

CHAPTER 10
CONCLUSION
ABRIDGED CONTENTS

	Page
A Introduction	
1 General-----	373
2 Traditional Labour Law-----	373-374
3 The Changing World of Work-----	374-375
B Diminished Role for Trade Unions and Collective Bargaining---	376-378
C Alternatives for the Protection of Workers' Interests	
1 Introduction-----	378
2 The Contract of Employment-----	378-379
3 The Constitutional Right to Fair Labour Practices-----	379
4 Corporate Social Responsibility-----	379-380

A Introduction

1 General

There appears to be consensus on one score: Labour law must be re-invented.¹ This is because the social and political circumstances on which traditional labour law is premised are disappearing.² Traditional labour law has become outdated.³ If a measure of equality and fairness is to be attained, labour lawyers and consultants have to look beyond traditional labour law and collective bargaining for its attainment.

2 Traditional Labour Law⁴

In these systems of employment relations (also referred to as the 'employment model'⁵), competition between firms concerning wages and other distributive issues were eliminated by the extension of collective agreements concerning these issues to entire economic sectors including non-union firms.⁶ National economies were able to deal with the repercussions of this, at times, non-market related setting of wages by the imposition of import tariffs, controls on currency trading and capital flight. In this way wage costs were borne by the consumer and not the employer, thus enabling the employer to remain competitive. It then became possible for collective bargaining systems, supplemented by protective legislation to achieve what was accepted by many as being the function of labour law, namely, the protection of employee rights.⁷ The labour market conditions that

¹ D'Antona "Labour at the Centuries End" in Conaghan *et al Labour Law in an Era of Globalization* (2002).

² Klare "The Horizons of Transformative Labour and Employment Law" in *Labour Law in an Era of Globalization* (2002) 4; Arup *et al* "Employment Protection and Employment Promotion: The Contested Terrain of Australian Labour Law" 2000 Centre for Employment and Labour Relations Law University of Melbourne 2 where the authors state: "...the emergence of the concept of labour law was historically specific, and related largely to the existence of certain labour market conditions in western industrialised economies."

³ See ch 2 subsection E4 and 5 *infra*.

⁴ See ch 2 subsection E4 and ch 5 subsection E *infra*.

⁵ Arup *et al op cit* 2.

⁶ Klare *op cit* 8; see also ch 4 *supra*; s 32 of LRA.

⁷ See ch 2 *supra*.

prevailed in the industrial era⁸ rendered post war Keynesianism and these systems of labour law not only possible, but also economically viable.⁹

Traditional labour law systems are based on certain assumptions: “The employer is a large organization engaged in mass manufacturing of uniform products with dedicated machinery. It is heavily invested in fixed capital. The employees’ experience at work is a crucial fount of their consciousness, identity and solidarity. Work organization is Taylorist. The worker is a command-follower, a pair of hands performing repetitive tasks paced by the assembly line. Workers are men....working full-time shifts on site...”¹⁰ This organisation of work is conducive to structures of vertical hierarchies of authority. In fact, authority and control form the basis of the employment relationship that is the subject matter of traditional labour law.¹¹ Since traditional labour law focuses on this relationship it “is grounded in a job-based and workplace focused conception of work, workers, and employers. It does not treat work in general, but only the subset performed within dependent employment relationships. For labour law purposes, ‘work’ means paid work typically occurring outside the home and done by someone holding a job. In a labour law perspective, people obtain means to secure social and economic welfare primarily through job-related income.”¹² The obvious pitfall of this conception of work is that ‘atypical employees’ are excluded.

3 The Changing World of Work¹³

The advance of technology has resulted in what is generally referred to as “globalisation”. The result is international political and economic integration.¹⁴

⁸ See ch 2 sub-section E 4 *supra*.

⁹ See ch 2 sub-section E4 and ch 5 sub-section B *supra*.

¹⁰ Klare *op cit* 11.

¹¹ Benjamin “Who Needs Labour Law? Defining the Scope of Labour Protection” in Conaghan, Fischl and Klare *Labour Law in an Era of Globalization* (2002) 81-85.

¹² Klare *op cit* 10.

¹³ See ch 2 sub-section E 5.

¹⁴ *Ibid* 5.

Consequently nation-states have lost control over national economic factors and as a result, their ability to regulate.¹⁵

Technological advances have transformed the organization of work¹⁶ and the subject matter of traditional labour law. The ‘employer-employee’ relationship is becoming less typical as more and more work is performed outside of this framework.¹⁷ Business organization and strategies have been re-arranged in response to a more integrated world economy. Huge, centrally organized firms are disintegrating.¹⁸ Smaller, more flexible firms with flatter hierarchical structures are emerging. At the same time, some countries have experienced a “break up of sectoral collective bargaining relationships and a devolution of bargaining downward to plant level.”¹⁹

In short, the focus of traditional labour law, namely the employer –employee relationship is becoming blurred and ambiguous with many work relationships falling beyond its scope. This results in many workers falling outside the net of protection provided by collective agreements as well as legislation. Secondly, the central means of attaining fair bargains adopted by traditional labour law systems, namely, collective bargaining, is being eroded. Clearly, traditional labour law has lost its identity.

