

# CHAPTER 1

## INTRODUCTION

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## A Contextual Background

### 1 General

There is no doubt that the world of work has changed since the 1970's and 1980's.<sup>1</sup> This is a world-wide phenomenon and is a direct result of changed socio-economic circumstances.<sup>2</sup> The change in socio-economic circumstances, in turn, is a direct result of technological advancement and development.<sup>3</sup> South Africa as a developing country has to compete in the global economy in an increasingly interconnected world and cannot escape from the effects of international change. South Africa has also had to deal with national transformation. Clearly the immense social and political changes that have occurred in the last decade in South Africa have had a major influence on the South African labour law dispensation.<sup>4</sup>

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<sup>1</sup> Owens "The Traditional Labour Law Framework: A Critical Evaluation" in Mitchell *Redefining Labour Law* Melbourne (1995) 6-7; Theron "Employment Is Not What It Used To Be" 2003 *ILJ* 1247; Thompson "The Changing Nature of Employment" 2003 *ILJ* 1793.

<sup>2</sup> Slabbert and De Villiers *The South African Organisational Environment* (2002) 3<sup>rd</sup> ed 6 explain: "Davis defines the business environment as the aggregate of all the conditions, events and influences that surround and affect it. An environment, which forms part of an open system, consists of two components, namely the external and internal business environments. The external environment entails influences or inputs from systems in the broader community, such as the political, economical, social, demographic, educational and technological systems, while the internal environment focuses on the influence of factors within the business organisation, such as the mission, vision, leadership and management style (including the way the employment relations are managed), culture philosophy, policies, strategies and objectives. However, like all structural components in the open system, the different environmental inputs are interdependent, integrated and almost indivisible...Against this background it is clear that the individual and collective relationships in business organisations, which form the building blocks of employment relations, cannot be seen and managed in isolation from the other sub-systems both internal and external to the organisation."

<sup>3</sup> See Coyle *The Weightless World* (1997) where in the introduction to the book the author states: "Profound technological change always involves economic upheaval. It also has always meant very rapid growth in living standards in the past. Unfortunately the gain follows the pain by some distance."  
Brassey *Employment and Labour Law* (1998) A1 51-56; Du Toit *et al Labour Relations Law - A Comprehensive Guide* 3<sup>rd</sup> ed (2000) 13-20.

The Labour Relations Act<sup>5</sup> (hereinafter the LRA) is the “centrepiece of the new model for regulating labour relations.”<sup>6</sup> The haste with which the ANC government went about re-writing the labour laws “can to a large extent be explained by the role that organized labour had played in the struggle against apartheid and in the ANC’s electoral success.”<sup>7</sup> The backbone of the LRA is collective bargaining with a preference for centralised collective bargaining.<sup>8</sup> The reasons for this emphasis become apparent when the historical events leading up to the democratic elections of 1994 are examined.

## **2 Historical Development up to 1994**

The Industrial Conciliation Act<sup>9</sup> provided a framework for a system of centralised collective bargaining.<sup>10</sup> However trade unions that represented Black workers were excluded from participation in this system.<sup>11</sup> This Act was a direct response by the government to the increasing number of strikes embarked upon by White mineworkers and finally culminating in the Rand Rebellion of 1922. The centralised collective bargaining system was adopted in order to contain labour unrest and regulate relations between employers and white organised employees. This racially exclusive system operated alongside a racially exclusive political system where only Whites enjoyed the right to vote. This system survived and operated for more than half a century before it was finally dismantled. The system of centralised collective bargaining, however, endured for much longer, and continues to be emphasized by our legislation.<sup>12</sup>

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<sup>5</sup> 66 of 1995.

<sup>6</sup> Du Toit *et al op cit* 3.

<sup>7</sup> *Ibid* 17.

<sup>8</sup> See ch 3 *infra*.

<sup>9</sup> 11 of 1924.

<sup>10</sup> S 2(1).

<sup>11</sup> S 24 defined an employee in such a way so as to exclude pass-bearing African workers from the definition. Therefore black people were precluded from membership of registered trade unions and only registered trade unions could take part in the statutory collective bargaining system. See also Du Toit *et al op cit* 9-10.

