A. Introduction: 1979

My first exposure to labour law was in 1979. As a final year law student at the University of Cape Town, I worked at the Workers Advice Bureau run by the Western Province General Workers Union, a trade union organizing largely African migrant workers in the Western Cape. While not illegal, the union was excluded from participation in statutory industrial relations because its members included workers classified as ‘African’. The apartheid state used a range of techniques (including the security police) to persuade black workers to join plant-based works committees rather than trade unions.

On Saturday mornings we interviewed workers in the union’s crowded offices in Athlone, a ‘coloured’ working-class area in Cape Town. Most were migrant workers from the Transkei for whom dismissal would probably mean removal from Cape Town under influx control legislation and a forced return to their Transkei ‘homeland’. The Western Cape had the unique status under the apartheid master-plan of being a “coloured” labour preference area – African workers could only hold positions if neither white nor coloured workers were available.

In the afternoons, we would type letters of demand on the union’s typewriter. The demands that we put in the post on behalf of dismissed workers were usually limited to claims for notice pay (usually a week’s pay but in some industries as little as a day or even an hour), unpaid wages, leave pay, the return of illegal deductions, and to receive the Unemployment Insurance card. As African workers, they enjoyed a limited amalgam of common law contractual and statutory rights. Re-employment was not on the cards unless their co-workers came out on strike in their support.

In the same year, I studied labour law for the first time. We read Kahn-Freund and, with our experience in the Advice Bureau, needed no convincing that the employment relationship was one typified by submission and subordination.

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1979 also saw the publication of the first volume of the report of the Wiehahn Commission into labour legislation. The Commission had been appointed in 1977 in response to the re-emergence of an independent trade union movement organizing black workers since 1973. In the two years that the Commission deliberated, the independent trade unions had grown from 70,000 to 200,000 members and by the end of the 1980s would have some 2 million members.

The Commission’s recommendations were enacted into law marking the start of the modern era of labour law in South Africa. Racial job reservation was scrapped and trade unions with African members could by 1980 register under the then Industrial Conciliation Act which had regulated labour relations for ‘non-black’ workers since 1924. This watershed change was achieved by removing the words ‘other than an African’ from the statutory definition of an employee. In retrospect, this was the first major step towards dismantling the edifice of the apartheid state. Within a few years, the influx control legislation and the racial segregation of residential areas would also fall away.

The Commission confidently advised the Nationalist government that extending the right to register and participate in collective bargaining would take the political sting out of the emerging independent trade union movement who would henceforth spend their time looking after their member’s economic (rather than their political) interests. A considerable portion of the trade union movement feared that the state could achieve this goal and argued against participation in the statutory system for fear of ‘judicial deradicalization’ and state interference in trade union democracy. For several years the unions were split by an acrimonious ‘registration’ debate but by 1984 this had been resolved; the union movement continued to grow rapidly throughout the 1980s using the legal space that flowed from participation in the system to advance their members’ interests through collective bargaining while intensifying their opposition to the apartheid government.

The Commission had recommended the establishment of an Industrial Court with wide discretionary powers to rule on unfair labour practices. While the initial rationale for its establishment was to offer some protection for white workers who were losing the benefits of statutory job reservation, it soon became the basis for unprecedented legal protections for all employees, significantly protection against unfair dismissal.

The workers who sought advice at the Advice Bureau have now had the protection of labour law for three decades. Falling in the middle of that period was the end of apartheid in 1994 – the evolution of a modern labour law in South Africa therefore spans the last decade and a half of the struggle against apartheid and the first decade and a half of the struggle to undo its deep-rooted legacy of inequality.

This chapter’s focus is to assess the extent to which one of the key goals of employment law – protection against unfair and arbitrary dismissal – has been achieved for South African workers. Its approach is ‘regulatory’ – it seeks to

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examine how successful legal techniques and institutions have been in translating this legal right into a real security in the lives of workers. At the same time two further themes are explored. The first is the issue of ‘judicialization’: what are the consequences of security of employment having been shifted from an organization- al to a rights-based issue? In particular, to what extent have the nature of legal processes and the attitudes of the judiciary and the legal profession helped or hindered the achievement of this goal. The second theme involves locating the legislative project of enhancing security of employment within the wider context of changes in the composition of the labour market that South Africa has experienced along with economies worldwide.

