

**ALTERNATIVE MEANS TO REGULATE THE
EMPLOYMENT RELATIONSHIP IN THE CHANGING
WORLD OF WORK**

by

MARIA-STELLA VETTORI

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Under the promotorship of Professor SR van Jaarsveld

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Abstract

Advancing technology has caused rapid and dramatic changes in the world of work. Labour law systems grounded in the industrial era, with their emphasis on collective bargaining, are not suitable in today's world of work.

Throughout the world, the 'atypical employee' is replacing the standard or typical employee whose terms and conditions of employment were generally regulated by collective agreements. Atypical employee's terms and conditions of employment generally are not regulated by collective agreements. World-wide trends in the decentralisation of collective bargaining, decollectivisation and individualisation of the employment relationship have contributed to a decline in trade union power and influence. Consequently the number of workers covered by collective agreements has decreased. Collective bargaining has been rendered less effective because of the changing the world of work.

The South African labour law system places a huge emphasis on collective bargaining, particularly at industry level, for the protection of employee interests. Given these trends in the changing world of work, the appropriateness of this emphasis on industry or central level collective bargaining is questioned.

The vacuum left by the inadequacy and inability of trade unions to protect employee interests in a comprehensive manner by means of collective bargaining, needs to be addressed. The following alternative means of protecting employee interests are considered:

- (i) The socialisation of the law of contract;
- (ii) the interpretation given to the constitutional right to fair labour practices; and
- (iii) the role of good corporate governance and corporate social responsibility.

These alternative means of addressing legitimate employee interests could play a role in filling the vacuum created by trade union decline. The South African law of contract is capable of bridging the gap between law and justice by the application of the concepts of good faith and public policy, so that employment contracts may take cognisance of employee interests despite the imbalance of power between employer and employee. The protection of worker interests by means of the constitutional right to fair labour practices depends on the judge's interpretation of what is fair. Implementation of good corporate governance codes can be influential in protecting and promoting employee interests.

Key words

Collective Bargaining refers to the negotiation between employer parties and trade unions in order to determine terms and conditions of work and all other aspects and issues arising from the employment relationship.

Plant level collective bargaining refers to collective bargaining between an individual employer and the trade union(s) representing the employees of that particular employer.

Industry/central level collective bargaining means bargaining at central level where employers and employees of an entire industry are represented.

Decentralisation refers to a movement away from industry level to plant level collective bargaining.

Decollectivisation refers to a move away from collective representation by trade unions of employee interests.

Individualisation refers to the setting of terms and conditions of the contract of employment between employer and individual employee as opposed to the setting thereof by means of collective bargaining.

“Fordism” refers to the assembly line mode of production prevalent in the latter part of the industrial era (approximately 1950-1980).

“Atypical” employee is a worker that does not qualify as an employee in terms of the definition of an employee provided for in labour legislation.

Corporate social responsibility refers to action that goes beyond legally imposed conduct, with the aim of achieving some social good rather than merely the maximisation of profits.

Good corporate governance refers to a style of corporate management that reflects concern and consideration of other stakeholders (aside from shareholders), including suppliers, clients, the community at large and employees.

CHAPTER 1

INTRODUCTION

ABRIDGED CONTENTS

	Page
A Contextual Background	
1 General-----	2-3
2 Historical Development up till 1994-----	3-6
3 Position since 1994-----	6-8
B Aim of the study-----	9-10
C Importance of the Topic-----	11-12
D Modus Operandi-----	12
E Overview of the Chapters-----	12-17
F Difficulties and Limitations of the Study-----	17-19

A Contextual Background

1 General

There is no doubt that the world of work has changed since the 1970's and 1980's.¹ This is a world-wide phenomenon and is a direct result of changed socio-economic circumstances.² The change in socio-economic circumstances, in turn, is a direct result of technological advancement and development.³ 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.⁴

¹ 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.

