The Labour Relations Act and global competitiveness

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The South African Labour Relations Act (LRA) was an essential part of the process of political democratisation. Together with the Bill of Rights[2], the Basic Conditions of Employment Act[3] and the Employment Equity Act[4], it entrenched many of the basic labour rights which South African trade unions had demanded for over 70 years. It was a high water mark in the tide of social regulation of market relations, one that both astounded and inspired unions in other parts of the world who have been feeling the cold winds of economic liberalisation since the 1980s.

Yet at the very moment that democratisation enabled South Africa to rejoin the global economy, those cold winds began to blow fiercely through industry. The Government signalled the end of protectionism and tariff barriers; this has been accompanied by financial liberalisation and tough fiscal policies, privatisation, and the introduction of labour market 'flexibility' involving increased casualisation, outsourcing, and the intensification of work. Webster and Adler[5] described this process of political democratisation under conditions of economic liberalisation as 'double transition'.

Economic liberalisation has been accompanied by claims that the labour market is rigid as a result of the bargaining council system and other regulation, and demands that this regulation should be scaled-down so as to allow markets to determine wage levels.[6]

The orthodox view is that globalisation is undermining the ability of nation states to regulate their own employment relations. In this scenario transnational corporations are able to put pressure on governments and unions to reduce labour costs by threatening to relocate. Trade unions and civil society are too weak to resist. International solidarity action between workers in different countries is frequently unlawful and, in any event, is usually impossible to organise because one worker's redundancy in country

1 66 of 1995.

2 Contained in Chapter 2 of the Constitution of the Republic of South Africa Act 108 of 1996.

3 75 of 1997.

4 55 of 1998.

5 (1998).

6 Bezuidenout A 'Towards global social movement unionism? Trade union responses to globalisation in South Africa', International Institute for Labour Studies, Discussion Paper, DP 115/2000.

A, may be another worker's gain in country B. In theory, the increased demand for labour in low-cost countries will induce workers to migrate to fill these jobs and this, in turn, will lead to higher wages and benefits in those countries. In practice most workers do not migrate for a number of reasons, such as political opposition to and legal restrictions on immigration. Even when they are able to cross borders, they are generally unwilling to do so for reasons of family, language, culture, and cost. The combination of these factors leads those who argue for the orthodox view to say that deregulation or a severe weakening of labour rights is the necessary and inevitable consequence of modern globalisation. A cause-and-effect relationship is assumed between globalisation and the alleged shrinkage of the coverage of labour rights, the growth of more insecure, irregular, non-unionised forms of employment, and the decline of collective representation and collective bargaining. This means that there is a 'race to the bottom', the memorable phrase used by Mr Justice Brandeis in 1933 to describe the competition between states to reduce regulatory requirements so as to attract business.[7]

In this article I am going to advance a different view.[8] I shall argue that nations prosper in the global economy not by becoming more similar in their labour laws but by building their institutional advantages on a floor of fundamental human rights. I hope to show that rights-based regulation is worth developing in order to give South Africa a comparative advantage in global trade and investment.

The orthodox view of the effects of globalisation on labour laws, is defective for three main reasons. First, it over-emphasises the role of labour costs in decisions about relocating or outsourcing. Firms are not likely to move to another state with lower nominal labour costs if those costs simply reflect lower productivity of the workers in that state. Let us suppose that a worker in a British call centre is paid R100 per hour and, on average answers ten calls in that time. If the worker in a call centre in South Africa is paid R50 per hour, but answers only five calls in that time, there would be no net difference in labour costs. If labour costs do not reflect the relative productivity in a particular state, and a firm relocates to that state, the result would be to increase demand for labour, with the likelihood of rising wage levels. This would, in due course, cancel out the advantages of relocation which was based purely on low labour costs. Moreover, in calculating costs one has to take account not only of relative wages, but also the costs of training the new labour force to ensure that they have the language and other skills and local knowledge required. The preferences of customers for a particular kind of service will influence relocation decisions. Not surprisingly, a UN Conference on Trade and

7 *Liggatt v Lee* 218 U.S. 517 at 599. For doubts about the validity of the race to the bottom see Barnard R 'Social Dumping and the Race to the Bottom: Some lessons for the European union from Delaware?' (2000) 25 *European Law Review* 57.

8 The argument is developed in more detail in Hepple B *Labour Laws and Global Trade* (Hart Publishing, Oxford, 2005) esp chs 1 and 10, and *Rights at Work: Global, European and British Perspectives* (Hamlyn Lectures 2004, Sweet & Maxwell, 2005) on which this article draws extensively.

