

# **Benchmarking Social Justice Allegiance of Dismissal Protections amongst the EE5 Countries**

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and

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## **ABSTRACT**

The primary motivation for this paper is the quest for social justice in employment protection. This paper presents a method for the scientific assessment, measurement, comparison and benchmarking of social justice allegiance in employment protection generally, and dismissal protection specifically. A generic social justice framework is propositioned which framework is customised in terms of employment protection. We argue that this framework promotes the development of social justice indicators that cumulatively reveals an instrument in the form of a tangible score-card, capable of measuring and comparing social justice allegiance inherent to dismissal protections. This Social justice score-card is applied to the current statutory dismissal protections of the EE5 countries. Jointly, the five score-cards represent a scientific social justice index. The results of this research paper show that all five jurisdictions suggest some measure of allegiance to social justice. Comparatively, in order of strongest to weakest social justice allegiance, the EE5 jurisdictions are ranked as follows: South Africa, India, Indonesia, China, and Brazil.

## **I. INTRODUCTION**

As a consequence of globalisation, international organisations such as the World Trade Organisation (WTO), the International Monetary Fund (IMF), the World Bank, the International Labour Organisation (ILO), and in particular, the Organisation for Economic Cooperation and Development (OECD), have gone from being lobbying committees to being policy recommenders and pace -setters and, recently even regulators of foreign trade traffic (Leary,

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2010). Various nations have been affected by and responded to globalisation, in different ways. The president of the ILO said:

*"Globalisation, like golf, requires a handicapping system that allows new players to catch up "* (ILO, 2008).

This statement was aimed at developing countries in general and more specifically, fragile<sup>3</sup> states. It has been reported that fragile countries account for a sixth of the world's population, but for half of the world's infant deaths' and a third of all people surviving on less than one United States Dollar (USD) per day. Further, the domestic and international effects of the bleak and worsening economic situations in these fragile countries include violent conflict, instability, organised crime, migration, human trafficking, deteriorating public health, and, ultimately institutional collapse (OECD, 2007).

However, a limited number of these fragile states have shown significant buoyancy amidst the global economic crisis. In particular, Brazil, China, India, Indonesia, and South Africa have survived (or did more than just survive) the world economic crisis of 2008/9. It was this phenomenon that stimulated international (economic) curiosity and resulted in a renewed and enhanced interest in such countries as competitive trade partners. International appreciation of the fragile conditions of these countries, remains prominent, which is evident in the stance taken by for example, the OECD (OECD, 2009). Such appreciation necessarily requires adapted economic transnational engagement, in fact, it requires a 'handicapping' approach as suggested by the president of the ILO (ILO, 2007).

Akin to the ILO, the OECD took this handicapping- notion further by designating certain developing, (fragile) countries for so-called enhanced engagement strategies relating to international trade activities (OECD, 2009, OECD, 2007 and [Fragile.states.dotcom](http://Fragile.states.dotcom), 2011). The OECD clearly understands that, within the context of globalisation, fragile countries should be afforded special attention in order to ensure that they are not left behind.

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<sup>3</sup> According to the World Bank, fragile states are countries facing particularly severe development challenges, weak institutional capacity, poor governance, and political instability. Often, these countries experience ongoing violence as the residue of past severe conflict (World Bank, 2012).

The OECD has identified five of these fragile countries, (Brazil, China, India, Indonesia and South Africa) dubbed the EE5 countries, which amongst other considerations show economic potential worthy of enhanced international engagement- bearing in mind such states could successfully overcome fragility related challenges within the current world economic order. This means that, regarding the EE5 countries, special features will be included in trade- and other economic treaties/agreements. These special features were designed to enhance national (domestic) sustainable development<sup>4</sup>, economic growth<sup>5</sup>, and social justice<sup>6</sup> (Elliott, 2011, Thompson, 2009, Kaufmann, 2009).

The concepts of sustainable development and economic growth have been widely researched and discussed. For the most part, authorities seem to generally agree on ideologies, theories, and principles of measurement regarding sustainable development and economic growth<sup>7</sup>. From the literature review performed in the present study, the same cannot be said about 'social justice'. Less has been written on the topic, much of which seems contradictory, and no attempt has been made to measure this phenomenon.

International organisations like the United Nations (UN), the International Labour Organisation (ILO), the European Union (EU), and the Organisation for Economic Cooperation and Development (OECD) have resolutely endeavoured to advocate 'social justice' as a

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<sup>4</sup> Sustainable development is defined as: *...development that meets the needs of the present without compromising the ability of future generations to meet their own needs* (Mintzer, 1992). Sustainable development therefore implies economic growth and protection of the environment, each reinforcing the other, resulting in a stable relationship between human activities and the natural world. This form of development does not diminish the prospects of future generations to enjoy a quality of life at least as good as that of present generations (Mintzer, 1992).

<sup>5</sup> Economic growth is defined as: *...quantitative change or expansion in a country's economy* (World Bank, 2012). Economic growth is primarily measured as the percentage increase in the gross domestic product (GDP) of a country in one year. Economic growth may be achieved in two ways: by using more resources ('extensive' growth) or by using the same amount of resources more efficiently/productively ('intensive' growth). When economic growth is achieved by using more labour, it does not result in per capita income growth. On the other hand, when economic growth is achieved through more productive use of all resources (including labour), it results in a higher per capita income and improvement in people's average standard of living. Economic 'development' is may only be achieved through 'intensive' (economic) growth (World Bank, 2012).

<sup>6</sup> Loosely defined, social justice refers to conceptions of a just society (Reisch, 2002, and National Pro Bono Resources Centre, 2011). This definition elevates the notion of justice to more than just the administration of laws. It originated from the idea of a society that gives individuals and groups fair treatment and a just share of the benefits of society (Rawls, 2012).

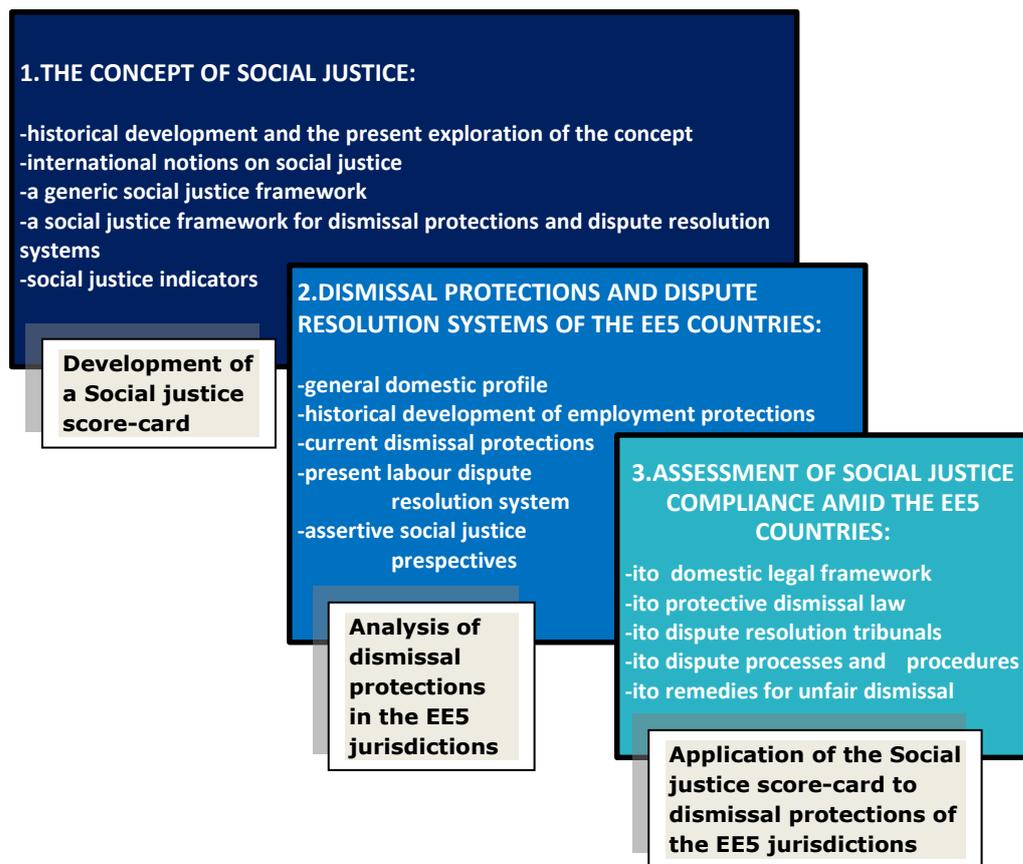
<sup>7</sup> See for e.g. The Global Competitiveness Index (GCI) 2013-2014 rankings @ 2013 World Economic Forum I [www.weforum.org/gcr](http://www.weforum.org/gcr), and the SSI Social-sustainability adjusted GCI @ 2013 World Economic Forum I [www.weforum.org/gcr](http://www.weforum.org/gcr)