² Slabbert and De Villiers *The South African Organisational Environment* (2002) 3rd 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."

³ 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* 3rd ed (2000) 13-20.

The Labour Relations Act⁵ (hereinafter the LRA) is the “centrepiece of the new model for regulating labour relations.”⁶ 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.”⁷ The backbone of the LRA is collective bargaining with a preference for centralised collective bargaining.⁸ 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 Act⁹ provided a framework for a system of centralised collective bargaining.¹⁰ However trade unions that represented Black workers were excluded from participation in this system.¹¹ 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.¹²

⁵ 66 of 1995.

⁶ Du Toit *et al op cit* 3.

⁷ *Ibid* 17.

⁸ See ch 3 *infra*.

⁹ 11 of 1924.

¹⁰ S 2(1).

¹¹ 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.

¹² 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.¹³ 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.¹⁴ 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.¹⁵

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:¹⁶

- “(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.”

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

¹⁴ *Ibid* 9.

¹⁵ *Idem*.

¹⁶ 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.¹⁷ Since Black trade unions were now able to register¹⁸ 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.¹⁹ 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 1985.²⁰ 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.²¹

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.²² By the end of the 1980's government was unable to contain the union movement by force²³ or by legislation.²⁴ South Africa was experiencing a serious economic recession, political

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

¹⁸ Industrial Conciliation Amendment Act 94 of 1979.

¹⁹ Du Toit *et al op cit* 11.

²⁰ 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."

²¹ *Ibid* 12.

²² *Idem*.

²³ 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.

²⁴ 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.²⁵ In the circumstances the apartheid government had no choice but to reform.²⁶

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."²⁷ It was acknowledged that this might entail "enacting a law which would compel centralised bargaining."²⁸ 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."²⁹

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.³⁰ The task team was instructed to draft a Bill that would *inter alia* promote and

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.

²⁵ Finnemore and Van Rensburg *op cit* 42.

²⁶ 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.

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

²⁸ *Idem*.

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

³⁰ *G Gazette* 16292, 10 February 1995, 112-117.

facilitate collective bargaining in the workplace and at industry level.³¹ The key point of contention in the negotiation process that followed at NEDLAC concerning the terms of the Bill was the collective bargaining system.³² 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.³³ 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.”³⁴ 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’.³⁵

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.³⁶

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

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

³³ *Idem*.

³⁴ *Ibid* 28.

³⁵ *Idem*.

³⁶ 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,³⁷ with the obvious consequence of a diminished role for collective regulation of the employment relationship.³⁸

The result of this is that many employees may not be covered by collective agreements.³⁹ Furthermore, the changing world of work has also created the 'atypical employee'.⁴⁰ 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.

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

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

³⁹ See ch 6 *infra*.

⁴⁰ 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 21st 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.⁴¹ 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,⁴² 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.⁴³ 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.⁴⁴

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

⁴¹ See ch 2 *infra*.

⁴² *Idem*.

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

⁴⁴ 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,⁴⁵ corporate social responsibility⁴⁶ and the constitutional right to fair labour practices⁴⁷ for the protection of employee interests are all considered.

⁴⁵ See ch 7 *infra*.

⁴⁶ See ch 8 *infra*.

⁴⁷ See ch 9 *infra*.

C Importance of the Topic

Technology has consistently changed the world of work dramatically.⁴⁸ 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

⁴⁸ 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.”⁴⁹ Clearly therefore if labour laws do not reflect reality their ability to deliver justice will be hampered resulting in those labour laws being challenged.⁵⁰

South Africa is no exception and is not immune from the effects of technology and globalisation.⁵¹ 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.”⁵² 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.⁵³

Since so many people are either employees in the traditional sense⁵⁴, or atypical employees, and work is such an important aspect of an individual’s life,⁵⁵ 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.”⁵⁶The starting

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

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

⁵¹ 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.

⁵² Coyle *op cit*, in the introduction to the book.