Development Report concluded that 'despite a few notable cases, transnational corporations do not often close down on account of low labour cost considerations alone, production facilities in one country to re-establish them in another country'.[9]

The second objection to the orthodox theory is that it neglects the positive gains from free trade which can offset job losses. What this means is that while some jobs are lost due to globalisation, others will be gained provided that they are relatively more productive than in other countries. Workers who lose their jobs may take some time to retrain or to relocate. They need to be informed, to be consulted about the best ways to mitigate these short-term disturbances, and to receive financial assistance. This is precisely why displaced workers need rights to information, consultation, redundancy payments and the protection of acquired rights, as well as mechanisms to help them shift to new jobs. In this the procedures for collective bargaining and workplace forums give South Africa a real comparative advantage.

The third objection to the orthodox view is that it assumes that the strategies and structures of all firms are similar across states. In their influential work on *Varieties of Capitalism*, Hall and Soskice argue that firms react differently to similar challenges.[10] Their analysis indicates that firms do not automatically move their activities off-shore when offered low labour costs abroad. These scholars put forward the notion that firms may concentrate their activities in countries that provide the advantages of the institutional or regulatory frameworks that those countries offer. Firms that need to develop a new product quickly so as to get a market advantage – for example in biotechnology or telecommunications – want to be able to hire and fire workers rapidly, use temporary and agency labour, and not have to inform and consult, or bargain with, workers' representatives. On the other hand, firms that place a premium on continuity of production and long-range development need consensus rather than adversarial decision-making. They have a greater incentive to provide job security and in-house training as well as forms of worker involvement. Accordingly, they will tend to concentrate in countries where there is institutional support for these rights. This has been the case in sectors such as mechanical engineering, product handling, consumer durables and machine tools. Let me take a small example from Europe. It is quicker and cheaper to dismiss a worker in Britain than in Germany. In Britain there is no need to consult workers' representatives except (as a result of EU law) in the case of collective redundancies or transfers of undertakings, the employment tribunals allow employers freedom to dismiss so long as they act within a range of reasonable responses and observe fair procedures, average amounts of compensation are low, and reinstatement is a rarity. In Germany, on the other hand, the works council must be consulted before

9 UN Conference on Trade and Development, *World Investment Report 1994: Transnational Corporations, Employment and the Workplace* (United Nations, New York, 1994).

10 Hall and Soskice *Varieties of Capitalism: The institutional foundations of comparative advantage* (Oxford University Press, Oxford, 2001).

every dismissal and failure to do so renders the dismissal null and void. The works council is in a better position than the employee to control the social aspects of the dismissal. From the employer's point of view, the collaboration with the works council ensures a long-term relationship of trust and confidence.[11] Firms that want high labour turnover may prefer UK dismissal law; those that place a premium on collaboration and stability may favour Germany – in reality, of course, dismissal laws are only one of the factors taken into account in relocation decisions.

This theory of comparative institutional advantage helps to explain why – contrary to many predictions – globalisation has not in fact led to across-the-board deregulation of labour laws, or the disappearance of standard forms of contract. A universal cause-and-effect relationship between globalisation and deregulation has not been established. One of the paradoxes of globalisation is that 'nations often prosper not by becoming more similar, but by building on their institutional differences'.[12]

This leads me to ask: can the model of rights-based employment regulation which has developed in South Africa since 1994 be justified on grounds of comparative advantage? Those – particularly public choice theorists – who give priority to the economic functions of labour laws tend to argue that economic globalisation is leading to 'law without the state' because the state is a fetter on the free play of global market forces.[13] If that is correct, rights granted by the state are the natural enemy of competitiveness. However, all but the most extreme free market economists, would agree that rights may sometimes be necessary to correct market failures. Markets may generate differences in wages and working conditions that have no relationship to the value added by individual workers. The labour of some is over-valued while that of others is under-valued. Under-valued labour is inefficient, hampers innovation and leads to destructive competition. It was this argument that was used by the French to claim during the negotiations for the 1957 Treaty of Rome that they would be at a competitive disadvantage if they were the only country among the six with a law requiring equal pay for women and men. This was endorsed by an ILO Committee of Experts (the Ohlin Committee) which said that 'countries in which there are large differentials of sex will pay relatively low wages to industries employing a large proportion of female labour and those countries will enjoy what might be considered as a special advantage over their competitors abroad where differentials according to sex are smaller or non-existent'.[14] The result was Article 119 (now 141) of the EC Treaty laying down the principle of equal pay – not,

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11 Hepple 'European rules on dismissal law' (1997) 18 *Comparative labor law journal* 204 at 211.

