Covid-19 pandemic, an unwanted trespasser occupying the indigenous countryside of the common law and imposing unjustified regulation on the freedom to contract on similar or equal terms in the marketplace. They contend that legislation calculated to protect employees has the unforeseen result of protecting the employed at the cost of the unemployed. They further contend that any statutory regulation of the labour market conflicts with what is referred to as a "right to work under any conditions" (Friedman, 1997). This suggests that the real option for

policymakers is between permitting employees to work under any circumstances they are willing to accept and compelling them to be unemployed against their will.

In terms of this view, the only lawful protection for employees is afforded by the effective and adequate common law and the resulting sellers' market in which employers are required to compete for labour by offering ever-better terms and conditions of employment (Brassey, 2012). Libertarians contend that getting rid of labour legislation will thus have beneficial results for employees and society at large.

A parallel, more sophisticated, contention for deregulation of the South African labour market assumes linkages between inferior labour standards and competitive advantage in the world market. Those who opt for removing restrictions and regulations frequently draw comparisons with other economies, especially those in developing countries, which seek to compete for access to global markets and investment through a form of labour market deregulation that requires a significant reduction in labour standards. This approach stresses the individual contract of employment (as opposed to any form of collective employment) as the best means for ensuring the greatest possible degree of flexibility and competitiveness.

While deregulation has had a profound effect on labour law in numerous jurisdictions, there are many reasons why this approach is inappropriate for any re-examination of labour market regulation in South Africa (Brassey, 2012). It is increasingly apparent that there is no empirical evidence to support the view that gains in trade performance or foreign direct investment (FDI) are related to inferior labour standards. The ILO core labour standards do not play a significant role in shaping trade performance (Lee, 1998). In other words, there appears to be no comparative advantage to be had from the denial or violation of core labour standards.² Research indicates that the contrary is true. A study into the link between labour standards and competitiveness came to the following conclusion:

Against the race to the bottom hypothesis, the analysis did not find notable linkages between export performance or FDI inflows and the measures of labour standards. In short, the paper finds no proof that states with lower standards gained a competitive advantage in global markets. Poor labour conditions usually diminish productivity or are an element of a package of national characteristics that discourage FDI inflows or inhibit export performance (Flanagan, 2003, p.17).

This is not to suggest, however, that there is no link between inflexible labour markets and the stifling of job creation. On the contrary, a co-publication by the World Bank and the International Finance Corporation quotes a study which suggests that the employment rates in OECD countries with flexible labour laws are 2 to 2,5% higher (World Bank, 2006).

Apart from labour economics, there are numerous external limitations on the nature and extent of any deregulation of the South African labour market. These include the fact that South Africa is a member of the ILO. Since the dawn of democracy in the country, South Africa has ratified all of the ILO's core conventions. Accordingly, it has incurred international law obligations to uphold the right to freedom of association, promote collective bargaining, ensure equality at work, and eliminate forced labour and child labour. The collection of labour law reforms introduced in South Africa in 1995 was specifically crafted to anticipate the ratification of the core ILO conventions and thus South Africa's international law obligations. South Africa is also bound by the ILO's *Declaration on Fundamental Principles and Rights at Work* and adopted by the International Labour Conference in 1998. The *Declaration* provides that by acceding to the ILO's constitution, the member states are obliged to observe the principles central to certain core conventions.

Furthermore, South Africa is a constitutional state which recognises labour rights, in particular the right to fair labour practices, as fundamental rights (Constitution, 1996).

5. SOCIAL JUSTICE DEFINED

Social justice is a well-established concept used to justify government intervention and the distribution of resources. It is a policy that is intellectually substantial, being based in its modern form on the Rawlsian theory of justice. It has been defined as “the common good through the equalization of goods or services” (Sadeghi & Price, 2007) and further as:

The fair distribution of opportunities, rewards, and responsibilities in society, as well as principles and institutions for the distribution of meaningful social goods – income, shelter, food, health, education, and the freedom to pursue individual goals (Hudson, 2013, 432-433).