B. Towards more secure employment

The organizing strategies of the independent trade union movement that re- emerged in apartheid South Africa in the 1970s centred on trade union recognition, wage negotiations, and protection against arbitrary dismissal. Dismissals, particularly of key union activists, led to frequent and widespread wild-cat strikes. In a hostile legal environment, greater security of employment was initially achieved on a plant-by-plant basis by including ‘just cause’ dismissal protections in hard-won collective agreements in terms of which contested dismissal disputes were resolved by private arbitrations.

From the early 1980s, protection against unfair dismissal was extended more broadly as the newly established industrial court ruled that a dismissal was an unfair labour practice unless the employer followed a fair procedure and had a valid reason. The court required employers to conduct an internal disciplinary inquiry before dismissing a worker for misconduct or incapacity and to consult trade unions before retrenching on account of their operational requirements. This approach drew on two key sources: international standards, in particular the ILO’s Convention on Termination of Employment 158 of 1982, and the emerging practice of large corporations who were introducing formal disciplinary procedures to control the increasingly expensive knee-jerk tendency of managers and supervisors to fire on sight.

By the end of the apartheid era in 1994 the industrial court was dealing with 3,000 dismissal cases annually. A lack of resources meant that cases were taking up to three years to resolve, and considerably longer if there were appeals. Dismissals remained a significant cause of (generally wild-cat) strike action and the major trade unions and employers continued to make extensive use of arbitration to expedite adjudication.

While many of the initial precedents were established in cases involving individual (often white) employees, the newly registered trade unions used litigation strategies to advance their organizational drives. For instance, the National Union of Mineworkers which was established in 1982 had by 1985 won cases establishing the right of its members to conduct strike ballots on mine property, the right of shaft stewards to represent members at disciplinary inquiries and had obtained
reinstatement orders for workers dismissed for refusing to work in dangerous conditions and for participating in lawful strike action. These rights were achieved at a time when the trade union movement continued to face intense repression: in 1987 the headquarters of the largest trade union federation COSATU were blown up by the security police. The security police also funded rival (often violent) trade unions and ‘front’ labour consultancies which advised employers on anti-union strategies.

In 1988, the Nationalist Government enacted legislation to roll back many of the gains achieved through unfair labour practice litigation. This led to massive nation-wide stay-aways which persuaded organized business to withdraw its earlier support for this legislation. Negotiations between organized business and labour led eventually to the conclusion of a tri-partite agreement in 1990 between the apartheid state, organized business, and labour that future changes to labour law would not be introduced without negotiation. The ‘social capital’ forged in the intense battles over labour law in the last years of apartheid created the ethos in which the post-apartheid reform of labour laws were negotiated and enacted.

The transition to democracy was regulated by a 1993 Interim Constitution that entrenched a number of labour rights including protection against unfair labour practices, rights of freedom of association and collective bargaining, and rights to strike and lock-out. Protection against unfair labour practices was elevated to constitutional level to allay the fears of old order civil servants who anticipated mass dismissals at the hands of a democratic government.

An innovative Labour Relations Act was enacted in late 1995, the first major legislative achievement of the new Parliament. It contained a reworking of unfair dismissal law that sought to reduce the time and costs involved in resolving dismissal disputes. The pre-1995 jurisprudence was codified and simplified. The new statute’s core provisions were supplemented by a ‘soft law’ Code of Good Practice which sought to promote certainty while at the same time allowing for a flexible application of the law, permitting smaller businesses to adhere to less formalized procedures. The requirement to conduct an inquiry before dismissing was replaced by a less formal obligation to conduct an investigation and allow representations. Two new institutions for dispute resolution and adjudication were created: a para-statal Commission for Conciliation, Mediation and Arbitration (CCMA) and a specialist system of labour courts. The CCMA is governed by a tri-partite Governing Body and staffed by panels of full-time and part-time commissioners who conciliate and arbitrate disputes, many of whom were drawn from the ranks of the trade union movement.