⁵³ *Ibid* 62.

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

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

⁵⁶ 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 era⁵⁷ 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.⁵⁸ 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'⁵⁹ and the employer, is misplaced in today's world of work. The fact is that the 'atypical

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

⁵⁸ 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.

⁵⁹ 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'⁶⁰ and an increasing proportion of the workforce is now made up of these 'atypical employees'.⁶¹

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.⁶²

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 ⁶³ (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.⁶⁴

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

⁶⁰ 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.

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

⁶² See ch 5 *infra*.

⁶³ 66 of 1995.

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

collective bargaining,⁶⁵ 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.⁶⁶

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

⁶⁵ 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.

⁶⁶ See Thompson *op cit* 1800; Theron *op cit* 1247; Blanpain "Work in the 21st 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.⁶⁷ 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

⁶⁷ 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.”⁶⁸This change has not only forced the courts to give effect to this “altered milieu of thinking”⁶⁹, 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

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

⁶⁹ *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 membership⁷⁰, the coverage of centralised collective agreements and the number of informal and other forms of non-standard employment.⁷¹

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 circumstances⁷² it follows that an inter-disciplinary approach is necessitated.⁷³ 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 Act⁷⁴ 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.

⁷⁰ 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.

⁷¹ Thompson "The Changing Nature of Employment" (2003) *ILJ* 1800.

⁷² See ch 2 *infra*.

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

⁷⁴ Act 75 of 1997.

CHAPTER 2

THE FUNCTION OF LABOUR LAW

ABRIDGED CONTENTS

	Page
A Introduction-----	21
B Concept of Labour Law-----	22-23
C The Protective View-----	24-26
D The Market View -----	26
E The Four Stages of Human Society	
1 Introduction -----	27-28
2 The Hunter-Gatherer Era -----	28-29
3 The Agricultural Era -----	29-32
4 The Industrial Era -----	32-38
5 The Information Era -----	39-43
F The View of Otto Kahn-Freund -----	43-46
G The View of Davis -----	47-50
H Other Views of Importance	
1 Mischke and Garbers -----	50-51
2 Van Wyk -----	51
3 Brassey -----	51-53
4 Du Toit -----	53
5 Grogan -----	54
I Conclusion-----	54-55

A Introduction

The premise or basis of any legal dispensation is the purpose or the function of such laws. The legislature's perception therefore of the function or purpose of labour law is a major determinant of the content of the labour law of that specific country. If the legislation is unable to achieve such perceived function or purpose, the legislation should be revised. Where the premise upon which the edifice of a labour law dispensation is built is defective, it is my view that such dispensation is unlikely to achieve any useful or progressive socio-economic goals. The aims and objectives of the South African Labour Relations Act¹ (hereinafter the LRA) are rather ambitious. The chief aims are to advance economic development, social justice, labour peace and the democratisation of the workplace.² In terms of the LRA the primary means of achieving these objectives is through the encouragement of collective bargaining especially centralised or industrial level collective bargaining.³ One of the purposes of this thesis is to indicate that the South African labour legislation over - emphasises the role and usefulness of collective bargaining especially centralised collective bargaining in achieving the noble objectives of the LRA. Since "the only claim of law to authority is its delivery of justice"⁴, if the means adopted by legislation to achieve such justice are inappropriate, inefficient or counterproductive, then the law should be revised. In other words, if what the function or purpose of labour law is, is misinterpreted the resultant legislation will be less than effective in achieving its goals.

¹ Act 66 of 1995.

² S 1.

³ See Thompson and Benjamin *The South African Labour Law* (1997) AA1-2; ch 3 *infra*, they provide the reader with a brief survey of the collective labour law contained in the LRA so that the reader can follow the means the legislature intends to adopt in order to achieve the LRA's stated objectives.

⁴ Owens "The Traditional Labour Law Framework: A Critical Evaluation" in Mitchell *Redefining Labour Law* (1995) 3.