¹⁵ D’Antona *op cit* 34 states: “The nation-state’s loss of control over economic factors changes, not merely its regulatory competence, but also the material conditions from which labour law as we know it has been made. One size must fit all: the extreme mobility of investments and, indeed, of production facilities restricts the space available to the nation-state to govern firms that operate within its territory through labour legislation, the restrictions and costs of labour protection. One might say that in an open, supranational market, and in a global economy, firms ‘vote with their feet’, meaning that disagreement with a particular social policy of the nation –state (that might, for example, emphasize particular restrictive guarantees for labour, or impose, particularly costly taxes or contributions) may be expressed simply by moving elsewhere, to southeast Asia or Poland or Hungary, but equally to Wales, if different national or local policies make that convenient”

¹⁶ See ch 2 *supra*.

¹⁷ Benjamin *op cit* 85.

¹⁸ D’Antona *op cit* 34.

¹⁹ Klare *op cit* 17.

B Diminished Role for Trade Unions and Collective Bargaining²⁰

The starting point of this study is the rejection of the traditional view of the function of labour law. In terms of this view the function of labour law is to protect the employee from abuse of employer power and to redress the imbalance of power inherent in the employment relationship. In other words, labour law basically has a protective function. The view that the main function of labour law is the regulation of labour markets is put forward. Labour law is a sequence of responses to socio-economic circumstances aimed at maintaining social and economic power by those who possess it. This objective however, can very plausibly involve, as a secondary objective, the protection of employee interests.²¹ Rights and efficiency are not necessarily exclusive. Various studies in fact demonstrate that they are complementary.²² The point is that in the changing world of work trade unions and collective bargaining, especially industry level collective bargaining, can no longer influence the labour market or provide the type of employee protection that was attainable by these systems in the era of Fordism.²³ It follows that a labour law dispensation that hopes to utilise collective bargaining with an emphasis on centralised collective bargaining as the main vehicle for the attainment of its objectives in today's changed world, is less likely to succeed. It is not possible to regulate labour markets or the employment relationship by working against prevailing socio-economic circumstances. These are forces that legislatures have to work with. They cannot simply be ignored in the hope that they either will go

²⁰ See ch 5 sub-section B and C; ch 6 *supra*.

²¹ Graham and Mitchell "The Limits of Labour Law and the Necessity of Interdisciplinary Analysis" in Mitchell *Redefining Labour Law* 66.

²² See Deakin and Wilkinson "Rights v Efficiency? The Economic Case for Transnational Labour Standards" 1994 *ILJ* 289; Feys "Labour Standards in Southern Africa in the Context of Globalization: The Need for a Common Approach" 1999 *ILJ* 1445; Arthurs "Corporate Codes of Conduct" in Conaghan *et al/ Labour Law in an Era of Globalization* (2002) 471 472.

²³ See ch 2 *supra* and Feys *op cit* 1445 where the author states: "This environment is not that conducive to collective activity and unions are impeded in playing their role of watchdog of employment standards through representation on the shop floor and through collective bargaining."

away and the glorious years of Fordism can be recreated, or, that a policy of autarky can be adopted and South Africa can proceed in its policies without regard or recourse to the happenings in the rest of the world.

Furthermore, a misconception of the main function of labour law accompanied by an unrealistic and exaggerated view of the potential of law for social transformation²⁴ will inevitably result in disillusionment and frustration. The rather ambitious objectives of the LRA²⁵ indicate that our legislature, in drafting the LRA had these expectations and misconceptions.

There are many reasons for the worldwide trend in trade union decline.²⁶ To a large extent trade union power during the industrial era was a result of historically specific socio-economic circumstances. Circumstances characterising the latter part of the industrial era were particularly conducive to the establishment and success of centralised systems of collective bargaining.²⁷ The advance of technology and globalisation have changed all of this; the ultimate consequence is the diminished relevance of the hitherto *raison d'être* of trade unions, namely

²⁴ Influences such as technology, commodity prices, politics, the state of the economy and so on, may have a greater influence on labour relationships than legislation.

²⁵ S 1 of the LRA headed "Purpose of this Act" states:
"The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of this Act, which are -
(a) to give effect to and regulate the fundamental rights conferred by section 27 of the Constitution;
(b) to give effect to obligation incurred by the Republic as a member state of the International Labour Organisation;
(c) to provide a framework within which employees and their trade unions, employers and employers' organisations can -
(i) collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest; and
(ii) formulate industrial policy; and
(iii) to promote -
(i) orderly collective bargaining;
(ii) collective bargaining at sectoral level;
(iii) employee participation in decision-making in the workplace; and
(iv) the effective resolution of labour disputes.