The aim is to provide a system of industrial justice that is ‘cheap, accessible, quick and informal’. There are simplified referral procedures and tight time-frames:

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disputes must be referred within 30 days although late referrals can be condoned. The first conciliation meeting must be held within 30 days of the referral. Unresolved disputes about the most common categories of dismissals (misconduct and incapacity) may be referred to arbitrations in which the parties’ right to legal representation is restricted. Unless a party objects, the arbitration can start immediately after the failure of the conciliation process. The arbitrator’s award must be delivered within 14 days of the end of the hearing and is not subject to appeal; in addition, the grounds on which the Labour Court can review arbitrator’s awards are restricted to a narrow set of grounds typically applicable to consensual arbitrations. The Labour Court is the court of first instance for cases about dismissals for operational requirements, strike dismissals, and discrimination cases.

The Act articulates reinstatement as the primary remedy for employees dismissed without a valid reason. At the same time, the maximum compensation award is capped at 12 months (or 24 if the dismissal is automatically unfair). The Act represents a trade-off: organized labour was attracted by the idea of quick arbitrations without the expense of lawyers and with a realistic possibility of reinstatement as a remedy. Employers saw their gains as the simplification of their obligations in respect of internal disciplinary inquiries, the short referral period, and the cap on compensation awards. At the same time, the line between disputes of right and interest was tightened and strike action over justiciable disputes was prohibited.

To what extent has the promise of greater security of employment been achieved? Access to dispute resolution has certainly been achieved: the number of dismissal cases has risen from an estimated 3,000 in the final years of the old system (1994–95) to approximately 120,000 per year a decade later in 2006–07. Dismissal cases represent 80 per cent of the CCMA’s case load and are the stock-in-trade of South African labour law. It is estimated that 4 per cent of the approximately 7 million employees in the private sector formal economy are dismissed each year and that one in two dismissed workers refer cases to the CCMA. After a few years of operation, the CCMA appeared to be swamped under the weight of its enormous case load but increased funding and enhanced managerial and administrative efficiencies have allowed it to deliver substantially the initial vision of ‘swift and cheap’ dispute resolution.

Roughly 60 per cent of dismissal cases referred to it are settled through conciliation, generally within a month of the dispute being referred. The terms of these settlements are not known, but it is likely that the majority involve a financial settlement. Of the balance of cases that go on to arbitration, one-third of employees

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4 Other categories of disputes which must be referred to arbitration are those concerning trade union organizational rights, the interpretation of collective agreements, and certain individual unfair labour practices.

5 The grounds which are classified as automatically unfair dismissals include dismissal where the reason is participation in a protected strike, the employee’s pregnancy, unfair discrimination, and whistle-blowing.

6 These numbers increased to 132,000 in 2007–08 and 140,000 in 2008–09 reflecting higher levels of retrenchment due to the recession.

7 *Tokso Review* 2009–10 at 21 (Juta). This publication is a review of labour dispute resolution published annually by a private dispute resolution agency.
succeed with a claim but less than 10 per cent of employees who win their cases (roughly 1,500 annually) receive a reinstatement award in their favour. How many of those workers return to work is not known. This means that the vast majority of workers who are found to have been unfairly dismissed receive an award of financial compensation. The average award is equivalent to four months’ pay. The low level of reinstatement is the result of a number of factors. It is not feasible for workers such as domestic workers and employees of very small businesses to be reinstated because of the personal nature of the relationship. However, many employees of larger employers do not seek reinstatement confining their claim to one for compensation only. Even where reinstatement is sought, many arbitrators are reluctant to order reinstatement and tend to accept uncritically the employer’s opposition to reinstatement on the ground that the employment relationship has broken down.