B Concept of Labour Law

The starting point of any discussion concerning the function of labour law would be a definition of the concept. Labour law is difficult to define and “there is no comprehensive and conceptionally coherent definition of labour law”.⁵

Nevertheless, it has been demonstrated, after having considered a few definitions of labour law that “there is a consensus of opinion regarding the extent and content of labour law as an autonomous legal discipline.”⁶ Van Jaarsveld, Fourie and Olivier thus conclude: “From the above the following definition may be extracted: in general labour law is the totality of rules in an objective sense that regulate legal relationships between employers and employees, the latter rendering services under the authority of the former, at the collective as well as the individual level, between employers mutually, employees mutually, as well as between employers, employees and the state.”⁷ Various definitions of labour law from other countries confirm the above conclusion. Bakels *et al* define labour law as follows: “Het arbeidsrecht kan voorlopig globaal worden omschreven als het geheel van rechtsregels dat betrekking heeft op de arbeidsverhouding van de onzelfstandige beroepsbevolking.”⁸ The authors continue: “De kern van het arbeidsrecht...bestaat uit het geheel van rechtsregels dat ten doel heeft de regulering van de individuele en collectieve relaties tussen werkgevers en werknemers in de particuliere sector.” Blanpain argues: “Labour Law aims at monitoring economic developments. Its objective is to establish an appropriate balance in the relationship, interests, rights and obligations between the employer on the one hand and the employee on the other hand.”⁹ Deakin and Morris are of the opinion that: “The area of labour is defined in part by its subject matter, in part by an intellectual tradition. Its immediate subject-matter consists of the rules which

⁵ Creighton and Stewart *Labour Law: An Introduction* (2002) 2.

⁶ Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* (2004) par 51. (Van Jaarsveld, Fourie and Olivier *Principles*.)

⁷ *Idem*.

⁸ *Schets van het Nederlands Arbeidsrecht* (1980) 1.

⁹ *European Labour Law* (1999) 23.

govern the employment relationship. However, a broader perspective would see labour law as the normative framework for the existence and operations of all the institutions of the labour market: the business enterprise, trade unions, employers' associations, and, in its capacity as regulator and as employer, the state."¹⁰

There appear to be 'three unifying themes which give the area its conceptual cohesion.'¹¹ These 'unifying themes' are expressed as 'needs' and are the following:

- (i) the rationalisation of the relationship between an employee and his/her employer;
- (ii) the regulation of relations between organised labour and the employer and/or the state; and
- (iii) the moderation of the market in the interests of any or all of employees, employers unions and the public.¹²

In describing these 'needs' as giving cohesion to the concept of labour law, it follows that there is a presumption that the function of labour law is to address these 'needs'. Labour law is capable to a very limited extent (if at all) of addressing these 'needs'. The reason for this, as is demonstrated below is that the function of labour law is dependent on surrounding socio-economic circumstances.¹³ Labour law reacts to the prevalent socio-economic forces that exist at the time and its function is to formalise market forces that affect the relationship between employers and employees for the benefit of the economy.¹⁴ Labour law in other words cannot alter market forces. Market forces should guide and help mould and alter labour laws.

¹⁰ *Labour Law* (1995) 1.

¹¹ Creighton and Stewart *op cit* 2.

¹² *Ibid* 2-3.

¹³ See discussion, later in this chapter, describing the four stages of human society.

¹⁴ *Idem*.

Two general philosophies towards the function of labour law have been identified. They have been referred to as ‘the protective view, and ‘the market view’.¹⁵ These two approaches will be discussed in turn.

C The Protective View

Creighton and Stewart¹⁶ are of the view that there are two main philosophies concerning the function of labour law: the protective view and the market view. The starting point of the protective view is that there is an inherent imbalance of power within the relationship between employer and employee. The employee is at a great disadvantage vis-à-vis the employer in terms of resources and bargaining skills. As a result of this the employee has very little, if any bargaining power and is at the mercy of the whims of the employer. The function of labour law therefore is protective in that it assists in redressing this imbalance of power so that equity and fairness will result.