necessary world policy. Whereas social justice principles are embedded in almost every aspect of civilised societies, these morals are of particular concern in terms of employment protections.

The present paper is particularly concerned with 'social justice' in employment protections generally and dismissal protections specifically and, its manifestation in the EE5 jurisdictions and ultimately the measurement/benchmarking of social justice allegiance. Further, this paper is premised on the conviction that a generic social justice framework can assist in the identification and design of social justice indicators, which reveal a social justice score-card capable of measuring and comparing social justice compliance inherent to any particular legal doctrine. Although the present study focuses on one particular legal doctrine namely, dismissal protection, the proposed generic social justice framework may serve as a template for the development of social justice indicators regarding any other doctrine.

The purpose of this paper is twofold. Firstly, a generic, conceptual social justice framework is propositioned. Secondly, a selected doctrine, namely employment protections relating to dismissals, is examined in terms of the proposed social justice framework. Subsequently, a customised social justice framework (derived from the generic framework) identifies and employs a number of social justice indicators for dismissal protections. Collectively, these social justice indicators reveal a tangible score-card capable of measuring and comparing social justice compliance in dismissal protections across divergent jurisdictions. For the purpose of the present paper, this score-card is applied to the respective EE5 jurisdictions revealing comparative knowledge on the level of social justice allegiance amongst these fragile states insofar dismissal protections.

Figure 1, below displays the scope of the present research according to three particular research aims.



**FIGURE 1: Research Scope**

## **II. A SOCIAL JUSTICE SCORE-CARD FOR DISMISSAL PROTECTIONS**

### **A. Defining 'social justice'**

A systematic literature review confirmed that social justice refers to a 'just society', and concerns more than the mere administration of justice through laws. (Reisch, 2002, National Pro Bono Resources Centre, 2011).

In essence social justice represents justice aimed at 'the fair distribution of benefits and burdens' throughout a society (Rawls, 2012). Ferree (1997) and Rawls (2012) noted that we

should carefully consider the architecture of our social institutions and social structures (the way we interact with each other, individually and collectively). When these institutions are well organised, a society that is just and efficient is created. Rawls's theory on social justice is aimed at both 'just procedures' and 'just outcomes', and encases remedial justice<sup>8</sup>, economic justice<sup>9</sup> and distributive justice<sup>10</sup>.

International forums such as the ILO, the UN, and the OECD have subscribed to similar interpretations of the concept of social justice (Reisch, 2002, National Pro Bono Resources Centre, 2011).

## **B. A generic social justice framework**

Following a comprehensive literature analysis, a generic social justice framework was developed, embracing the following significant requirements for the successful construction of a just society:

- construction of a just social *architecture* aimed at the common good which is: the fair distribution of benefits and burdens throughout society;
- provision for appropriate *remedial justice* that promotes equality, equity and inclusion;
- establishment of just *social structures* that enhance participation in decision-making and efficient governance;
- development of civil and criminal *procedural justice* that is simple, effective, and accessible and considers natural justice; and
- configuration of *economic justice* that addresses restitution, redress and redistribution throughout society.

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<sup>8</sup> Remedial justice involves just and fair rules and procedures pertaining to criminal and civil (legal) matters.

<sup>9</sup> Economic justice involves a society's rules and procedures for maintaining productive, efficient and fair commercial markets.

<sup>10</sup> Distributive justice focuses on fair outcomes. Distributive justice is concerned with relative fairness- that all people within a society possess a portion of that society's benefits and burdens.

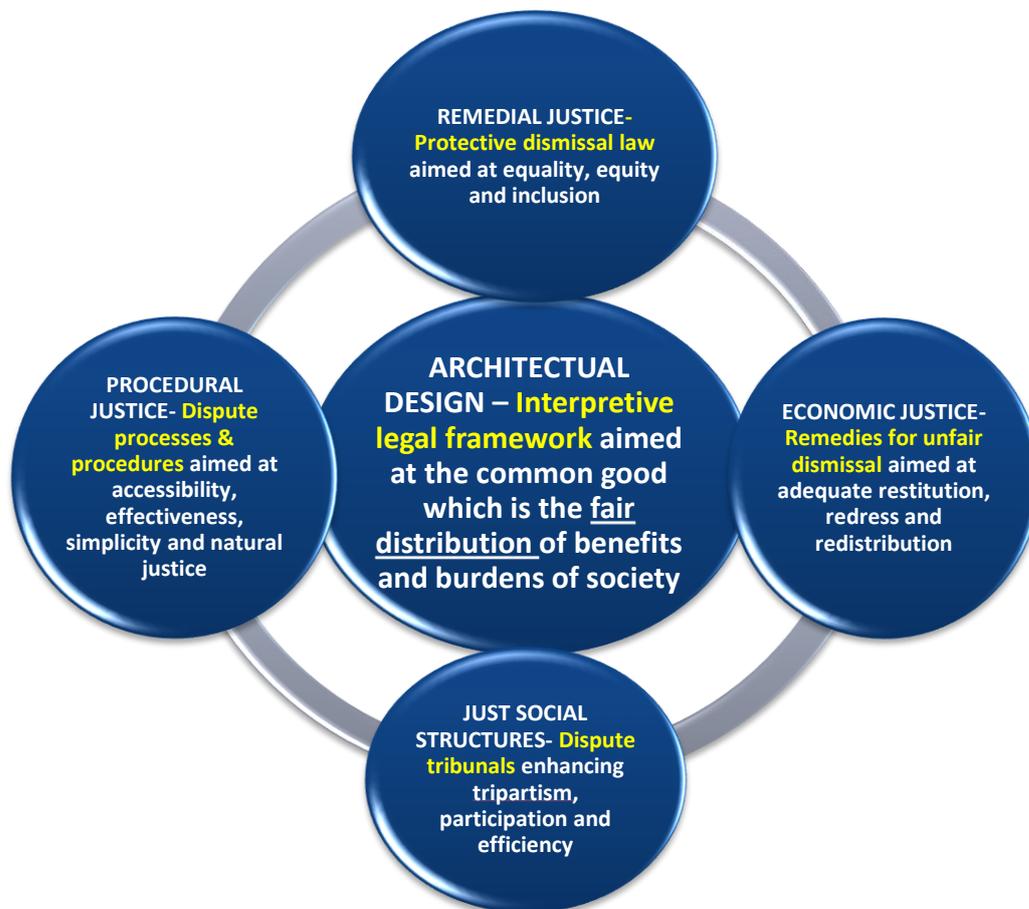
These requirements were organised into five distinct dimensions (or clusters, as the case may be), with the 'architectural design' of social institutions, as a logical point of origin for the latter four dimensions, revealing a generic social justice framework (See Figure 2, below).