<sup>12</sup> See ch 3 *infra*.

The political regime used force to contain political opposition and South Africa's economy enjoyed phenomenal growth until the early 1970's.<sup>13</sup> By the early 1970's it became increasingly difficult for the government to contain the militancy of the growing black working class. Opposition to the racially exclusive labour relations system and the repressive apartheid regime in general was expressed in the form of massive and sometimes debilitating strikes.<sup>14</sup> Being excluded from the statutory collective bargaining system, these unregistered trade unions had sufficient strength in numbers to place unprecedented pressure on employers and coerce them to enter into recognition agreements in terms of which these unions were recognized as bargaining partners for the purposes of plant level collective bargaining.<sup>15</sup>

These unions grew rapidly and the growing resistance pressured the National Party government into appointing the Wiehahn Commission of Enquiry into labour legislation in 1977. The Commission made, *inter alia*, the following recommendations:<sup>16</sup>

- “(a) trade union rights should be granted to Black workers;
- (b) more stringent requirements were needed for trade union registration;
- (c) job reservation should be abolished;
- (d) a new industrial court should be established;
- (e) a national manpower commission should be appointed;
- (f) provision should be made for legislation concerning fair labour practices;
- (g) separate facilities in factories, shops and offices should be abolished; and
- (h) the name of the Department of Labour should be changed to the Department of Manpower.”

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<sup>13</sup> Du Toit *et al Labour Relations Law - A Comprehensive Guide* 3<sup>rd</sup> ed (2000) 8.

<sup>14</sup> *Ibid* 9.

<sup>15</sup> *Idem*.

<sup>16</sup> Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* (2004) par 329.

In the hope of co-opting and restraining the unions, government accepted most of the Wiehahn Commission's proposals.<sup>17</sup> Since Black trade unions were now able to register<sup>18</sup> the central collective bargaining system was now available to them as well. Initially however, unions resisted registration for fear of being co-opted, but gradually they began to register. Despite having registered, the unions continued to reject the centralized system of collective bargaining and continued to bargain with individual employers at plant level.<sup>19</sup> From 1982, as unions grew in strength, they began to acknowledge the potential benefits of centralised collective bargaining and a shift in policy became apparent. The acceptance of centralised collective bargaining by unions gained momentum with the formation of the Congress of South African Trade Unions (COSATU) in 1985.<sup>20</sup> Employers, who had previously refused to bargain with unions at plant level on the basis that the unions could bargain at central level at the industrial councils, now changed their stance and increasingly called for decentralised collective bargaining.<sup>21</sup>

As the union movement grew from strength to strength and government's ability to contain the unions diminished, states of emergency were declared in 1985 and 1986. This served to further elevate and emphasize the political significance of the trade union movement, especially COSATU.<sup>22</sup> By the end of the 1980's government was unable to contain the union movement by force<sup>23</sup> or by legislation.<sup>24</sup> South Africa was experiencing a serious economic recession, political

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<sup>17</sup> See *White Paper on Part 1* (WP S -'79).

<sup>18</sup> Industrial Conciliation Amendment Act 94 of 1979.

<sup>19</sup> Du Toit *et al op cit* 11.

<sup>20</sup> Du Toit *et al op cit* 12 say: "From its inception COSATU advocated the establishment of one union per industry, and within a few years it called for the formation of national, industry-wide councils in all sectors."

<sup>21</sup> *Ibid* 12.

<sup>22</sup> *Idem*.

<sup>23</sup> See Finnemore and Van Rensburg *Contemporary Labour Relations* (2000) 39-41 for a summary of the restrictions, bannings and general force adopted by government in an attempt to destroy union opposition.