On average, conciliations take 27 days and arbitrations are concluded within 39 days; the speed of dispute resolution is a considerable achievement compared to the standard of conventional litigation. However, if the employer resists the claim it can be several years before the worker sees any money or returns to work. At least one-third of those who receive an award in their favour are required to take further administrative steps to ensure payment. Employers are able to take advantage of judicial delays to put off the day of reckoning almost indefinitely which can result in workers receiving nothing or accepting a smaller sum in settlement. Ten per cent of arbitration awards are submitted to the Labour Court for judicial review although a significant proportion of these applications are not pursued to completion, indicating that they are more than anything else a delaying tactic. Where they are pursued to finality, a simple review takes an average of two years to be argued.

The success of the ‘rough justice’ scheme in achieving access to adjudication can be contrasted with the fate of discrimination litigation. Although South Africa has explicitly prohibited discrimination and employees have been able to bring equal pay claims since 1998, no more than a handful of cases have been brought challenging wage discrimination on racial or gender grounds in this period despite clear evidence of the persistence of the ‘apartheid’ wage gap. This contrasts with the UK where there are almost as many equal pay claims as there are unfair dismissal claims.

C. Judicial responses

The successes and failures of the scheme illustrate many of the fault-lines along which labour law operates. Its design seeks to insulate the arbitration system from

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8 This assessment is based on information derived from the CCMA’s electronic case management system. The CCMA’s Annual Reports can be found at <http://www.ccma.org.za>.
10 P Benjamin, ‘Different Routes to Equality and Empowerment’ in O Dupper and C Garbers (eds), Equality in the Workplace: Reflections from South Africa and Beyond (Juta, 2010).
11 These figures can be found in the Annual Reports of the Employment Tribunals.
many of the institutional practices and attitudes that load litigation in favour of employers as the stronger and better-resourced party and allow employers to utilize delay as a strategy to prevent workers enforcing their rights.

Chief among these has been the restriction on legal representation in arbitration hearings. This reform has certainly succeeded in reducing the costs of dismissal cases for employees, trade unions, and employers and levelling the playing field. While the legal profession has frequently threatened to challenge this incursion into its livelihood, the courts have accepted this restriction.12

It was envisaged that arbitrators would play an inquisitorial role in hearings thereby reducing the premium for legal representation. However, to a large extent this has not materialized, partly because of entrenched attitudes among the legal profession and the judiciary about the inherent superiority of adversarial proceedings. Many judges tended to see a more interventionist approach by an arbitrator as evidence of bias although more recently there has been a line of authority accepting the benefits of a more inquisitorial approach.

There have been a number of other areas of judicial ‘resistance’. The most extreme judicial response was a ruling in the country’s second highest court, the Supreme Court of Appeal, in 2006 that arbitrators should ‘defer’ to the reasons given by an employer for a dismissal decision and should be cautious about reversing an employer’s decisions.13 This approach drew its intellectual inspiration from the long-standing UK rule (articulated by Lord Denning) that employers should be allowed a ‘band of reasonable responses’ in dismissal cases.14 This approach, which was without foundation in the text of the statute or its underlying policy, was the result of a perception that the ease with which employees could refer disputes to conciliation and arbitration was somehow unfair to employers. The decision was reversed by a unanimous decision of the country’s highest court, the Constitutional Court, which pointed out that this had been an explicit policy decision of the legislature in order to prevent dismissals giving rise to industrial unrest.15

A similar tension can be seen in contrasting court decisions over the grounds for a judicial review of arbitrator’s awards. While the law explicitly limited these grounds, judges during the first decade of the CCMA’s life consistently expanded these to give themselves greater scope to set aside arbitral decisions. This made it easier for recalcitrant employers to use review proceedings as a delaying tactic. It took until 2007 for the Constitutional Court to restrict the permissible review grounds to those set out in the Act and remind the lower courts of the clear policy of the Act to limit the scope for judicial intervention in arbitral decisions.16

Another of the fault-lines along which unfair dismissal law operated has been the ‘public–private’ divide. This has thrown up two areas of potential duplication and controversy – the relationship between internal disciplinary inquiries and arbitrations and whether dismissals in the public service carry a public character that should allow for them to be subject to administrative review.