12 Hall and Soskice, *op cit* 60.

13 Picciotto 'The regulatory criss-cross: Interaction between jurisdictions and the construction of global regulatory networks' in Bratton ed *International regulatory competition: Competition and co-ordination* (Clarendon Press, Oxford, 1996) at 93, 95.

14 Ohlin *Social aspects of European collaboration*, (ILO Reports and Studies (New Series) No. 46 ILO Geneva 1956). See also, 74 *International labour review* 99 at 107.

at the time, as a fundamental human right, but as an economic necessity to ensure fair competition.

Another economic justification for employment rights is that they can improve efficiency. One example is the right to a minimum wage. Provided this is set at a sensible level, it encourages employers to invest in technology and in the skilled workforce that technology requires. Another pair of examples is equality rights, and rights to parental leave and childcare. The former enable disadvantaged groups to enter and remain in the labour market and improve their skills. The latter make it easier for women and men to reconcile family and working life, and so remain in the labour market.

There are also social justifications for a rights-based approach. One of these is to counteract the inequality of the employment relationship. The social-democratic model of rights first developed in Weimar Germany (1919–1933), and widely followed in most Continental countries after the Second World War, was based on the notion that rights are needed by subordinate or dependent labour so as to maintain a balanced system of industrial pluralism. This was done in Germany by giving constitutional protection to workers' rights and enabling the works councils to act as custodians of individual protection. However, not all democratic societies answered the problem of inequality in the employment relationship by the creation of rights. In Britain until the 1970s, 'Labourism' rather than any ideology of legal rights was the dominant influence. The British approach was to defend social and organisational rights won through industrial struggle, using the law on a pragmatic basis only when voluntary means were inadequate. The decline of trade union strength and collective bargaining since the 1980s have greatly enhanced the importance of both statutory and common law rights as a means of redressing inequality. Even from a liberal, as distinct from a social democratic perspective, it is possible to argue –as Ronald Dworkin has – that the right of everyone to equal treatment and respect is not antithetical to liberty of contract, which is still the cornerstone of employment law.[15]

Perhaps the most persuasive argument for rights is that they can be used to support democratic control over the process and effects of globalisation. Democratic states generally recognise or tolerate the autonomy of a plurality of legal orders. This is particularly relevant in the labour field, where 'law' is not necessarily coterminous with the state. A variety of actors make rules, enforced through non-state mechanisms or customs, within the workshop or office, enterprise or industry, and these rules may be even more important in practice than state-made laws. There are transnational rules such as international treaties, codes of conduct made by transnational corporations, and a small but growing number of collective agreements with international trade unions and non-governmental organisations. There are also the rules of regional institutions, such as SADC.

15 Dworkin *Sovereign virtue: The theory and practice of equality* (Harvard University Press, Cambridge Massachusetts, 2000) at 179–80, 181–3.

The pluralist perspective sees regulatory diversity not so much as a competition between state systems of labour law, but as a strategic or political process between different legal orders both within and beyond the state. Katherine Stone argues that globalisation 'not only breeds a desire for localisation, it also breeds the means to achieve it'.[16] She points to the agglomeration of transnational corporations in particular places, such as the computer industry in Silicon Valley, partly because of the skills and knowledge of the locality's workforce and the networks they can establish. The attractions of such regions dissuade corporations from moving off-shore to avoid high labour costs, increases the leverage of local work and community groups, and the opportunities for local investment in human capital. If the centralised state is not able to provide the redistributive functions of labour laws, then struggles for social protection will become increasingly localised. But local unions and community groups will be powerless to act together to put pressure on transnational corporations to adopt best practices – the 'race to the top' – unless they have rights. Rights which reduce divisions between different employment statuses at local level (employees, contingent or atypical, and self-employed), and between working-life and family-life can strengthen these local solidarities. Rights – such as those to establish bargaining councils and workplace forums – can help to develop solidarities with those employed by the same transnational corporation in other countries.