<sup>24</sup> The Labour Relations Amendment Act 83 of 1988 which *inter alia* placed restrictions on the right to strike and made changes to the definition of an unfair labour practice (S 1(h)) caused such a furore amongst trade unions that it was amended in 1990 to remove the sections that the unions found objectionable. –see Du Toit *et al op cit* 15 for a description of the events leading up to the repeal of

and economic isolation in the form of sanctions, disinvestments and capital flight, rising unemployment, crime and violence.<sup>25</sup> In the circumstances the apartheid government had no choice but to reform.<sup>26</sup>

### **3 Position since 1994**

The ANC, COSATU and the South African Communist Party formed an electoral alliance and in April 1994 the ANC led 'Government of National Unity' was elected to power. Naturally, the ANC was indebted to COSATU who looked to the newly appointed government for satisfaction of its demands. High on COSATU's list of priorities was a labour relations system of centralised collective bargaining. In March 1994 at COSATU's Campaign Conference, it was decided that one of COSATU's aims would be "to secure centralised bargaining forums in all sectors by the end of the year."<sup>27</sup> It was acknowledged that this might entail "enacting a law which would compel centralised bargaining."<sup>28</sup> The Reconstruction and Development Programme (RDP), which embodied the ANC's pre-election commitments, specifically committed the ANC *inter alia*, to, a system of national level, industrial level and plant level collective bargaining, with industrial councils empowered to "negotiate industrial policy including the implementation of the RDP at sectoral level."<sup>29</sup>

In August 1994 the government appointed a Ministerial task team to review labour legislation and to draft a negotiating document in the form of the Labour Relations Bill.<sup>30</sup> The task team was instructed to draft a Bill that would *inter alia* promote and

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these provisions. See also Cameron, Cheadle and Thompson *The New Labour Relations Act* (1989) for a comprehensive account of the content and effect of these amendments.

<sup>25</sup> Finnemore and Van Rensburg *op cit* 42.

<sup>26</sup> For a summary of the process of transition from 1990-1994 see Van Jaarsveld, Fourie and Olivier *op cit* par 332-338 and Finnemore and Van Rensburg *op cit* 42-44.

<sup>27</sup> Baskin *Centralised Bargaining and COSATU; A Discussion Paper* (1994) par 2.4.

<sup>28</sup> *Idem*.

<sup>29</sup> African National Congress *The Reconstruction and Development Programme: A Policy Framework* (1994) par 4.8.07, 4.8.8, and 4.8.9.

<sup>30</sup> *G Gazette* 16292, 10 February 1995, 112-117.

facilitate collective bargaining in the workplace and at industry level.<sup>31</sup> The key point of contention in the negotiation process that followed at NEDLAC concerning the terms of the Bill was the collective bargaining system.<sup>32</sup> Business South Africa (BSA) supported voluntary collective bargaining with no legally enforceable duty to bargain. BSA proposed a system where the parties would be at liberty to choose both the level at which collective bargaining would take place as well as the issues for collective bargaining.<sup>33</sup> Labour, on the other hand was opposed to the removal of a legal duty to bargain. “Secondly, the union federations argued that the proposed Act should provide for national industry-wide bargaining. This should be achieved by NEDLAC demarcating the scope of each bargaining council (the new name for industrial councils), which would then be established ‘in law’. All employers would be ‘required to be represented at council level’, and any trade union with 30% membership would be entitled to representation, although bargaining could take place only once the union side had achieved a 50% + 1 level of representivity. Bargaining issues were, however, for the parties themselves to decide upon, if necessary by recourse to industrial action.”<sup>34</sup> Since there would be no non-parties, extension of collective agreements would be superfluous. Exemptions could be obtained by agreement of the parties to the council and the only ground for appeal would be *mala fides*. Small business could be represented on a separate bargaining council ‘where appropriate’ subject to a carefully drafted definition of a ‘small business enterprise’.<sup>35</sup>

Despite these vastly opposing expectations a compromise was reached at NEDLAC. However, what was finally enacted into law in the form of the LRA more closely resembled Labour’s proposals and a clear emphasis on centralised collective bargaining was finally adhered to.<sup>36</sup>

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<sup>31</sup> *Draft Negotiating Document in the Form of a Labour Relations Bill*, GG 16259, 10 February 1995, 110-111.

<sup>32</sup> Du Toit *et al Labour Relations Law - A Comprehensive Guide* 3<sup>rd</sup> ed (2000) 27.

<sup>33</sup> *Idem*.

<sup>34</sup> *Ibid* 28.

<sup>35</sup> *Idem*.