The right to challenge unfair dismissals extends to all employees, including public servants. However, due to the more bureaucratic disciplinary proceedings within the public service, this has resulted in a time-consuming duplication of internal and arbitration hearings, making dismissal procedures extremely cumbersome. In the transition period, existing disciplinary proceedings were often transformed into collective agreements which public sector trade unions are now reluctant to change. Civil servants facing dismissal for the more serious misconduct (in particular, corruption) are often suspended on full pay during internal hearings giving them a substantial incentive (with legal assistance) to drag out hearings while collecting their pay cheques. This has contributed to a widely held public perception that that labour law is undermining the state’s capacity to deliver services.

In the 1980s, when black employees in the public service were rightless ‘temporary’ workers, liberal judges had extended administrative law protection to them, often in the context of mass strike dismissals. After 1995, these rights existed in parallel with new statutory rights with the result that public service employees had a choice of routes to attack a decision to dismiss. Again, it has taken the Constitutional Court’s intervention in 2010 to confine employees challenging their dismissal to their labour law remedies. Up to this point, the state as employer had been in the anomalous position of having to comply with two (at times divergent) sets of rules. Within the legal community, this has been a bitterly contested dispute provoking unusually acrimonious exchanges in both judgments and academic writing. Ultimately, the argument for the special character of labour law has won out with the Constitutional Court ruling that the unfair dismissal protections in labour legislation ‘ousted’ employee access to administrative law protections, except in exceptional cases in which the dismissal has a ‘public’ effect.17

Ironically, at much the time that the administrative law–labour law dualism was being put to rest, the civil courts had a brief flirtation with granting employees across the spectrum an additional and parallel set of remedies under a constitutionally derived ‘duty of fair dealing’. This would have allowed employees to challenge the fairness of a dismissal or any other labour practice in either the civil courts or the Labour Court. However, this development proved to be short-lived with a different panel of judges in the same court deciding that the statutory remedies were exclusive.18

Running through these controversies has been a tension between a ‘rights’-oriented approach, which has sought to expand the remedies available to individual plaintiffs who have the resources to approach the superior civil courts, and the collective orientation of the statutory scheme, which gives a set of accessible although slightly restricted rights to all and ousts the jurisdiction of the courts.

17 Chirwa v Transnet Ltd & others [2008] 2 BLLR 97 (Constitutional Court of South Africa).
18 Murray v Minister of Defence (2008) 29 IJ 1369 (Supreme Court of Appeal).
These judgments also reflect the reluctance of civil courts to give up any part of their general jurisdiction to specialist courts and tribunals. Although high court judges generally rely on the Constitution to expand individual rights, the Constitutional Court has consistently brought them back to the purposes of the Labour Relations Act and its promotion of effective dispute resolution.

From a trade union perspective, one of the potential pitfalls of ‘judicialization’ is that the right to litigate may be an ineffective replacement for industrial action. This issue has been most prominent in retrenchment (redundancy) cases where the specialist Labour Court has generally been reluctant to ‘second guess’ an employer’s reasons for reducing its workforce. The wide definition of the term ‘operational requirements’ has allowed employers to use this route to restructure their businesses, including arrangements for outsourcing or externalizing work. Trade unions were prevented from using protected industrial action to challenge decisions to reduce workforces. This led to two changes to the law in 2002 for large-scale retrenchments: employers must refer proposed retrenchments to the CCMA for a facilitation process before deciding to dismiss and the union may elect to challenge the dismissals by either litigation or strike action. However, the weak bargaining power of trade unions at the time of mass lay-offs has meant that this provision is seldom used to take strike action against retrenchments.

D. Employer responses

The counter-narrative to the rise of collective bargaining and protective labour law (typified by unfair dismissal protection) has been the restructuring of businesses and the use of a range of strategies to disguise employment and break up bargaining units. In addition, fixed-term contracts have been increasingly used to restrict protection against unfair dismissal.