²⁶ See ch 2 *supra*.

²⁷ *Idem*.

collective bargaining.²⁸ Consequently, decentralisation of collective bargaining and even individualisation of the contract of employment have taken place in many industrialised countries.²⁹

C Alternatives for the Protection of Workers' Interests

1 Introduction

The exclusion of atypical employees from the net of protection provided by the legislature leaves many workers at the mercy of the prerogative of the provider of work. Furthermore the ever-diminishing power and subsequently role of trade unions and of collective bargaining has increased employer prerogative in the setting of wages and other conditions of work.³⁰ The challenge is to achieve a system where both economic efficiency and fairness and equity can co-exist.

2 The Contract of Employment³¹

The judiciary can and should play an increasingly important role in the interpretation of contracts of employment.³² The examination of the South African law of general principles of contract demonstrates that this is possible. The comparative studies with England, United States of America and Australia show that there has already been movement in this direction in these countries that

²⁸ Adams "Regulating Unions and Collective Bargaining: A Global Historical Analysis of Determinants and Consequences" 1993 *Comparative Labor Law Journal* 272.

²⁹ See chapters 5 and 6 *supra*.

³⁰ See Deery and Mitchell *Employment Relations: Individualisation and Union Exclusion – An International Study* (1999) 14, where in an international study of Australia, New Zealand, Japan and England the authors conclude: "In many cases individualisation has become a synonym for managerial unilateralism in which the bilateral determination of wages and working conditions has often been replaced by managerial fiat. As a number of the country and regional studies show (e.g. Australia, Britain and New Zealand) individual contracts have not been formed through individual bargaining...Although these contracts lacked individual discretion, however, they did reserve substantial discretion to management to make changes to the organisation of work if and when the firm required those changes. In this sense individual contracts clearly represented an important reassertion of managerial prerogatives at the workplace."

³¹ See ch 7 *infra*.

³² This is already happening in the United States - See Finkin "Regulation of the Individual Employment Contract in the United States" in Betten *The Employment Contract in Transforming Labour Relations* (1995).

share a similar common law heritage with South Africa. In the final analysis: “Whether or not the employment contract is an appropriate instrument for dealing with the problems of a changing pattern of industrial relations depends, in other words, on the rethinking of the concept in order to find a balance between efficiency on the labour market and protection of the weaker parties on the market.”³³

3 The Constitutional Right to Fair Labour Practices³⁴

Whether this right will contribute meaningfully to the attainment of fairness in the relationship between workers and providers of work will largely be determined by the role to be played by judicial activism. Since the open-ended criterion of fairness is the determining factor, there is huge potential in this constitutionally guaranteed right for the provision of some measure of fairness for workers.

4 Corporate Social Responsibility³⁵

What renders this concept both attractive and unique is the fact that it potentially provides benefits not only for employees, but also for the unemployed, clients and customers, the community in general and even the environment. In this way imbalances can be redressed in a potentially more even and comprehensive manner. This study has demonstrated that corporate social responsibility is a logical response to global market forces and that it benefits not only communities in general but corporations as well.³⁶

³³ Betten “The Role of the Contract in Transforming Labour Relations” in *The Employment Contract in Transforming Labour Relations* (1995) 8.

³⁴ See ch 8 *infra*.

³⁵ See ch 9 *infra*.

³⁶ See Arthurs *op cit* 472-473 where the author states: “If TNCs (trans national corporations) want workers to work in their factories, consumers to consume their goods, and governments to govern in their interest, they must appear to be ‘responsible’ in the way they treat their workers, consumers and communities. And by a happy coincidence, a modest body of research seems to suggest that they can be responsible and profitable too. There is money to be made in ‘ethical investment’ and ‘sustainable development’; social market policies do not seem to impair the efficiency and adaptability of workers; and economic prosperity may correlate positively with civic mindedness and progressive labour practices.”

The view that socially responsible conduct is generally in the company's best interests was put forward. This is also true of large trans-national corporations. As a result, since the early 1990's many trans-national corporations have adopted codes of conduct especially with reference to employment standards.³⁷ As seen³⁸ South Africa's code on good corporate governance is comprehensive and one of the most advanced codes in the world.

These codes of conduct are not imposed by legislation. They are self-imposed by the companies themselves. It might therefore *prima facie* appear that companies can simply pay lip service to these codes of conduct since unlike legislation they cannot be enforced by state forces. But "if there is excessive dissonance between the reality of workplace life and the rhetoric of an employment code, workers will be disillusioned, the public will be disenchanted, TNC's will be publicly embarrassed, and self-regulation will cease to be regarded as legitimate."³⁹ Given the huge costs of administering and enforcing legislation and the fact that it is impossible for a state to police and monitor every enterprise, self-imposed voluntary codes of conduct might well be more effective in achieving acceptable labour standards for employees.

³⁷ *Ibid* 474 -475.

³⁸ Ch 9 *supra*.

³⁹ *Arthurs op cit* 477.