<sup>36</sup> See ch 3 *infra* where the LRA’s preference for centralised collective bargaining is explained.

Clearly, in enacting the provisions of the LRA the legislature reacted to, and was influenced by prevailing national, social, political and economic circumstances that had been brought about as a result of our history as demonstrated above. Given this history it is perhaps not surprising that international influences were accorded only secondary relevance.

The global trend towards 'de-collectivisation' and decentralisation of labour law and labour relations began in the early 1980's and resulted in a decline in union membership in most industrialised countries,<sup>37</sup> with the obvious consequence of a diminished role for collective regulation of the employment relationship.<sup>38</sup>

The result of this is that many employees may not be covered by collective agreements.<sup>39</sup> Furthermore, the changing world of work has also created the 'atypical employee'.<sup>40</sup> Since such employees are not employed in the traditional sense they are usually not trade union members. They do not enjoy the protection afforded to ordinary employees in terms of legislation as well as in terms of collective agreements.

In the light of these developments centralised collective bargaining might not always be the most appropriate vehicle for the regulation of the employment relationship.

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<sup>37</sup> See ch 3 *infra* where the reasons for general trade union decline in the last two decades are discussed.

<sup>38</sup> Creighton and Mitchell "The Contract of Employment in Australian Labour Law" in Betton *The Employment Contract in Transforming Labour Relations* (1995) 157.

<sup>39</sup> See ch 6 *infra*.

<sup>40</sup> See Owens "The Traditional Labour Law Framework: A Critical Evaluation" in Mitchell *Redefining Labour Law* Melbourne (1995) 3-9 for a comprehensive account of the reasons and consequences of the creation of such an 'employee'; Thompson "The Changing Nature of Employment" 2003 *ILJ* 1798-1806; Theron "Employment Is Not What It Used To Be" 2003 *ILJ* 1249-1258; Blanpain "Work in the 21<sup>st</sup> Century" (1997) *ILJ* 185 187-198; Olivier "Extending Labour Law and Social Security Protection: The Predicament of the Atypically Employed" (1998) *ILJ* 669-679; Peck "From Welfare to Workfare: Costs Consequences and Contradictions" (1999) *ILJ* 808 -809.



## **B Aim of the Study**

The aim of this study and research, which is entitled “Alternative Means to Regulate the Employment Relationship in the Changing World of Work”, is to demonstrate that centralised systems of collective bargaining which were typical of the industrial era in industrialised developed countries are not suitable in today’s global economy and consequently, in the interests of labour justice, alternative means for the protection of workers’ rights need to be explored.

This is done by looking also beyond labour law. The reason for looking beyond labour law is that the traditionally held belief amongst most labour lawyers that the main function of labour law is to protect individual employees is rejected. Instead, the view that this protective function is only a secondary or even an ancillary function of labour law is put forward.<sup>41</sup> Given the fact that technology has affected the world economy to the extent that it has altered the world of work as it existed in the industrial era,<sup>42</sup> it makes little sense to insist on the centralised systems of collective bargaining that were well suited to the world of work that used to exist in the industrial era.<sup>43</sup> To insist on centralised collective bargaining is to adopt laws that do not give adequate cognisance to surrounding socio-economic reality. Failure to pay adequate attention to these factors will hinder the success of the law in achieving its objectives.<sup>44</sup>

However, the fact remains that individual employees, given the inherent imbalance of power that usually exists between employer and individual employee or worker, are open to unfair employer exploitation. Since centralised systems of collective bargaining may reduce the ability of employers to attain the flexibility that is necessary to enable them to compete globally, it is necessary to look to other

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<sup>41</sup> See ch 2 *infra*.

<sup>42</sup> *Idem*.

<sup>43</sup> See ch 2 *infra* for a description of the industrial era and the era of technology.

<sup>44</sup> See ch 2 *infra*.

means of protecting individual employees from exploitation in a manner that does not jeopardise efficiency and ultimately the national economy.

Having explained the reasons for trade union decline and consequent decentralisation and individualisation of labour law, the potential of basic common law principles,<sup>45</sup> corporate social responsibility<sup>46</sup> and the constitutional right to fair labour practices<sup>47</sup> for the protection of employee interests are all considered.