Since the mid-1980s, practices such as outsourcing and sub-contracting have been common. The 1995 Labour Relations Act does contain a ‘transfer’ provision based on the EU Directive and the UK Transfer of Undertakings (Protection of Employment) Regulations (TUPE), which facilitates business transfers by removing the requirement for individual consent while simultaneously seeking to prevent outsourcing and other business transfers being used to reduce conditions of employment. While these rules may prevent a reduction in terms and conditions at the time of transfer, trade unions generally have significantly less bargaining power after outsourcing has occurred.

Disguised employment by means of fraudulent ‘independent contracting’ became increasingly widespread in the 1990s, having initially been advocated in the last years of apartheid by an anti-union consultancy funded by the security police. However, by 2002, the transparently abusive nature of these practices led the courts to show a greater willingness to look beyond contractual labels and adopt a more substantive approach to identifying the employment relationship. That this transparent fraud was perpetuated for almost a decade was the result of the ‘contractual fallacy’ – that the courts required workers to prove their contract of employment
even though this was not a requirement of the statutory definition of an employee. In 2002 the core labour legislation was amended to include a presumption of employment and the available evidence indicates that these changes led to a reduction in the use of ‘independent contracting’ as a vehicle for disguised employment.

Subsequently triangular employment has become the primary, and perhaps more pervasive, vehicle for labour law avoidance. This has been possible because the legislative provisions recognizing triangular employment are not restricted to ‘temporary employees’. Employees who are placed with a client (whether temporarily or indefinitely) by an agency are employees of the agency (rather than the client) if the employees’ remuneration is routed through the agency. While the client can be held liable for the agency’s non-compliance with statutory employment standards, this liability does not extend to unfair dismissal, leaving employees placed in this manner without any security of employment. Employees engaged in this manner also earn considerably less than ‘direct’ employees performing the same work. The vulnerability of low-paid employees to abuse by labour broking agencies is exacerbated by the absence of any framework for the registration and control of these agencies.

South African labour hire firms expanded their lucrative operations into the region, particularly Namibia. In 2007, Namibian legislators voted to prohibit labour hire on the basis that it resembled the labour contracting system used in Namibia under South African apartheid rule. The ban replaced proposals to regulate labour hire that had been enacted in 2004 but had not come into effect. The ban itself never came into effect and its constitutionality has been argued twice before the Namibian courts. It was initially held not to violate any provisions of Namibian Constitution by the country’s High Court in a highly idiosyncratic decision which found that triangular employment was not recognized by the country’s legal system, was akin to slavery and violated ILO norms because it turned labour into a commodity.

However, in December 2009 the country’s highest court reversed the decision. The Supreme Court judgment describes the abuses associated with the apartheid era labour contracting at some length but points out that whatever the similarities of language used to describe these two phenomena, they are different and that agencies supplying temporary and specialized workers have a legitimate role in contemporary labour markets. The court struck down the prohibition as being unconstitutional because the abuses associated with agency work could in its view be dealt with through an appropriately designed regulatory regime.²⁰

₁⁹ An estimated 900,000 employees are placed through ‘labour brokers’ who are their employers. It is not known how many of these are working temporarily for the client and how many are working indefinitely.

²⁰ The following passage indicates the approach of the Namibian Supreme Court: ‘If properly regulated within the ambit of the Constitution and Convention No 181, agency work would typically be temporary of nature; pose no real threat to standard employment relationships or unionisation and greatly contributes to flexibility in the labour market. It will enhance opportunities for the transition from education to work by workers entering the market for the first time and facilitate the shift from agency work to full-time employment.’ Africa Personnel Services v Government of the Republic of Namibia (Supreme Court of Namibia, Case No SA 51 / 2008) at para [117].
Nevertheless, the ‘populist’ approach of the Namibian legislators and the High Court have influenced debates about triangular employment in South Africa, with the Minister of Labour, ruling party MPs and trade unions advocating a ban on triangular employment. At the time of writing, the issue remains unresolved with some sectors of government and the trade unions still favouring a ban.21

What is one to make of the ‘populist’ turn of events in debates about labour law? The emergence of labour broking and other forms of externalized and contingent work have reversed many of the gains achieved by the trade union movement. Bargaining units have been broken up and employment has become less secure. African workers who only gained protection against unfair dismissal and began to participate in pension and medical funds in the 1980s are being pushed back into greater insecurity.