**Figure 2: Generic social justice framework**

**C. A customised social justice framework for dismissal protections**

Using the generic social justice framework, a customised version harmonises well with the pedantic qualities that are universally associated with dismissal protections and disputes about dismissals. Figure 3 below represents a customized Social justice framework.



**FIGURE 3: Customised Social Justice Framework for Dismissal Protections**

The point of departure, which is the architectural design, may be translated to a particular *interpretive legal framework* within which statutory or otherwise law finds application. The first dimension of the framework sets the stage for the further and/or potential creation of just, social institutions (laws, policies, and directives). Notably, the Constitution of a country provides a legal framework for the interpretation of statutory legislation based on such values expressed in such Constitution. Social justice allegiance through fundamental human rights, including rights aimed at redress and redistribution, is of significant value. Social justice indicators pertaining to the *architectural design dimension* should therefore elicit social justice notions within supreme law, including through domestic constitutions. Further, the level of compliance with international social justice prescriptions, should also be assessed.

The element of remedial justice runs parallel with *existing dismissal protections*, meaning current statutory law on dismissals. Social justice indicators relating to the *remedial justice dimension* focus on the scope of protective dismissal law. Social justice is particularly translated through inclusion (everybody should enjoy protection) and equality (everybody should enjoy the same protection). There should also preferably be deterrence mechanisms insofar incidences of unfair discrimination that result in social injustices.

*Just social structures* should primarily provide for participation by all the social partners to the employment relationship. On a micro-level, an individual should have easy access to dispute tribunals irrespective of his/her social standing. Tribunals should promote effective conflict resolution based particularly on the advancement of participation through voluntarism.

Procedural justice is equated with *dispute processes and procedures* whereas just social structures envisage the compilation and functioning of *dispute tribunals*. The *procedural justice dimension* ensures social justice in the processes and procedures of fair and valid dismissals, and in the litigation of disputes about unfair or unlawful dismissals. Such procedures should be aligned with the principles of natural justice, and should be fairly simplistic for easy access and efficient dispute resolution.

Economic justice anticipates the so-called *remedies* for unfair/unlawful dismissal. The *economic justice dimension* pertains primarily to monetary or otherwise restitution as remedy for unfair or unlawful dismissal. Social justice is embodied in policies aimed at full restitution or redress, with due regard of all the parties involved in the employment relationship. Punitive measures, particularly relating to unfair discrimination, should also be included.

#### D. Social justice indicators

This customised framework was used in the development of *social justice indicators*, with a view to eliciting such features required in the creation of a just society within the context of dismissal protections.

In an effort to measure social justice compliance within the five respective dimensions, five questions, were formulated under each dimension. These 25 questions were selected purposively with a view to measure social justice compliance both, clinically and derivatively. The design of these indicators are done having carefully considered the aims and objects of each respective dimension of the customised social justice framework as described under paragraph C, *supra* (See Table 1, below).

**Table 1: Social justice indicators for dismissal protections**

<i>Dimension 1</i>	<i>Dimension 2</i>	<i>Dimension 3</i>	<i>Dimension 4</i>	<i>Dimension 5</i>
<b>ARCHITECTURAL DESIGN</b>	<b>REMEDIAL JUSTICE</b>	<b>JUST SOCIAL STRUCTURES</b>	<b>PROCEDURAL JUSTICE</b>	<b>ECONOMIC JUSTICE</b>
Social justice through an interpretive framework	Social justice in protective dismissal law	Social justice in dispute tribunals	Social justice in dispute processes and procedures	Social justice in remedies for unfair dismissal
1. Does the term <i>social justice</i> appear in the supreme law of the country as part of its prelude?	1. Does the country provide constitutional protection against unfair / unlawful dismissal in the form of a <i>fundamental human right</i> ?	1. Are (at least selected) bodies of dispute tribunals <i>tripartite</i> in nature (labour, business & government) ?	1. Does the law governing unfair / unlawful dismissal provide for specific <i>procedural safeguards</i> or pre-dismissal procedures in effecting a dismissal ?	1. Are available remedies for unfair / unlawful dismissal aimed at <i>full restitution</i> in that retrospective reinstatement is provided as a primary statutory remedy?
2. Does the country have specific, independent fundamental rights on <i>substantive</i> equality?	2. Does the term <i>social justice</i> appear in the law governing unfair / unlawful dismissal ?	2. Can a complainant (applicant) refer an unfair / unlawful dismissal matter <i>in person</i> , without necessarily having to pay for expensive (legal) representation ?	2. Are referral procedures for unfair / unlawful dismissal disputes simple and <i>less formal</i> in comparison to other civil litigation ?	2. Are remedies assessed on <i>equitability</i> , recognising the balance between employer and employee ?
3. Does the country acknowledge <i>redistribution</i> or <i>redress</i> for specific	3. Is provision made for extra-ordinary protection against dismissals based on	3. Do referring parties have a <i>choice</i> as to compulsory /	3. Are referral and resolution procedures regarding dismissals	3. Are remedies <i>redress</i> sensitive to the extent that such remedies serve as a punitive

societal groups in any employment related legislation?	<i>unfair discrimination</i> ?	alternative dispute resolution tribunals ?	statutorily aimed at <i>expedited</i> dispute resolution ?	measure or deterrence ?
4. Is the country an ILO member state and has it ratified Convention 158?	4. Do public and private sector employees enjoy the <i>same protection</i> against unfair dismissal ?	4. Are tribunals <i>user-friendly</i> , and do they provide assistance and education ?	4. Is provision made for compulsory mechanisms <i>without prejudice</i> ?	4. Do remedies anticipate economic damages ( <i>financial redistribution</i> ) ?
5. Has the country adopted a <i>national decent work programme</i> in collaboration with the ILO's Decent Work Mandate ?	5. Are <i>all employees</i> protected against unfair / unlawful dismissal irrespective of the nature of the contract, type of work or profession or level of income ?	5. Do particular tribunals of final instance have statutory powers to <i>mediate</i> an unfair / unlawful dismissal claim at any stage of the litigation process ?	5. Do processes make provision for an <i>inquisitorial</i> (as opposed to an adversarial) approach ?	5. Are remedies <i>readily</i> (practically) enforceable ?

## E. A Social justice score-card

Having answered the 25 questions, a score or index figure is revealed which is of significant comparable value in assessing the extent to which the EE5 jurisdictions subscribe to the notion of social justice in employment protections in general and dismissal protections, specifically.

Consequently, a typical score-card transpires. This is succinct due to the fact that the original questions were formulated in a manner that would elicit a definite positive (Yes) or, a definite negative (No), answer. An answer in the positive will result in a score of 1 and an answer in the negative will achieve a score of 0.

When the scores (out of a total of 5) under the distinct five dimensions are added, a grand total of 25 (five questions x five dimensions) is obtained on a linear and scientifically valid score-card that is clear and non-weighted.

Table 2, below presents a Social justice score-card that measures social justice compliance in terms of dismissal protections and disputes about dismissals.