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<sup>45</sup> See ch 7 *infra*.

<sup>46</sup> See ch 8 *infra*.

<sup>47</sup> See ch 9 *infra*.

## C Importance of the Topic

Technology has consistently changed the world of work dramatically.<sup>48</sup> Consequently, national labour laws that were designed to operate in the industrial era are now being challenged. As Mitchell states: “If labour lawyers are agreed about anything at the moment it is that rapid changes in the ‘world of work’ are calling into question the continued relevance of labour as we have come to know it. There is no shortage of agreement that economic and social developments at both the national and international level have forced changes to established patterns of industrial relations and to the legal structures and processes which

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<sup>48</sup> Coyle *The Weightless World* (1997) 45 expresses this fact in terms of productivity as follows: “There is therefore a clear pattern over time of employment shifting from the high to the low productivity parts of the economy: from farming to factories, from factories to services.” Owens, *loc cit* 3-9, describes the world of work as it progressed from the agricultural era to the industrial era to the present (the age of technology or the era of globalisation): “In the western world the dominant conception of work, the worker and work relationships during the last two centuries has been moulded through the revolutionary changes which inaugurated the ‘industrial age’. Incorporating developments in technology and transportation, the movement to urbanisation and the re-organisation of markets initiated through the imperial power of colonisation, the magnitude of these changes ensured that they touched every aspect of life and effected a fundamental re-organisation of society. No less revolutionary, although gradual in the way they took hold, were the changes in the legal conception of work, the worker and work relationships. The transformation of the proprietorial relationship of master over servant into the contractual relationship between employer and employee, reflected a development in the concept of the person as an individual, who was independent and free, engaging with others through an act of intention, an exercise of choice and free will. Work was a means of acquiring property and thereby individuated the worker in society. The worker was no longer a servant (property) but a free man (a person). Work was thus understood as a central means of achieving full membership of the community-citizenship...The archetype of the male ‘blue collar’ worker engaged in hard manual labour under conditions of dirty, noisy and dangerous, held the focus of the law...The breakdown of the old picture of the world of work has been particularly apparent in the last two decades. It is clear that there is no longer a ‘typical’ worker who is male, works full-time and permanently in primary or secondary industry. The growth of ‘atypical’ work relationships’ especially part-time and casual work, is the most significant aspect of this...  
...If the new flexible workplace represents a change only in the form, but not in the substance, of work relationships and this is ignored by the law then there will be a failure of justice all over again.” See also other authors referred to in footnote 40 *supra*.

have helped shape them.”<sup>49</sup> Clearly therefore if labour laws do not reflect reality their ability to deliver justice will be hampered resulting in those labour laws being challenged.<sup>50</sup>

South Africa is no exception and is not immune from the effects of technology and globalisation.<sup>51</sup> South African labour laws cannot ignore these changes because “if employment law and other regulations make it hard for the economy to adjust, there will be an increase in joblessness, concentrated in the dying industries, and little new job creation.”<sup>52</sup> It is senseless to oppose this changing world and pretend that things have not changed. These changes are unstoppable and consequently the law should work with them and not against them.<sup>53</sup>

Since so many people are either employees in the traditional sense<sup>54</sup>, or atypical employees, and work is such an important aspect of an individual’s life,<sup>55</sup> the regulation of these relationships is naturally important, not only in the interests of justice between the parties, but also in the interests of the national economy.

## D Modus Operandi

Since every country is affected by globalisation, the approach of this study is comparative. Although South Africa is not as developed as the countries with which comparisons are made, “the more modern sector of the local economy is encountering the same forces, with much the same consequences.”<sup>56</sup>The starting

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<sup>49</sup> “Introduction: A New Scope and a New Task for Labour Law?” in Mitchell *Redefining Labour Law* (1995) vii.

<sup>50</sup> Owens “The Traditional Labour Law Framework: A Critical Evaluation” in Mitchell *Redefining Labour Law* Melbourne (1995) 3.