Social justice is also defined as the fair and equitable distribution of power, resources, and obligations in society to all people, regardless of race or ethnicity, age, gender, ability status, sexual

orientation, and religious or spiritual background. Basic principles underlying this definition include the values of inclusion, collaboration, cooperation, equal access, and equal opportunity. Such values are also the foundation of a democratic and egalitarian society.

These definitions reflect the aspiration for social justice through which every working man and woman can based on equality of opportunity, freely claim their fair share of the wealth they have helped to generate. The importance of achieving social justice in South Africa is ever more pressing with the rise in inequality and exclusion, which is a threat to social cohesion, economic growth, and human progress in a world of work that is changing at an unprecedented pace and scale.

6. NEXUS BETWEEN SOCIAL JUSTICE AND LABOUR RIGHTS

There is a crucial link between social justice, labour rights, and well-being. For individuals, the absence of justice often represents increased physical and emotional suffering as well as greater vulnerability to illness. Furthermore, issues of social justice and access to resources are inexorably tied to the collective well-being (eg, relationships and political welfare) of families, communities, and society.

Provision of the opportunity to work for its people and providing them with access to labour justice are important aspects of the social justice responsibility of any state. This is particularly true in a country like South Africa where poverty, inequality, unemployment, and under-employment are rife. The South African workforce is exceptionally vulnerable to exploitation at the hands of inherently more powerful employers (Kahn-Freund, 1972).

The individual contract of employment cannot challenge the unilateral rationality of managerial prerogative. This gives rise to the need to allow labour to unite, form collectives, and strive to alleviate poverty on its own. Unionisation and collective bargaining lie at the root of most labour-relations issues.

Social justice is important because it represents the notion that justice does not have to be achieved through a set of abstract legal rights which bear scant relation to the experience of the society at large. Justice can be achieved through the consideration and involvement of different social groups in the design and application of the law. Social justice means that the law can be expanded to meet social compromises and should not be constrained by the liberal commitment to non-intervention and the free-market model.

This created space in 1994 for the development of labour law to meet social compromise during the dawn of democracy in South Africa. New legal forms emerged which recognised the interdependent interests of employers and workers and a need to coordinate these in the greater “public interest” (eg, social insurance against industrial accidents in the OHS Act and collective bargaining). A more contemporary social-justice perspective might, therefore, acknowledge collective bargaining as an important means of defining and enforcing protection for workers but recognises rights as a contemporary, and perhaps more significant, medium by which to promote social justice in the workplace.

To a certain extent, the creation and development of the ILO is a good example of this social moment. The Organisation was formed in 1919 as part of a broader peace project at the end of the First World War (Hendrickx, 2012). Its constitution explained the importance of social justice in realising this mandate and the importance of the creation of labour standards in the achievement of social justice (Preamble to the ILO constitution).

A commentary on the seven policy concerns in the constitution identified three priorities for the ILO as regards “social justice.” First was the concern with work as a source of livelihood and fulfilment; the second was the goal of preventing exploitation (e.g., by limiting hours of work and “taking measures to protect those who might be particularly vulnerable”) and the third was the need to protect workers against the difficulties of working in dangerous or inadequate environments (Rodgers et al., 2009).

Social justice thus required a redistribution of power from employers to workers, but it also meant the recognition of the value of work to both workers and the social system as a whole.

Given the social value of work, social justice represented the idea of the quality of work. It was understood that this recognition guarded against the treatment of labour merely as a commodity or an article of commerce and ensured that global industrial peace could be maintained.

Increasingly, however, labour law theorists came to be persuaded of the value of labour law in helping to equalise the unequal power-relation between employers and workers. A role was recognised for the law in limiting the “duty” of obedience of the worker and increasing the “range of his freedom” (Kahn-Freund, 1983).

The constitutionalization of labour rights in South Africa implies that social justice is a prerequisite for ensuring a durable economy and society, and places obvious limitations on the policy choices open to those who pursue the regulation of the labour market.