**Table 2: Social Justice score-card**

<b><i>SAMPLE COUNTRY</i></b>	<b><u>ARCHITECTURAL DESIGN</u></b> Social Justice through an interpretive legal framework	<b><u>REMEDIAL JUSTICE</u></b> Social Justice in protective dismissal law	<b><u>JUST SOCIAL STRUCTURES</u></b> Social Justice in Dispute Tribunals	<b><u>PROCEDURAL JUSTICE</u></b> Social Justice in dispute processes and procedures	<b><u>ECONOMIC JUSTICE</u></b> Social Justice in remedies for unfair dismissal
	Q1 A yes (1)	Q1 A yes (1)	Q1 A Yes (1)	Q1 A Yes (1)	Q1 A yes (1)
	Q2 A yes (1)	Q2 A yes (1)	Q2 A yes (1)	Q2 A yes (1)	Q2 A no (0)
	Q3 A yes (1)	Q3 A no (0)	Q3 A no (0)	Q3 A yes (1)	Q3 A no (0)
	Q4 A yes (1)	Q4 A no (0)	Q4 A no (0)	Q4 A no (0)	Q4 A no (0)
	Q5 A no (0)	Q5 A yes (1)	Q5 A no (0)	Q5 A no (0)	Q5 A no (0)
<b>13/25</b>	<b>4</b>	<b>3</b>	<b>2</b>	<b>3</b>	<b>1</b>

### III. DISMISSAL PROTECTIONS IN THE EE5 COUNTRIES

The dismissal protections in the respective EE5 jurisdictions are significantly diverse, although all five jurisdictions provide protection against unfair/unlawful dismissal. These protections inclusive of the respective jurisdictions’ constitutional protections relating to dismissal law and social justice subscriptions are summarised hereunder.

#### A. Brazil

Although the phrase *social justice* does not appear in the preamble, or as part of the fundamental principles of the Constitution, the statute does refer to a “just society” and more importantly, acknowledgement of (un)fair distribution of benefits and burdens is evident in the reference to ‘social and regional inequalities’<sup>11</sup>. The Constitution promotes anti-discriminatory conduct however, does not provide for an independent right to substantive equality<sup>12</sup>.

Brazil’s Consolidated Labour Laws (CLT) Legislative Decree No. 5452 of 1 May 1943 provides protection against arbitrary dismissal and dismissal without just cause<sup>13</sup>. The CLT does

<sup>11</sup> FC Art. 3 (i) & (iii)

<sup>12</sup> FC Art. 3 (iv)

<sup>13</sup> CLT art 7

not refer to social justice at all and public sector employees and employees working for parastatals are excluded from the scope of the CLT<sup>14</sup>. The CLT defines an employment relationship, irrespective of the existence or otherwise of any written agreement, as a person who renders services on a regular or continuous basis, is subject to supervision and control of an employer, and is compensated for such services. Although specific societal groups enjoy special protection against discrimination in employment practices, there is no statutory provision for redress in the labour market<sup>15</sup>.

A tripartite approach to dispute resolution was abandoned in 1999. Compulsory conciliation of dismissal disputes is provided for where-after a Labour Court system is followed. Arbitration boards may consider specific types of disputes which seem to involve the assessment of compensation and severance payments. For the most part, Brazil follows a Labour Court system that promotes simple litigation procedures, the parties may appear in person, and the Labour Court must attempt to mediate the dispute at least twice during the litigation stage<sup>16</sup>.

Reinstatement<sup>17</sup> is the primary remedy only for unfair dismissals related to injury or disease at work. Employers and employees contribute to the FGTS<sup>18</sup> during the employment period, and compensation for unfair dismissal is calculated in accordance with various formulae, depending on the circumstances and the available funds in the FGTS. Compensation as a remedy for moral damages relating to discrimination based unfair dismissals is assessed and ordered by the Labour Courts, exclusively<sup>19</sup>. Remedies are enforced through the Court system.

## **B. China**

The preamble of the Constitution of the People's Republic of China, adopted on the 4 December 1982, denotes the form of an abridged history lesson of the country. The Constitution does not include any reference to the term *social justice*. The notions of unity and common

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<sup>14</sup> CLT art 7(d)

<sup>15</sup> CLT art 10

<sup>16</sup> CLT art 364 & 365

<sup>17</sup> CLT art 478

<sup>18</sup> Act No. 8036 dated 11 May 1990

<sup>19</sup> ILO 2008

prosperity of citizens, and all other nationalities in the country are a central theme in China's Constitution. References to *equality* in all law(s) should be understood within the framework of a socialist ideology, as the Constitution in the preamble, specifically directs such interpretation. Equality is promoted amongst citizens of the country, and minority nationalities are particularly mentioned with reference to discrimination<sup>20</sup>. The Constitution does not in any manner refer to substantive equality or measures regarding redress or redistribution of benefits. Equality amongst men and woman is also stated as a fundamental right<sup>21</sup>.

China's Labour Contract Law (LCL) adopted on 29 June 2007, and the Labour Law (LL), adopted on 5 July 1994, list prohibited (and valid) grounds for the termination of an employment contract; however, no reference is made to the term *unfair dismissal*<sup>22</sup>. Prohibited grounds for termination of an employment contract include pregnancy and incapacity. The laws governing termination of employment do not refer to *social justice*. Public- and private-sector employees are covered by the LL; however, public employees are excluded from the LCL<sup>23</sup>. The term *employee* is not defined in these Acts; however, *employer* is described. Broadly speaking, the only beneficiaries of some kind of redress in employment, are the disabled.

Mediation and arbitration committees are tripartite in nature, consisting of representatives from unions, employers and a labour administrative department. All disputes are first mediated before an application may be made to an arbitration committee. The law makes specific reference to the principles of mediation<sup>24</sup>.

Reinstatement is not provided as a primary remedy, and remedies are notably in the nature of compensation for contractual damages. This compensation is calculated with due regard to the length of service of the employee. Because of the nature of this compensation

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<sup>20</sup> Constitution of the People's Republic of China, Art. 33

<sup>21</sup> Constitution of the People's Republic of China, Art. 48

<sup>22</sup> LCL art 23

<sup>23</sup> LL art 1 & 2

<sup>24</sup> LL art 77-82

being financial (contractual) damages, extra-ordinary remedies for discrimination related (invalid) terminations, do not exist<sup>25</sup>.

### **C. India**

The preamble of the Constitution of India refers to 'justice' including, *social, economic* and *political*. Notably, the allegiance to social justice is mentioned as the first and foremost guarantee to all citizens. Equality before the law is addressed under fundamental rights<sup>26</sup>. The Constitution further provides for the right to equality and prohibition of discrimination. Also, provision is made for the interpretation of substantive equality.<sup>27</sup> Anti-discrimination protections are provided in Article 16 of the Constitution<sup>28</sup>. Further, the Constitution provides for redress and redistribution amongst certain 'classes' of the society, and 'reservation measures', in employment practices<sup>29</sup>.

India's Industrial Disputes Act (IDA) of 1947 provides protection against unlawful dismissals including union affiliation and certain forms of discrimination<sup>30</sup>. An individual dismissal due to, for example, misconduct should also be preceded by due regard to the rules of natural justice. The IDA does not refer to social justice in any manner.

The IDA covers both private- and public-sector employees however, managerial and administrative staff and high earners are excluded from its scope of application<sup>31</sup>. General employment protections are elaborate and special provision is made for woman in employment.

Dispute resolution is primarily in the form of a Court system<sup>32</sup>. Voluntary arbitration is provided for, although conciliation is not a pre-requisite for access to the Court. On interpretation, it seems that the preferred method for resolving disputes is mediation. The IDA

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<sup>25</sup> LL art 97 & 98

<sup>26</sup> Constitution of India Art. 14

<sup>27</sup> Constitution of India Art. 15

<sup>28</sup> Constitution of India Art. 16(1)

<sup>29</sup> Constitution of India Art. 16(3) & (4)

<sup>30</sup> IDA schedule 5

<sup>31</sup> IDA sec 2

<sup>32</sup> IDA sec 11

does not address the issue of representation. Courts, arbitrators, and conciliators have wide statutory powers, and it seems they may follow an inquisitorial approach to litigation<sup>33</sup>.