<sup>51</sup> See Thompson “The Changing Nature of Employment” 2003 *ILJ* 1794, 1800-1802; Feys “Labour Standards in Southern Africa in the Context of Globalization: The Need for a Common Approach (1999) *ILJ* 1445.

<sup>52</sup> Coyle *op cit*, in the introduction to the book.

<sup>53</sup> *Ibid* 62.

<sup>54</sup> See Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* (2004) par 1.

<sup>55</sup> Bendix *Industrial Relations in the New South Africa* 3<sup>rd</sup> ed (1998) 4.

<sup>56</sup> Thompson *op cit* 1794.

point is that the South African legislature has misinterpreted the true function of labour law. The consequence of this misperception is that in its pursuit of providing adequate protection for the employee, insufficient attention has been paid to the socio-economic forces that have an even greater impact and consequences on the employment relationship than legislative measures.

The study consists of two parts: The first part is a comparative study with other industrialised countries identifying the reasons for the general decline of trade unions and, the consequent decentralisation of collective bargaining and even the individualisation of the employment relationship. In sharp contrast it is demonstrated how the South African legislature has adopted centralised collective bargaining as a vital mechanism of regulating the employment relationship. The implication is that the appropriateness thereof is questioned. The second part is advisory and looks to possible alternatives for the protection of workers' rights given the changing world of work and the need for flexibility. Once again, comparative research with the laws of other countries is undertaken.

## **E Overview of the Chapters**

The research presented in the following nine chapters entails:

**Chapter 2:** The purpose of this chapter is to demonstrate that the traditional view of the function of labour law, namely, that its main function is to protect the individual employee from abuse of power by the employer, is inherently incorrect. It is proposed that the main function of labour law is the regulation of labour relations and by implication the labour market. The policy reasons for such regulation may vary as circumstances differ at different times and from government to government.

It is not difficult to see why the type of labour laws that were enacted in industrialised countries at the peak of the industrial era<sup>57</sup> might be construed as having mainly a protective function. However, these laws were enacted in reaction to and as a direct result of new socio-economic circumstances brought about by the advent of technology. What was needed at that time in order to regulate the labour market so as to preserve the socio-political status quo was a labour relations system that could effectively regulate and thereby control the potentially enormous power that trade unions in the industrial era could amass and wield. This was done *inter alia* by legitimising trade unions and creating structures within which they could operate in a regulated and controlled manner. The fact that employee interests were protected in the process is merely a bi-product of these systems and was only of secondary relevance. The main object remained the regulation of the labour market. This does not mean that the protective function of labour law is automatically excluded.<sup>58</sup> It is merely a question of emphasis.

If the view is accepted that the main function of labour law is the regulation of labour markets for different policy reasons, it becomes apparent that a system that places a huge emphasis on centralised collective bargaining where the object is the regulation of employment relations between the 'typical employee'<sup>59</sup> and the employer, is misplaced in today's world of work. The fact is that the 'atypical

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<sup>57</sup> See ch 2 *infra* for explanations for, and discussion of the topic of the different socio-economic eras of mankind.

<sup>58</sup> The Basic Conditions of Employment Act 75 of 1997 (s 6-18, s19-27, s28-35, s36-42) provides a floor of employee entitlements from which employers are not legally entitled to deviate. International Labour Organisation (ILO) Conventions, for example Convention 87 concerning the freedom of association and protection of the right to organise and Convention 98 concerning the application of the principles of the right to organise and to bargain collectively) and Recommendations are also there to create a floor of minimum standards.

<sup>59</sup> The 'typical employee' is the employee created by the socio-economic forces of the industrial era. Such an employee is male, full time, and is usually unskilled, covered by collective agreements, a trade union member, and at times goes on strike; Olivier "Extending Labour Law and Social Security Protection: The Predicament of the Atypically Employed" (1998) *ILJ* 669.

employee' is rapidly replacing the 'typical employee'<sup>60</sup> and an increasing proportion of the workforce is now made up of these 'atypical employees'.<sup>61</sup>