If one looks at South African labour legislation in general, it appears that our legislature has adopted this approach, which is premised on pluralism. This view of labour law is said to have been the philosophy behind labour law systems in all liberal democracies of the 20th century.¹⁷ The pluralist approach to employment relations entails the following underlying presumptions:¹⁸ The organisation comprises individuals and groups who have conflicting interests and goals. Despite this, they are interdependent. Thus there is an inherent conflict between these individuals and groups. This conflict needs to be managed so as to avoid destructive conflict which is counterproductive due to the interdependence between employers and employees.¹⁹ Both employers and employees have a

¹⁵ Creighton and Stewart *op cit* 2-3.

¹⁶ *Idem*.

¹⁷ Creighton and Stewart *op cit* 5.

¹⁸ Finnemore and Van Rensburg *Contemporary Labour Relations* (2000) 9-10.

¹⁹ The South African legislature supports this view as seen in the *Explanatory Memorandum to the Labour Relations Bill GG 16259 10 Feb 1995* 130, where the basic function of labour law was stated as being to create or attempt to create

common interest in the survival of the organisation. This conflict is controlled and managed by collective bargaining. Pluralism cannot survive where one party constantly gains at the expense of the other. The power of the opposing parties therefore must be balanced. Where compromise is not possible, the parties exercise their respective powers, usually by means of industrial action.

In order to have meaningful collective bargaining and compromise, the imbalance of power inherent between employer and employee must be balanced. The way to do this is by the employees acting jointly through trade unions. The law serves to facilitate this balancing of power by providing for:

- (i) freedom of association and organisation²⁰
- (ii) substantial powers for trade unions and organisational rights²¹
- (iii) the right to strike²²
- (iv) commitment by all concerned to the rules, processes and outcomes of collective bargaining.²³

Davies and Freedland also said the following in this regard: “This system of collective bargaining rests on a balance of the collective forces of management and organised labour. To maintain it has on the whole been the policy of the legislature during the last hundred years or so. The welfare of the nation has depended on its continuity and growing strength”.²⁴ The irony of stating that the welfare of the nation is dependent on enforcing this pluralistic system is that this lends support to the opposing view concerning the functions of labour law i.e. the market approach discussed hereunder.²⁵ Labour law according to the ‘protective view’ is there to protect employees by creating a system which is conducive to

labour peace and harmony between employers or employer’s organisations on the one hand and employees or trade unions on the other.

²⁰ Ch II of LRA and ss 18 and 23 of Constitution Act 108 of 1996.

²¹ Ss 11 – 22 of LRA.

²² Ch IV of LRA and s 23 of the Constitution.

²³ The old Industrial Court in *National Union of Mineworkers v East Rand Gold and Uranium Company Ltd* 1991 12 ILJ 1221 (A) 1238-9 emphasised the link between meaningful collective bargaining and the right to strike thus giving judicial recognition to the right to strike.

²⁴ *Kahn-Freund’s Labour and the Law* (1983) 12; and s 23(5) of the Constitution.

²⁵ See next sub-heading.

meaningful collective bargaining. As shall be seen below²⁶, South African labour law has clearly adopted this 'protective view'.

The pluralist approach assumes that unions are essential and legitimate in employment relations. Otto Kahn-Freund is often quoted in support of the protective view because of his famous words, viz. "the main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship".²⁷

D Market View

The starting point in terms of this view is that market forces are preferable to government intervention in the attainment of economic growth and prosperity.²⁸ This view began to gain support in the early 1970's and has been associated with the likes of Thatcher and Reagan. Supporters of this approach have also been termed "neo-liberals".²⁹ Implementation of this approach has resulted in government support for reduction in wages and other labour costs and a reduced role of the state in the setting of minimum labour standards. According to the market approach state intervention, for example in the form of protection for the employee, results in an artificial distortion of the market forces which in turn inevitably results in economic inefficiencies and loss of prosperity.³⁰

The basis of this approach is that the operation of market forces is more conducive to the attainment of the efficient allocation of resources than state intervention.³¹

²⁶ Ch 3.