Retrospective reinstatement is the primary remedy for an unlawful dismissal. Adjudicators have exceedingly wide powers to make orders and awards provided that all the circumstances of the matter in dispute are taken into account. There is no ceiling to compensation orders, and remedies are enforced through a general civil procedure<sup>34</sup>.

#### **D. Indonesia**

The Constitution of Indonesia (as amended) of 1945 makes mention of social justice in its preamble. The Indonesian Constitution is noticeably short consisting of a mere 37 articles. The reason for this is explained in the Constitution and relates to the fact that it is a young country and wishes to draft legislation as and when the need arises. Article 27 of the Constitution provides for equality and the right to live in human dignity. Provision is made for production sectors to be state-controlled and the state must ensure that such sectors are managed to the *greatest benefit of the people*.

Indonesia's Manpower Act (MA) No. 13 of 2003 addresses dismissals, and aims to secure equal opportunity and equal treatment for all. The MA covers public and private sector employees<sup>35</sup>. Dismissals are avoided at all costs, despite *social justice* not being referred to in the MA.

The Industrial Relations Dispute Settlement Act (IRDSA) No. 2 of 2004 deals with disputes about dismissals, and bipartite negotiations take place before a dismissal can be executed. Should bipartite negotiations fail, conciliation must take place. Mediators and

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<sup>33</sup> IDA sec 10-12

<sup>34</sup> IDA sec 11A

<sup>35</sup> MA sec 151

conciliators are appointed by the Department of Manpower and a Court system is used to resolve dismissal matters, which follows normal civil procedures<sup>36</sup>.

Re-employment and reinstatement are the primary remedies for dismissals that are null and void. The issue of remedies is vague in the Act; however, Courts have wide powers to make orders, including awarding damages. Remedies are enforced through normal civil procedures<sup>37</sup>.

## **E. South Africa**

As a result of South Africa's legacy of apartheid, numerous statutory regulations were promulgated post-1995, with a view to redressing past discriminatory or otherwise unequal distributive, anomalies. With the abolition of apartheid in 1995, the Constitution was rewritten in order to affirm the country's new non-racial, non-discriminatory democracy. Notably, in the preamble of the Constitution, reference is made to *social justice* within the context of acknowledging the significance of healing the callous atrocities of the past, and building a future based on (genuine) democracy. Section 1 of the Constitution elaborates on the values adopted by the nation by referring to equality in the first instance. Further, the Constitution draws particular attention to an anti-discrimination policy in section 9 of the Bill of Rights. The formulation of clause 9 also anticipates certain forms of 'fair discrimination', which is indicative of for example affirmative action measures permissible, as it is aimed at redress and redistribution or otherwise, *substantive equality* <sup>38</sup>.

South Africa's Labour Relations Act (LRA) No. 66 of 1995, as amended, provides protection against procedurally and substantively unfair dismissals<sup>39</sup>. *Social justice* is referred to in the Article on the purpose and objects of the Act. All employees, public and private, are included in the scope of the LRA, except for those employed by the South African National Defense Force (SANDF), the National Intelligence Agency (NIA) and the South African Secret Service (SASS). The LRA defines an employee as including all types of contracts irrespective of

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<sup>36</sup> IRDSA sec 16

<sup>37</sup> MA sec 153 & 170

<sup>38</sup> Constitution of the Republic of South Africa, clause 9

<sup>39</sup> The Labour Relations Act, 66 of 1995 as amended covers both the collective and individual employment relationship

status, type of work or pay. General employment protection is elaborate, and includes protection against unfair discrimination, and provision is made for redress in the form of affirmative action<sup>40</sup>.

The Commission for Conciliation, Mediation and Arbitration (CCMA) which resolves the largest number of dismissal disputes is governed by a tripartite body. Compulsory conciliation of disputes is provided, where-after (for the most part) final arbitration takes place. An arbitrating commissioner may only with the consent of all the parties attempt to mediate the matter during the arbitration process. Even though the CCMA is largely a one – stop shop for dismissal disputes, certain restrictions to legal representation do exist. Parties may however appear in person<sup>41</sup>.

Provision is made for inquisitorial processes<sup>42</sup> in the resolution of dismissal disputes and retrospective reinstatement is statutorily the primary remedy (unless the employee does not wish to be reinstated). All available remedies are based on equitability, and the circumstances of both employer and employee are taken into account<sup>43</sup>. Compensation for dismissals based on unfair discrimination has a limit of twice the ceiling for all other unfair dismissals, and therefore serves as a punitive measure. Economic loss/damages are considered in the assessment of compensation for unfair dismissal. Remedies are easily enforced via a certification process<sup>44</sup>.

#### **IV. SOCIAL JUSTICE ALLEGIANCE IN DISMISSAL PROTECTION AMONGST THE EE5 COUNTRIES**

Following an examination of the respective legal dispensations of the EE5 countries, table 3, below, represents answers to the social justice indicators as developed under paragraph 11(D), *supra*.

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<sup>40</sup> The Employment Equity Act (EEA) 55 of 1998 as amended provides for anti-discrimination practices and affirmative action in employment

<sup>41</sup> LRA sec 138

<sup>42</sup> LRA sec 138

<sup>43</sup> LRA sec 193 & 194

<sup>44</sup> LRA sec 143

**Table 3: Social justice indicators amongst the EE5 Countries**

	BRAZIL	CHINA	INDIA	INDONESIA	SOUTH AFRICA
<b><u>ARCHITECTURAL DESIGN</u></b>	Social Justice through an interpretive legal framework				
<b>1. Does the term <i>social justice</i> appear in the supreme law of the country as part of its prelude?</b>	NO, the preamble of the Constitution mentions a 'just, society' which does not relate to social justice as conceptualised and defined in the present study.	YES, the prelude of the Constitutions refers to 'common prosperity', which aligns well with the interpretation and meaning of social justice in the present context as the 'fair/equal distribution of benefits and burdens'.	YES, the preamble refers to 'justice' which is social, economic and political.	YES, the Constitution mentions social justice in the same phrase as 'peace, freedom and independence'.	YES, reference is made to 'social justice' in the preamble of the South African Constitution. Such reference is done particularly within the context of the recognition of past unfair discrimination and the need for redress.
<b>2. Does the country have specific, independent fundamental rights on substantive equality?</b>	NO, even though the Constitution acknowledges regional and societal inequalities, provision is not made for any independent right to substantive equality.	NO, as a fundamental right, equality (not, substantive equality) is only referenced between men and woman.	YES, special provision is made for woman and children, and certain classes of society.	NO, the Constitution does not specifically provide for any fundamental rights pertaining to substantive equality.	YES, everyone enjoys the right to equality, which right is contained in the Bill of Fundamental Rights of the Constitution of South Africa. 'Fair' forms of discrimination are also provided, aimed at redistribution, such as affirmative action.
<b>3. Does the country acknowledge redistribution or redress for specific societal groups in any employment related legislation?</b>	NO, Brazil, in 2012, enacted affirmative action regulations which provides quotas for university admissions relating to Africans - quota systems do not relate to redress or redistribution,	YES, China provides for a tax benefit to employers in relation to the employment of people with disabilities.	YES, the constitution provides for the promulgation of legislation regarding reservation/promotion of certain classes, in employment.	NO, the country does not make provision for any redress or redistribution in terms of employment law.	YES, statutorily, particular societal groups are designated beneficiaries of affirmative action measures aimed at redressing disadvantages in employment as a result of past unfair discrimination.