In this context, the call for a ban is a response to the failure of labour law to offer a meaningful response to the rise of non-standard work and in particular the ‘splitting’ of the employer through techniques such as outsourcing, sub-contracting, and agency work. Proponents of a prohibition argue that a legal requirement compelling ‘direct’ employment by the party who supervises work will assist to reverse the decline of trade union bargaining power in the private sector and provide workers with more secure employment. In both South Africa and Namibia the intensity of the debate is exacerbated by the fact that negotiations to change the law have been going on for most of the last decade. While there are regulatory models which confine agency work to a limited range of ‘true temp’ activities, these proposals have not won the backing of either the unions or the employers yet.

The scale of the abuses associated with triangular employment has been exacerbated by regulatory failures, in particular the absence of a system for registering and controlling agencies. Inadequate enforcement also plays a significant role with vulnerable workers in both direct and indirect employment having great difficulty in enforcing claims for issues such as statutory minimum wages. The Department of Labour’s inspectorate has been identified by an ILO-sponsored study as a significant ‘Achilles heel’ in terms of both monitoring and enforcement activities.22 While post-apartheid labour legislation decriminalized labour regulation (with the exception of offences involving child labour and forced labour) inspectorates were not granted additional resources to take on new functions such as enforcing compliance orders through the court system. There has also been a very significant extension of the Department’s jurisdiction to enforce minimum wages and other conditions of employment in a range of ‘difficult’ sectors including farmworkers and domestic workers. While the design and management of a dispute resolution institution such as the CCMA has been a significant area of institutional and legislative innovation, there has been no equivalent overhaul

21 The ruling African National Congress’ 2009 Election Manifesto states: ‘In order to avoid exploitation of workers and ensure decent work for all workers as well as to protect the employment relationship, introduce laws to regulate contract work, subcontracting and out-sourcing, address the problem of labour broking and prohibit certain abusive practices.’
of the labour inspectorate. Ironically, the representatives of organized business and labour, in particular, who actively participate in the governance of the CCMA, have not pushed for enhanced performance capacity with the same vigour.

E. Conclusion

In South Africa, labour law operates within a context of extreme unemployment and inequality, and in which many of those who work received inferior schooling under apartheid’s ‘Bantu education’ system which was designed to ensure that African workers remained ‘hewers of wood and drawers of water’. The difficulties that have been encountered in turning around the education and training system means that the vast majority of new entrants in the labour market continue to lack the skills needed for employment. There continues to be an over-supply of low-skilled workers and a shortage of critical skills. South Africa remains one of the most unequal societies in the world and income inequality increased between 1993 and 2008.23 There has been an exponential increase in the incomes of the wealthy at the same time that the vast majority of the population are either earning minimum wages or are informally employed or unemployed.24 The poorest sectors of society have benefited from the massive extension of social grants which are received by some 13 million individuals.25 The earnings of those in the middle income brackets (lower white-collar and blue-collar workers) have decreased in real terms and the gap between this group and high-earners has increased, largely because of the premium paid for scarce skills. It is this group who perhaps most value protection against unfair and arbitrary dismissal. The value of their job is increased by the fact that many support members of their extended family who are without work.

While South Africa’s labour laws, including protections against dismissal, are not particularly onerous when compared to other middle-income countries, there is a widespread perception (among both the public and employers) that it is more difficult to dismiss than virtually anywhere else in the world. This perception (colloquially referred to as the ‘hassle’ factor) has had a major influence on the labour market behaviour of both local and international firms and has been a key driver of externalization.26 While it can be expected that some employers will hold