There is, of course, an ever-present danger that the rhetoric of rights-talk can become far removed from the reality of the practice of liberalisation. Even universal social and labour rights are not unqualified. Rights to decent working conditions and to fair pay depend upon the level of socio-economic development in a particular country and they generally presuppose economic growth and expanding social welfare. Rights in the market place are balanced against economic considerations. For example, the right against indirect discrimination on grounds of sex or race is subject to justification on grounds of business necessity or cost. So, a German law that excluded from unfair dismissal protection, employees in undertakings with five or fewer employees had a significant adverse impact on women who are disproportionately employed in small enterprises. But the law was held to be justified by the European Court of Justice (ECJ). This was because it pursued the legitimate aim of creating jobs in small undertakings, and the measure was proportional to that aim.[17] There is also the problem of effective enforcement. The argument that only civil rights can be justiciable is now widely discredited, but the courts – led by the South African Constitutional Court and the Indian Supreme Court – are only gradually developing effective procedures and mechanisms for enforcing so-called social rights. More generally, increasing reliance on 'soft law' (such as voluntary corporate codes and guidelines laid down by regional and international bodies), the tendency towards privatisation of enforcement through management-controlled disputes resolution procedures rather

16 Stone 'From globalism to regionalism: Protecting labor rights in a Post-National Era' (Unpublished paper, 2004). I am grateful for the author's permission to cite this paper.

17 *Kirshammer-Hack v Sidal* [1994] IRLR 185 (ECJ).

than public tribunals, and restrictions on collective solidarity, reduce much rights talk to mere rhetoric – in Jeremy Bentham's famous phrase 'so much bawling on paper'.[18]

I come then to the question whether labour rights can be reconciled with global competitiveness? My answer is a qualified 'Yes'. The alternative would simply be to leave things to global market forces in the belief that the 'invisible hand' will in the long run result in equilibrium. This is an argument for widespread deregulation which, I believe, would be unacceptable in post-apartheid South Africa. The theory of comparative institutional advantage encourages us to use rights in a rational way. Rights can help markets work more effectively by correcting market failures and promoting economic efficiency; they can reduce the inequality of the employment relationship; and they can be used to exert democratic control over the processes and outcomes of globalisation.

Comparative advantage should never involve the violation of core human rights. This is why the ILO's campaign for 'decent work', including the observance of fundamental rights, is of critical importance not only to the developing countries but also to workers in the rich nations. The ILO's Declaration on Fundamental Principles and Rights at Work, adopted in 1998, places obligations on all 175 Member States of the ILO to 'respect, to promote and to realise' four fundamental principles: the freedom of association and right to collective bargaining, the elimination of forced labour; the elimination of child labour and the elimination of all forms of discrimination. These principles are embodied in eight 'core' ILO conventions. The unique feature of the Declaration is that it imposes obligations on the Member States, not by reason of the ratification of these conventions, but 'from the very fact of membership'. This is, therefore, a constitutional obligation. An interesting question is whether any of the fundamental principles and rights embodied in the Declaration have become part of customary international law. The International Court of Justice has said that the practice of states, followed from a sense of legal obligation, must be 'broadly consistent'.[19] While the prohibition of forced labour is a matter on which state practice is broadly consistent, it is much more difficult to show this in respect of the prohibition on child labour. The UK House of Lords has recently recognised that racial discrimination is a breach of customary international law[20] but the situation is less clear with other forms of arbitrary discrimination. Widespread abuse of freedom of association in many countries make it virtually impossible to regard these human rights as part of consistent state practice, but the growing observance of the relevant conventions may in time change this.

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18 Bentham 'Anarchical fallacies' in Bowring ed *Collected works of Jeremy Bentham* (Simpkin Marshall, London, 1843) 23; see generally on the law and politics of enforcement, Hepple in *Social and Labour Rights in a Global Context* (Cambridge University Press, Cambridge, 2002) ch 10.

19 *Nicaragua v United States* [1986] ICJ 14 at 98; 76 ILR 349 at 432.

20 *R v Immigration Officer at Prague Airport, ex parte European Roma Rights Centre* [2005] IRLR pars 46 (Lord Steyn) 102, 103 (Baroness Hale). See, generally Shaw *International Law* 5 ed (CUP, Cambridge, 2003) 28–29.

Although the Declaration may not have elevated all these fundamental principles to the level of customary international law, and it can be criticised for its weak follow-up mechanism and its dilution of the 'rights' in the eight conventions into four general principles, it has led to a significant increase in the number of ratifications of the eight core conventions. By 2004, a total of 100 Member States (including South Africa) had ratified all eight core conventions and 144 countries had ratified at least one convention in each group. 'There is a long hard road to travel' before international labour standards can take human labour out of global competition.[21] But the idea of fundamental rights is a dynamic one that will be progressively developed and updated, for example to include occupational health and safety. A more effective complaints-based mechanism for supervising compliance with these rights is needed. Membership of the World Trade Organisation (WTO) could be made conditional upon the observance of core labour rights, but the supervision and enforcement of these standards should be left to the ILO and not the WTO.[22]

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22 For a detailed analysis see Hepple *Labour laws and global trade* chs 2 and 6.

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