	it is simply a form of reservation - in this case, learner reservation not specifically related to the employment context.				
4. Is the country an ILO member state and has it ratified Convention 158?	NO, Brazil has been an ILO member state since 1919; however, denounced Convention no 158 during 1996.	NO, China has been a member state since 1919, and currently consulting with the ILO on the adoption of Convention 158.	NO, India is an ILO member state but has not ratified Convention 158.	NO, Indonesia has been a member of the ILO since 1919; however, it has not ratified Convention 158.	NO, South Africa was a member state for the period 1919-1966, and since 1994 to date; however, has to date not ratified Convention 158.
5. Has the country adopted a national decent work programme in collaboration with the ILO's Decent Work Mandate ?	NO, Brazil is actively involved in the work groups of the ILO relating to the promotion and measurement of decent work. Brazil has made significant strides in regional programmes albeit that the country has yet to adopt a national decent work programme.	Yes, China has adopted a national decent work programme for the period 2013 to 2015.	Yes, A national decent work programme has been adopted for the period 2013 to 2017.	YES, a decent work programme has been adopted.	Yes, South Africa adopted a national decent work programme for the period 2010-2014.
<b>REMEDIAL JUSTICE</b>	<b><i>Social Justice in protective dismissal law</i></b>				
1. Does the country provide constitutional protection against unfair / unlawful dismissal in the form of a fundamental human right ?	NO, the federal Constitution does not provide for any protection against arbitrary or otherwise unfair/unlawful dismissal as a fundamental human right.	NO, although China's Constitution provides a fundamental right (and duty) to work, this does not translate to protection against unfair dismissal as a human right.	No, there is no fundamental right relating to protection against unfair dismissal.	NO, the Constitution is significantly and purposively, short. It does not provide for any constitutional reference to dismissals.	YES, the Constitution provides protection against unfair labour practices which includes unfair dismissal, in the form of an independent human right.
2. Does the term social justice appear in the law governing unfair / unlawful dismissal ?	NO, no reference is made to social justice in the primary law governing dismissals.	NO, there is no reference to 'social justice' in either the LL or in the LCL.	NO, no reference is made to the term 'social justice', in the law governing	NO, the MA does not refer to 'social justice'.	YES, as part of the purpose of the LRA, mention is made of social justice as clear objective.

<p><b>3. Is provision made for extra-ordinary protection against dismissals based on <i>unfair discrimination</i> ?</b></p>	<p><b>YES, federal laws protect particularly woman against unfair discrimination in the workplace, and racism in employment practices is also illegal.</b></p>	<p><b>NO, discrimination-based terminations are not particularly addressed.</b></p>	<p><b>dismissals.</b> <b>YES, particular reference is made to dismissals based on discrimination.</b></p>	<p><b>YES, the MA declares certain terminations as null and void, particularly those related to unfair discrimination.</b></p>	<p><b>YES, the LRA distinguishes between so-called automatically unfair dismissals, and other dismissals. Automatically unfair dismissals are dismissals based on unfair discrimination and otherwise infringement of fundamental rights.</b></p>
<p><b>4. Do public and private sector employees enjoy the <i>same protection</i> against unfair dismissal ?</b></p>	<p><b>NO, the scope of the CLT specifically excludes employees in the public sector and employees employed by parastatals.</b></p>	<p><b>YES, since China is a socialist state( with a constitutional duty to work), all employees actually work for the state.</b>  <b>Statutorily, the new LL covers both private- and public-sector employees.</b></p>	<p><b>YES, public- and private-sector employees are covered by the IDA.</b></p>	<p><b>YES, the MA covers private- and public-sector employees.</b></p>	<p><b>YES, the scope of the LRA includes both private- and public-sector employees .</b></p>
<p><b>5. Are <i>all employees</i> protected against unfair / unlawful dismissal irrespective of the nature of the contract, type of work or profession or level of income ?</b></p>	<p><b>YES, rhe CLT defines an employment relationship irrespective of the existence or otherwise of any written agreement, as a person who renders services on a regular or continuous basis, is subject to supervision and control of an employer and who is compensated for such services.</b></p>	<p><b>NO, the only requirement for protection against unfair dismissal is that the person should be an employee with a valid (written) employment contract.</b>  <b>The requirement of a written contract, however, excludes a vast number of nationals from this protection.</b>  <b>Also, the LCL provides that parties can agree on terms and conditions</b></p>	<p><b>NO, managerial, supervisory, and administrative employees are excluded from the scope of protection of the IDA.</b></p>	<p><b>YES, the MA covers all employees employed on any basis.</b></p>	<p><b>YES, the LRA provides for a significantly wide definition of an employee including all types of employment contracts irrespective of nature of the contract, the work or profession.</b></p>

		relating to termination, which means that little standardised protection exists.			
<b><u>JUST SOCIAL STRUCTURES</u></b>	<b><i>Social Justice in Dispute Tribunals</i></b>				
1. Are (at least selected) bodies of dispute tribunals <i>tripartite</i> in nature (labour, business & government) ?	NO, the majority of unfair dismissal matters are dealt with by means of the Labour Courts. Judges are appointed by the Ministry of Labour (government).	YES, for the most part, arbitration- and mediation panels are tripartite in nature, albeit the court system is not.	NO, disputes are resolved primarily (unless private arbitration is agreed upon) through a Court system. Conciliation officers are government officials/ employees.	YES, bipartite negotiations take place as a first step to resolving dismissal disputes.	YES, the CCMA which handles the bulk of dismissal matters is governed by a tripartite governing body.
2. Can a complainant (applicant) refer an unfair / unlawful dismissal matter <i>in person</i> , without necessarily having to pay for expensive (legal) representation ?	YES, parties may refer matters and appear in person. Procedures are significantly less formal in the Labour Courts as opposed to other civil Courts.	YES, statutorily, it does not seem as though parties require any form of representation in mediation and arbitration processes.	NO, since the IDA provides for a Court system (based on general civil procedures), it is assumed that parties would make use and pay for legal representatives.	YES, since the IRDSA makes provision for bipartite negotiations as a first step in dispute resolution, an applicant may refer an unfair dismissal claim in person.	YES, Applicants may refer matters in person.
3. Do referring parties have a <i>choice</i> as to compulsory / alternative dispute resolution tribunals ?	NO, there is no provision made for private dispute resolution, and the Court system and conciliation processes are compulsory.	NO, no provision is made for a choice of dispute resolution mechanisms in either the LL or in the LCL.	YES, the IDA provides for voluntary arbitration.	YES, the IRDSA provides for voluntary mediation.	YES, the LRA provides for voluntary private dispute resolution which effectively sets aside the compulsory statutory process.
4. Are tribunals <i>user-friendly</i> , and do they provide assistance and education ?	NO, statutorily, no reference is made to any consumer assistance or educational functions exercised by the courts or conciliation/arbitration boards.	NO, statutorily, no provision relates in any manner to education / assistance provided to disputing parties.	NO, there is no indication in the IDA regarding educational/ assistance functions of any tribunals.	NO, the IRDSA does not necessarily make reference to educational functions of disputing bodies.	YES, the CCMA has a statutory obligation to provide assistance and education to parties and the broader public.
5. Do particular tribunals of final instance have statutory powers to <i>mediate</i> an	YES, Labour Courts are statutorily obliged to attempt	NO, the Courts do not have any mediation/ conciliation,	NO, the IDA does not make provision for mediation at	NO, mediation is strictly a voluntary, process.	NO, Commissioners overseeing arbitration may only with