The reality is that, irrespective of whether the main objective is the control of labour market outcomes or whether the main object is the protection of the employee against employer abuse of power, a system that attempts to utilise centralised collective bargaining as the main vehicle for the achievement of either of these objectives cannot succeed in today's changed world of work. Centralised collective bargaining may have been appropriate in the industrial era but technology has altered the world of work to such an extent that the efficacy of centralised collective bargaining systems has to a large extent been eroded.<sup>62</sup>

**Chapter 3:** This chapter is entitled "The South African Legislative Framework". It demonstrates how the South African legislature has attempted to attain the stated objectives of the Labour Relations Act <sup>63</sup> (hereinafter the 'LRA'). This is principally by means of collective bargaining with an emphasis on centralised collective bargaining. This insistence on a centralised system of collective bargaining is borne out by the bias in favour of majoritarianism, the encouragement of super-unions and a general antipathy to the proliferation of a number of smaller unions.<sup>64</sup>

**Chapter 4:** This chapter is entitled "Collective Bargaining". Since, as is demonstrated in chapter 3, collective bargaining forms the backbone of our labour law legislative framework, it is necessary to explain the meaning, origins and objectives of collective bargaining. The different levels at which collective bargaining takes place is also discussed. Since the *raison d'être* of trade unions is

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<sup>60</sup> See Theron "Employment Is Not What It Used To Be" 2003 *ILJ* 1249-1256 where the different types of 'atypical employees' including part-time and temporary employees, sub-contractors, home-workers and so forth are discussed and it is explained what an 'atypical employee' is.

<sup>61</sup> See Thompson "The Changing Nature of Employment" 2003 *ILJ* 1800-1807.

<sup>62</sup> See ch 5 *infra*.

<sup>63</sup> 66 of 1995.

<sup>64</sup> See "Organisational Rights" and "Fora for Collective Bargaining" in ch 2 *infra*.

collective bargaining,<sup>65</sup> a historical analysis of trade unions in South Africa is undertaken. Thereafter a comparative analysis of the different levels of collective bargaining currently utilised in other industrialised countries is undertaken. The purpose is to demonstrate that prevailing socio-economic circumstances determined by advancing technology will have an effect on which level of collective bargaining is the most appropriate.

**Chapter 5:** This chapter is entitled “Decentralisation of Collective Bargaining”. Its purpose is to explain the main reasons for the general, worldwide decline of trade unions and the consequent decentralisation of collective bargaining. This chapter also embarks on a comparative analysis with other industrialised countries not only in explaining the reasons for trade union decline, but also in identifying a general trend towards decentralisation of collective bargaining. Finally, the latest amendments to the LRA are discussed. A legislative insistence on collective bargaining as the main vehicle for employee protection and job security is identified. This leads to the inevitable conclusion that our legislation attempts to achieve its objectives by recourse to methods better suited to the world of work that existed in the industrial era, and that it does not pay sufficient attention to the reality of the changed world of work.<sup>66</sup>

**Chapter 6:** This chapter is entitled “The Individualisation of Employment Agreements”. A comparative study with other industrialised countries is undertaken. In the study it becomes apparent that there exists a general employer preference for the determination of employment terms and conditions by direct negotiation with the employee (both typical and atypical) as opposed to the determination thereof by means of collective bargaining. The decline of trade unions has rendered these practices possible and viable thus ensuring the

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<sup>65</sup> Trade unions can and do perform other functions but traditionally their main function has been to bargain collectively with employers in order to attain better terms and conditions of employment for their members. See Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* (2004) par 355.

<sup>66</sup> See Thompson *op cit* 1800; Theron *op cit* 1247; Blanpain "Work in the 21<sup>st</sup> Century" (1997) *ILJ* 185.



employer the necessary flexibility to compete in global markets. This trend in the individualisation of employment contracts also serves to highlight the increasing inability of trade unions to perform their traditional function, namely the negotiation of terms and conditions of employment on behalf of their members.<sup>67</sup> This concludes part one of this study.

**Chapter 7:** Having established the worldwide decline of trade unions and the consequent movement to decentralisation of collective bargaining and individualisation of employment relations, part two of this study will explore some alternative means of protecting the interests of individual workers, be they typical or atypical employees. The relationship between the atypical worker and the employer is usually determined solely by an individual contract between with the provider of work. This chapter is entitled “The Contract of Employment”. It explores the potential of judicial activism in moulding the common law in the determination of the validity of contracts or terms therein, and the interpretation of individual contracts of employment so as to attain a result that:

- (i) more accurately reflects the general mores of society;
- (ii) results in a measure of justice;
- (iii) is responsive to the changed world of work.