24 One measure of this growing inequality is that in 2005, adjustments in executive directors’ packages was 278 times greater than that for minimum wage earners. (A Crotty and R Bonorchis, Executive Pay in South Africa: Who gets what and why (Double Story, 2006) 125–40.
25 Expenditure on welfare and social assistance increased from R30.1 billion (3.2 per cent of GDP) in 2000/01 to R101.4 billion (4.4 per cent of GDP) in 2008/09. In April 2009, 13.4 million people were benefiting from social grants. Of these, 2.3 million were receiving old age pensions, 1.4 million were receiving disability grants and 9.1 million children were benefiting from Child Support Grants (Leibbrandt et al (n 23) 52).
negative views on labour law, the gap between perceptions and reality appears to be higher in South Africa (and Namibia) than in any other country. Significantly, the perception has a fixed ideological character and changes in key areas of labour law do not lead to any change in perceptions. The ease with which employers are able to lay off workers during the recent economic downturn is a further indication of the extent to which these claims are greatly exaggerated.

Employers have used triangular employment and other forms of non-standard work to escape the net of unfair dismissal protection. While there are very significant financial incentives for employers to employ unemployed workers through fixed-term learnerships, employers make limited use of these schemes. Proposals to promote the hiring of new employees, including introducing a qualifying period before workers qualify for full unfair dismissal protection as well subsidies for employing young first-time workers, have to date been rejected by the trade union movement who fear that these will be abused to displace their members.

Contemporary labour law debates tend to contrast ‘narrow’ conceptions of job security which focus on preventing employed workers losing their jobs unfairly with broader notions of labour market security. This notion underpins concepts of flexicurity in which a range of social protections are provided to workers through public unemployment and re-training programmes. This remains uncharted territory in South Africa.

To return to the workers who came to the Advice Bureau 30 years ago (or more likely their children). Many will have been laid off, a cruel reminder of the limits of labour law. For those in work, the existence of the CCMA, an institution of which they are aware and to which they (or their trade unions) can refer disputes without incurring any significant cost, is one of the most significant and real benefits that post-apartheid law has brought to them. While unfair dismissal law is highly unlikely to return dismissed employees to their previous jobs, it clearly serves as the guarantor of an approach to dismissal in which an employee’s prospects of arbitrary exclusion from the workforce are significantly reduced. It has produced a more stable society and made the lives of the South African workforce considerably more stable and predictable than at any time previously. This has been achieved primarily through a series of legal reforms that emphasized access to justice as their primary concern. A traditional rights-based model in which rights were enforced

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27 This disjuncture between perception and labour market reality is borne out by the fact that in the World Economic Forum’s Global Competitiveness Report which is based on the perceptions of groupings such as business executives, rates South Africa’s hiring and firing rules as the fifth most restrictive in the world. On the other hand, the OECD concludes that South Africa’s labour laws are relatively flexible and that of the OECD’s 29 members only the United States has less restrictive laws on hiring and hours of work, and the dismissal protections are more flexible than the average for OECD countries; more flexible than countries such as Brazil, Chile, China, and India with which it is often compared. The World Bank’s discredited Doing Business survey gives South Africa a mid-table ranking (102nd out of 182 countries), although it has been argued that if the relevant questions had been correctly answered the ranking would have been closer to 30. (See P Benjamin and J Theron, ‘Costing, Comparing and Competing: The World Bank’s Doing Business Survey and the Benchmarking of Labour Market Regulation’ in H Corder (ed), Global Administrative Law: Innovation and Development (Juta, 2009) (also published as Acta Juridica 2009) 204–34).
through conventional litigation in the courts and parties had rights of legal representation would not have succeeded in entrenching these protections as successfully.

Employees are now unlikely to strike over the dismissal of a co-employee as they willingly did in the 1970s and 1980s. However, demands that employers do not use contingent workforces hired through labour brokers have in the last couple of years become increasingly common in collective bargaining and have given rise to several (generally successful) strikes. A declining proportion of employees now receive protection against unfair dismissal. At least 30 per cent of the employed workforce, while forming part of the supply and distribution chains of large formal sector businesses, can have their employment or supply of work terminated without any recourse to law and are excluded from benefits negotiated through collective bargaining. While these workers have political rights not enjoyed under apartheid, their working conditions are increasingly beginning to resemble those of the workers of an earlier era.