unfair / unlawful dismissal claim at any stage of the litigation process ?	resolution of an unfair dismissal matter through mediation at least twice during the litigation process.	powers	any stage of litigation, once a matter is referred to the Court.		consent of all the parties to a dispute attempt to mediate the dispute.
<b>PROCEDURAL JUSTICE</b>	<i>Social Justice in dispute processes and procedures</i>				
1.Does the law governing unfair / unlawful dismissal provide for specific <i>procedural safeguards</i> or pre-dismissal procedures in effecting a dismissal ?	No, procedural safeguards seem to involve compliance with notice periods –only.	NO, the LL provides that parties should enter into a written contract, and such contract may (or may not) include dismissal procedures.	YES, pre-dismissal procedures included cognizance of the rules of natural justice in the form of a disciplinary hearing prior to termination.	YES, permission from the Institute for Settlement of Industrial Disputes has to be acquired before an employee may be dismissed.	YES, obligatory procedural requirements are provided for as a requisite for a fair dismissal.
2. Are referral procedures for unfair / unlawful dismissal disputes simple and <i>less formal</i> in comparison to other civil litigation ?	YES, it seems procedures are significantly less onerous in comparison to other civil litigation processes.	NO, the contract is the basis for litigation in labour disputes. It is assumed that this situation calls for formal procedures.	NO, processes and procedures are not necessarily simple.	NO, Courts follow general civil Court procedures.	YES, referrals to the CCMA must be made in writing, which is simply the completion of a form without the drafting of complex statements of case.
3. Are referral and resolution procedures regarding dismissals statutorily aimed at <i>expedited</i> dispute resolution ?	NO, the CLT does not make mention under its main objects of expedited dispute resolution, and the statute of limitation of two years relating to unfair dismissal referrals seems rather long.	YES, the LL specifically mentions 'promptness' in resolving labour disputes.	NO, the IDA does not refer to expediting dispute resolution, and matters should only be referred within three years from the date of dismissal.	YES, the statutory periods for referring dismissal matters are significantly short.	YES, the LRA specifically refers to expedited dispute resolution.
4. Is provision made for compulsory <i>without prejudice</i> mechanisms ?	YES, all unfair dismissal matters must be conciliated before access is gained to the Labour Courts and even the Labour Courts must attempt mediation during the	YES, the LL provides for compulsory, mediation.	YES, the IDA provides for compulsory conciliation.	YES, bipartite negotiations and conciliation are compulsory per the IRDSA.	YES, all alleged unfair dismissal matters must be conciliated before arbitration or adjudication.

	litigation phase.				
5. Do processes make provision for an <i>inquisitorial</i> (as opposed to an adversarial) approach ?	NO, the CLT does not refer to any possibility of tribunals following an inquisitorial approach to dispute resolution.	NO, no reference is made to any inquisitorial approaches.	YES, the wide statutory powers of Courts and tribunals may well provide for inquisitorial approaches to dispute processes.	NO, the IRDSA does not specifically provide for inquisitorial approaches to dispute resolution.	NO, CCMA arbitrating commissioners have wide statutory powers, including the right to follow an inquisitorial approach to arbitration.
<b><u>ECONOMIC JUSTICE</u></b>	<i>Social Justice in remedies for unfair dismissal</i>				
1. Are available remedies for unfair / unlawful dismissal aimed at <i>full restitution</i> in that retrospective reinstatement is provided as a primary statutory remedy?	NO, apart from a particular species of unfair dismissal (on the grounds of an injury or disease suffered at the workplace) retrospective reinstatement is not the primary remedy.	NO, no statutory provision is made for reinstatement.	YES, the IDA specifically mentions reinstatement / re-employment as a first-choice, remedy.	YES, reinstatement is the primary statutory remedy in terms of the MA.	YES, the LRA provides for retrospective reinstatement as the primary remedy, unless the applicant (employee) does not wish to be reinstated.
2. Are remedies assessed on <i>equitability</i> , recognising the balance between employer and employee ?	NO, no reference to 'equitability' is made relating to remedies per the CLT.	YES, labour disputes are resolved with regard to justice, fairness, and promptness, and therefore, at least theoretically, remedies may be assessed on fairness ( <i>equitability</i> ).	NO, the IDA does not make reference to equitability in terms of remedies	NO, the MA does not necessarily provide for remedies to be assessed on equitability.	YES, compensation as remedy must be considered with due regard to all the circumstances of both parties, including equitability.
3. Are remedies <i>redress</i> sensitive to the extent that such remedies serve as a punitive measure or deterrence ?	YES, compensation for unfair dismissals relating to unfair discrimination may include damages for pain and suffering, which orders are exclusively considered by the Courts.	NO, remedies are primarily, contractual in nature and therefore cannot include 'redress' / punitive measures.	NO, there is no statutory provision for punitive measures in compensation orders.	NO, statutorily, remedies do not aim to serve as deterrence.	YES, in terms of the LRA, the ceiling for compensation for unfair dismissals is 12 months' remuneration; however, for unfair dismissals based on unfair discrimination such ceiling is 24 months' remuneration.
4. Do remedies anticipate economic damages ( <i>financial redistribution</i> ) ?	NO, compensation orders are calculated in accordance with a formula	YES, compensation is based on contractual damages.	YES, the wide powers of tribunals include compensation orders	YES, even though the issue of remedies is significantly vague in terms	YES, compensation for unfair dismissal takes financial loss or damages into

	as a factor of money available in the FGTS i.e. depending on the period of contribution to this fund (length of service).		calculated on damages.	of the MA, the Courts have the statutory powers to order remedies in the nature of financial damages.	account.
<b>5. Are remedies readily (practically) enforceable ?</b>	<b>YES</b> , because of the existence of a fund such as the FGTS remedies in the form of compensation are readily enforceable; although, moderate, it is certainly guaranteed.	<b>NO</b> , a Court system is used.	<b>YES</b> , the IDA gives labour tribunals , civil Court status with regards to enforcement of awards/orders.	<b>NO</b> , enforcement takes place through normal civil procedures.	<b>YES</b> , a simple certification process is used for enforcement of arbitration awards.

## V. CONCLUSION

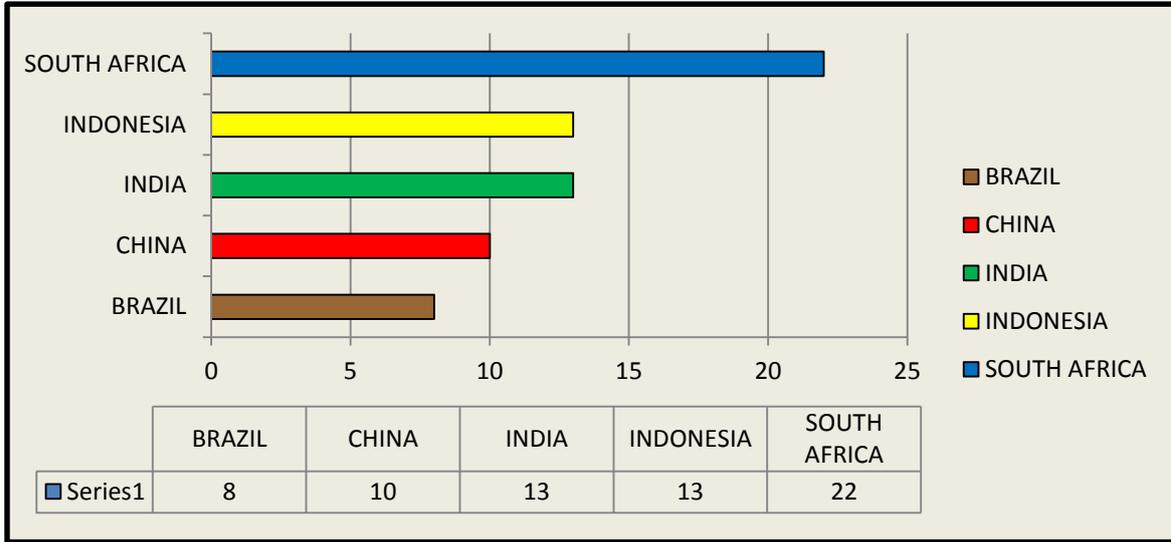
Essentially, the present paper analysed the diverse perceptions of social justice by means of a concise and generic social justice framework. Social justice was measured according to a customised framework (derived from the generic framework) provided in paragraph II *supra*, and a score-card comprising 25 social justice indicators was then used to calculate a score for each of the EE5 jurisdictions' regarding dismissal protections.