A comparative study with England, United States of America and Australia is undertaken.

**Chapter 8:** This chapter is entitled “The Constitutional Right to Fair Labour Practices”. The potential of this constitutionally guaranteed right to protect workers from employer abuse of power is explored. This potential is explored both in terms of ambit of coverage with reference to who is covered as well as with reference to the type of employer conduct that is prohibited and allowed. Once again, comparative studies with other industrialised countries are undertaken. This time the countries are England and United States of America. The reason for choosing

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<sup>67</sup> Van Jaarsveld, Fourie and Olivier *op cit* par 355.

these countries is that the concept of an unfair labour practice is not unknown to these jurisdictions.

**Chapter 9:** This chapter is entitled “Corporate Social Responsibility”. “A dramatic change in the social perceptions of labour relations has occurred.”<sup>68</sup>This change has not only forced the courts to give effect to this “altered milieu of thinking”<sup>69</sup>, it has also resulted in employers taking some responsibility for the well-being of their employees. The legality of employers taking social responsibility is discussed in terms of company law. The effects of the King Commission Reports on the legality of corporate social responsibility are also discussed. Comparative studies with England and the United States of America are undertaken because both these countries have systems of company law similar to that in South Africa. The conclusion is that corporate social responsibility is both legal and good for business; it can fulfil the social function of providing a better deal for the employee, and ultimately protect the employee against possible abuse of power by the employer.

**Chapter 10:** This chapter summarises the conclusions reached in this study as contained in each chapter.

## **F Difficulties and Limitations of the Study**

The most obvious limitation in this research is the application of a comparative approach. One should be mindful of following other legal systems without having recourse to the contexts within which they fit. Different legislation might have different underlying policies and objectives, and national socio-economic circumstances might differ. Comparisons with developed, industrialised countries were undertaken. South Africa is not as developed as the countries with which

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<sup>68</sup> Olivier “A Charter for Fundamental Rights for South Africa: Implications for Labour Law and Industrial Relations” (1993) *TSAR* 651, 656.

<sup>69</sup> *Idem.*

comparisons were made. Nevertheless, South Africa still faces many of the same challenges brought about by the advent of advanced technology.

Another limitation is the scarcity of accurate statistics regarding matters such as the extent of union membership<sup>70</sup>, the coverage of centralised collective agreements and the number of informal and other forms of non-standard employment.<sup>71</sup>

A major limitation has to do with the exclusion of other disciplines in the study. If it is accepted that labour law is influenced by the surrounding socio-economic circumstances<sup>72</sup> it follows that an inter-disciplinary approach is necessitated.<sup>73</sup> The inclusion of discourses pertaining to related fields including human resource management, labour economics and organisational behaviour are beyond the scope of this study. Other fields of law such as tax law, the law of competition, company law, the law of insolvency and the granting of credit, and social security law also have an effect on the labour market. Clearly, these fields of law are also beyond the scope of this study.

Finally, the effect of the ILO and local legislation, such as the Basic Conditions of Employment Act<sup>74</sup> on the establishment of minimum employment standards, go beyond the scope of this study. The reason for this is that this study is concerned not with this floor of minimum standards but rather with the setting of actual terms and conditions that go beyond these standards.

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<sup>70</sup> Republic of South Africa Department of Labour *Annual Report* (1 April 2002 - 31 March 2003) 49-50 provides information concerning the number of trade unions registered (namely 504), but not the actual number of members.

<sup>71</sup> Thompson "The Changing Nature of Employment" (2003) *ILJ* 1800.

<sup>72</sup> See ch 2 *infra*.

<sup>73</sup> Gahan and Mitchell "The Limits of Labour Law and the Necessity of Interdisciplinary Analysis" in Mitchell *Redefining Labour Law* (1995) 70-71.

<sup>74</sup> Act 75 of 1997.