7. A SOCIAL-JUSTICE PERSPECTIVE

The social-justice perspective on labour law views law as an instrument to further the interests of social justice. It centres on what Hugh Collins has termed the role of labour law in "setting the distribution of wealth and power in society" (Davies, 1997). Proponents of social justice can seek to achieve their goals and address some of the challenges facing South Africa mentioned above through a wide range of peaceful means, including various government programmes, social campaigns, and public activism.

At the government level, social-justice initiatives can be pursued through various types of programmes. These can include direct redistribution of wealth and income; protected legal status in employment and government subsidies.

While we must applaud and acknowledge South African legislation³ which endeavours to address the common-law deficiencies and favours the following three methods to redress the inherent inequality between employers and employees: a) to impose minimum conditions of employment for employees generally or for particular classes of the employee; b) to promote the concept of collective bargaining; and c) to develop special tribunals to create equitable rules for the workplace which have the power to enforce those rules. The author argues that much still needs to be done in the form of the implementation of a permanent basic-income grant in South Africa to assist in reducing inequality.

Furthermore, the government should intervene in the markets to address inefficiency. In an optimally efficient market resources are allocated to those who need them in the amounts they need. In an inefficient market, like that of South Africa, this is not the case; some have an excess of resources, others insufficient resources. The government can combat these inequities through regulation, taxation, and subsidies. The South African government can further intervene to promote social welfare and directly

address these issues. It is worth noting that the South African government must be applauded in this regard in light of the Social Relief Grant of R350 allocated to qualifying South African citizens.

The South African government can also intervene to minimise the damage caused by naturally occurring economic events. Recession and inflation are part of the natural business cycle but can have a devastating effect on citizens and migrant workers the majority of whom do business in the informal economy and barely eke out a living. In these cases, the government can intervene through subsidies and manipulation of the money supply to minimise the harsh impact of economic forces on its constituents.

Further, modern, and socially progressive labour legislation has significant social and economic benefits for employers, workers, and society at large. Such legislation, if well administered, supports a fair, predictable, and stable labour market, reduces industrial unrest, and enables businesses to grow with confidence and create new and better jobs. For example, if the government were to regulate the informal economy, many social benefits would accrue to South Africans operating in the sector. In addition, labour law must, through state institutions, guarantee the full implementation of national legislation promoting equality in the labour market and must be inclusive and extend to all people active in the South African labour market, irrespective of their employment status. Furthermore, the state must strengthen the role of labour inspection as part of its primary duty to protect workers. In this regard, migrant workers who ply their business in the informal sector, for example, must enjoy the same protection as their South African counterparts.

The provision of education and training schemes by the South African government is perhaps the most important type of government intervention required. This provides a better-skilled workforce to increase labour productivity and overcome market failure. In addition, to academic education, there is a strong case for the South African government to provide more vocational training and support for apprenticeships which will help to bridge the skills gap in the economy and overcome market failure in the under-provision of training schemes for workers.

Furthermore, one of the first paradigms developed within the social justice view regarded trade unions as the main channel through which to achieve social justice. In the words of Kahn-Freund:

[T]he relationship between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of the condition of subordination, however, much

submission and subordination may be concealed by that indispensable figment of the legal mind known as the "contract of employment". The main object of labour law has always been, and will venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent in the employment relationship (Kahn-Freund, 1972, p.8).

Written in the 1950s, this is the most widely repeated statement on the purpose of labour law. It has been repeatedly cited in articles, textbooks, and judgments, including the Constitutional Court's judgment in *Sidumo v Rustenburg Platinum Mines Ltd*, which describes the passage as a "famous *dictum*".

Kahn-Freund advanced the idea that the purpose of labour law is to maintain an equilibrium between employers and workers, a purpose best achieved through voluntary collective bargaining (Davies & Freedland, 1983). In terms of this approach, law plays a secondary role – it regulates, assists, and constrains the power of management and organises labour law, but leaves the process of bargaining and its results to be determined by the interests and power of the parties themselves. However, the British system of collective labour relations on which Kahn-Freund premised his structure of labour law, soon came under pressure. By the end of the 1970s, Kahn-Freund himself expressed the view that the system he had called "collective *laissez-faire*" needed adjustment (Davies & Freedland, 1983).