### A. Social justice in employment protections in the EE5 jurisdictions

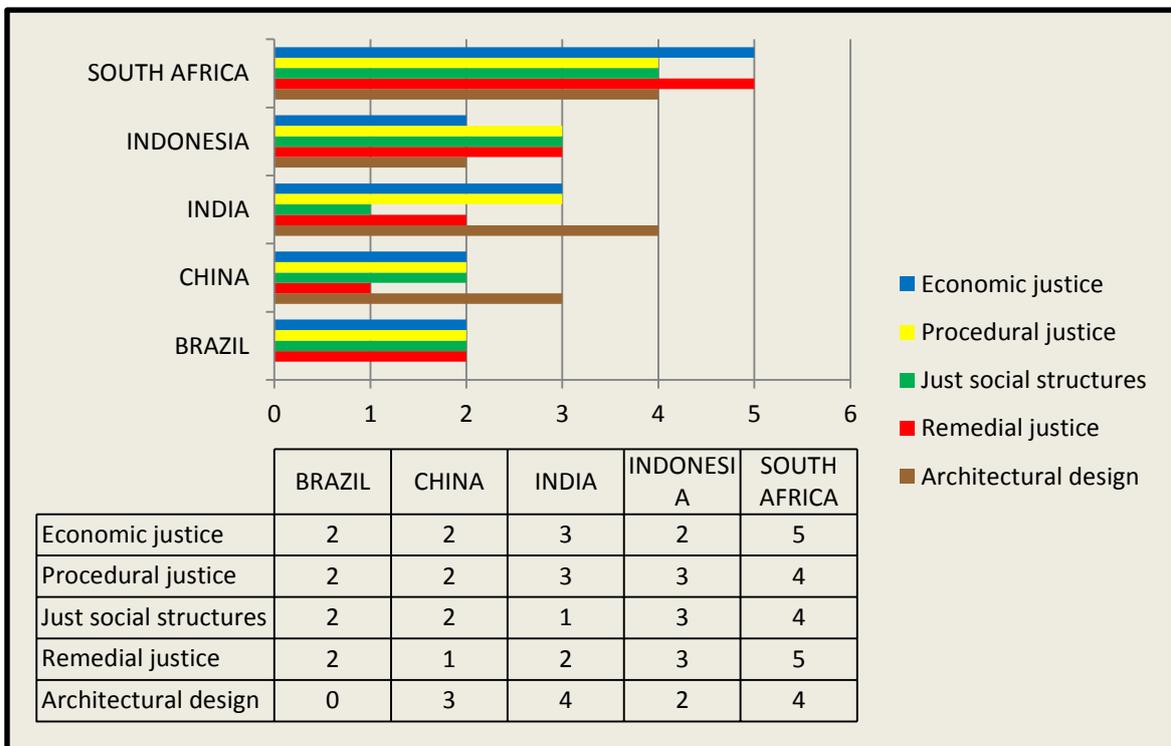
All five the EE5 countries, show some measure of social justice allegiance in dismissal protections. The results of the scoring showed that South Africa's dismissal protections and dispute resolution systems reveal strong allegiance with social justice values. India and Indonesia show moderate commitment to social justice, although significantly weaker when compared to South Africa. Amongst the EE5 jurisdictions, China's and Brazil's protections reveal little adherence to the notion of social justice.

Figure 4, below displays the extent to which unfair dismissal protections and dispute resolution systems in the EE5 countries subscribe to the notion of social justice and Figure 5

provides a comparative view of the scores (in the respective dimensions of the framework) on the proposed Social Justice Score-card.



**FIGURE 4: Social justice in dismissal protections amongst the EE5 countries**



**FIGURE 5: Graphic display of a combined social justice score-card of the EE5 countries**

A comparison of the EE5 countries per the 25 individual social justice indicators revealed significant qualitative information on the construction and design of constitutional frameworks and legal dispensations. Social justice allegiances or otherwise, present the possibility of sensible inferences when viewed within the respective jurisdictions' political, social, and economic contexts.

Social justice allegiance measured in the respective dimensions, show remarkable information. Brazil scored a, 0 for social justice allegiance according to the country's *architectural design*. This means that the country does not necessarily provide for social justice as a constitutional value. However, having attained scores (albeit, relatively, low) on the other four dimensions it may be inferred that the absence of constitutional allegiance to social justice does not confirm the complete ignorance of such principles in law of general application- albeit, a contributory factor to the country's overall low, score. It should be noted that the present research shows that Brazil tends to focus more on regional as opposed to national, policy making which may be a contributing factor to its low score from a constitutional perspective.

China, on the other hand, shows strong social justice allegiance from a constitutional point of view. Being a socialistic state, this was not surprising. However, China's scores for the other four dimensions are significantly lower than for the first dimension. It follows that, simply because a country shows strong constitutional allegiance to social justice, it may well be that this is not followed through in terms of law of general application. The present research did, however, indicate that currently, China is making significant changes to its statutory (employment) laws, although it is still a long way from embracing social justice in dismissal protection. Also, the low score on its *remedial justice dimension*, has been influenced severely by the fact that protective dismissal law (and general employment law), is based primarily on the law of contract. This seems to hamper the infusion of social justice principles into the employment institution.

India's Constitution, similarly, to that of China's, is moderately well aligned with the notion of social justice. However, translation of these principles, particularly insofar as their

social structures are concerned, (compilation and operation of dispute tribunals), seems problematic.

Indonesia and South Africa achieved the most balanced results amongst the EE5 countries. Bearing in mind South Africa's recent political changes, it is not surprising that this country reveals the highest overall score, of all the EE5 jurisdictions. Indonesia, on the other hand, has an extra-ordinary (flexible) Constitution which quite possibly contributes positively to its moderately high scores on the other four dimensions of the social justice framework. However, its significantly low score on the *economic justice dimension* indicates that, whatever inroads have been made regarding social justice in employment/dismissal protections, these have yet to filter through to its execution of remedies for unfair dismissals.

## **B. Value-add of the present study**

The present study adds value on a number of different levels of scientific study. On a micro or macro – level, the customised social justice framework may be applied to multiple doctrines. On a micro level, this framework may be applied to company policies relating to employment, recruitment, promotion and the management of discipline in the workplace. On a macro level, this framework may be applied to various legal doctrines, for example, social security law, land distribution, empowerment, and the likes.

Regarding the social justice indicators for dismissal protections, the number of indicators may for the purpose of future research, be enhanced with a view to measuring social justice compliance more eloquently. The scorecard which aims to provide a scientifically sound measuring and comparative tool in the assessment of social justice compliance pertaining to dismissal protections and disputes about dismissals may be applied in various ways. Scoring may be done on a number of different levels. Scores may be compared per individual indicator across different jurisdictions or, using a sub-total to compare scores on a particular dimension of the framework. The method of score tallying and comparison, results in convincing and scientific inferences which will add significant value to international and foreign labour law studies.

Measuring/benchmarking social justice principles may be done domestically (regionally or nationally), and across foreign jurisdictions. Scoring dimensions independently across various jurisdictions may reveal specific shortfalls, which may assist in the upgrading of laws, processes, and procedures with a view to enhance social justice allegiance.

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