Subsequently, in international terms, trade union membership has declined significantly, and collective bargaining is no longer the important social institution it once was. In these circumstances, employees are less likely to have their terms and conditions determined by collective agreements and are less able to rely on trade unions as agents to monitor and enforce those agreements.

Darcy du Toit has noted the ramifications of these developments:

If collective bargaining depends on effective worker organisation, it may seem to follow that the decline of trade union density, reflected in declining bargaining coverage, spells the demise of collective bargaining. If so, it might seem that labour law should shift its focus to new forms of worker organisation and new forms of collective interaction (Du Toit, 2007, p. 1404-1435).

One of the key reasons for the decline in the influence of collective bargaining as a social institution is that bargaining is more successful in a localised market. The opening-up of markets beyond the realm of union organisation and beyond nation-states has meant that collective bargaining has become progressively unable to promote workers' interests effectively (Brown & Oxenbridge, 2004) A possible

response is to develop collective bargaining at an international level and to encourage what has been termed "framework agreements between international trade union federations and multinational enterprises". How collective bargaining might develop to deal with these issues, and how trade unions will adapt their strategies to meet new challenges, are questions that will no doubt increasingly occupy the thoughts of labour lawyers (Du Toit, 2007).

A more modern view of social justice might, therefore, acknowledge collective bargaining as an important means by which to define and enforce protections for workers, but also recognise rights as a contemporary and perhaps a more significant medium for the promotion of social justice in the workplace.

While rights might serve the primary function of protection, they are not absolute and may often need to be balanced against the competing rights of others, including the employer and third parties. The role of dispute resolution institutions, particularly the Commission for Conciliation, Mediation and Arbitration (CCMA) and the labour courts, is thus fundamental. Courts provide the primary mechanism through which labour rights can be assessed and, where necessary, balanced.

8. CONCLUSIONS

This article has explored the socio-economic environment and why the state should intervene to regulate the labour market in South Africa. Why the state should intervene or whether a *laissez-faire* approach – the free-market model – should prevail is a matter of contention in South Africa. However, given the nature of the changing world of work and new forms of work that continue to emerge, the question remains relevant.

Although South Africa has made considerable strides toward improving the well-being of its citizens since its transition to democracy in the mid-1990s, this progress is slowing. In many ways, the legacy of apartheid endures. Previously disadvantaged South Africans held fewer assets, have fewer skills, earn lower wages, and are still more likely to be unemployed.

A socio-economic environment characterised by poverty, unemployment, inequality, increasing labour migration, a growing informal economy, the digital economy, and the impact of the Covid-19 pandemic, has created an unsustainable situation that compels the author to support proponents of the social-justice approach. The author suggests that without government intervention (eg, by providing a

blanket minimum-wage grant to those impacted by the above circumstances), any meaningful change to the current negative socio-economic environment will remain elusive.

The author suggests that, given that the primary objective of any enterprise in a free-market economy is to make a profit, the struggle against poverty, unemployment, and inequality cannot be resolved by the free-market model. In many cases, enterprises may sacrifice worker safety, environmental standards, and ethical behaviour in the service of profit margins. A market economy is defined by cut-throat competition and there is no mechanism to help those who are inherently disadvantaged, such as the poor and the unemployed. Without intervention by the state, the socio-economic gap between the haves and the have-nots will widen. Therefore, the government must intervene and implement a permanent social-security grant for all South Africans to level the playing field. In this regard, we must applaud the government for enacting the NMWA.

The inequality rate in South Africa is deplorable. Individuality must give way to social justice as regards the distribution of wealth, opportunities, and privileges within a society, especially in a country with a unique history of perpetual exploitation by the white minority under the apartheid regime. To achieve this, trade unions must be renewed and re-energised and the state must also play a crucial role in determining a minimum wage for all workers, and a social grant for its citizens. If the government fails to intervene and regulate the labour market in some measure and allows the *laissez-faire* model to flourish, inequality in South Africa will become still more entrenched.

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