²⁷ *Op cit* 18.

²⁸ Creighton and Stewart *Labour Law: An Introduction* (2002) 5.

²⁹ Neo-liberalists believe that market forces and market mechanisms are superior to social and economic intervention by the state, see Euzeby and Van Langendonck "Neo-liberalism and Social Protection: The Question of Privatisation in EEC Countries" 1990 *ILO Report* (Geneva) 2.

³⁰ Creighton and Stewart *op cit* 6.

³¹ Creighton and Stewart *op cit* 5.

Excessive state intervention in the form of, *inter alia*, legislation, results in inefficiencies and consequent economic decline. The function of labour law then should not be to interfere with market forces but rather to work with them in order to ensure the well being of the economy and consequently the well-being of employers and employees.³²

E The Four Stages of Human Society

1 Introduction

Insight into the different socio-economic eras of mankind demonstrates that the character of work alters the organisation of society. Such organisation of society will determine what labour laws (if any) will result. A brief discussion of the four stages of human society will serve to prove that the market view of the function of labour law is a more accurate interpretation of the function of labour law. However, even though it could be argued that the law had a protective function during the hey-day of Fordism³³ (1950 – 1980), this protective function was only the means to attain the end of economic prosperity. In other words as will be demonstrated hereunder protective legislation and structures were the means to work with socio-economic forces of the time in order to attain economic prosperity, i.e. the market view.

What follows serves to demonstrate that a change in the character of work results in a radical alteration in the organisation of society. Throughout history technology has always been the force behind the creation of the characteristics of the new socio-economic era.³⁴ In turn labour laws have been shaped and moulded by the

³² *Ibid* 6.

³³ Fordism refers to an economy of mass production fuelled by mass consumption, see par 4 *infra*.

³⁴ Coyle *The Weightless World* (1997) 2 stated as follows: “A millennium from now historians trying to summarize the twentieth century might characterise it in many ways: the age of total war, an era of environmental degradation, or of permanent technological revolution. But if they have an inclination towards either economics or optimism, it will have been for them a century of unprecedented improvement in human prosperity. Unfairly shared, to be sure, with almost all of the increase in

exigencies and circumstances peculiar to the socio-economic era within which they operate. Labour law should reflect and adapt to such circumstances.³⁵ It is necessary to have knowledge of the characteristics of the different socio-economic eras in order to understand why certain labour legislation was put in place and what type of labour law dispensation should be adopted in the present in order to achieve the maximum benefits for all concerned. Understanding the agricultural revolution is a necessary prerequisite for understanding the industrial revolution. In turn, in order to understand the revolutionary forces of agriculture it is necessary to understand the workings of society in the pre-agricultural era.

The following is a brief description of the four stages of socio-economic development of mankind as described by Davidson and Rees-Mogg.³⁶ These four stages have been referred to as the 'hunter-gatherer' era, the 'agricultural' era, the 'industrial' era and the 'information' era by these authors. They are discussed in turn below.

2 The Hunter-Gatherer Era

This socio-economic era was the longest in duration. According to anthropologists man had lived as a hunter-gatherer for the greater part of his existence since first appearing on earth.³⁷ Central to this concept of the human hunter-gatherers is that they could only survive in small numbers. Fruits and edible plants as well as the game they hunted would have been over-harvested if large populations of hunter-gatherers were to exist in this way. Normally hunter gatherer groups numbered between twenty and fifty individuals. Generally the requirement would be several thousand of acres to support one individual. Consequently the habitats of the hunter-gatherers were very sparsely populated. Hunter-gatherers had almost no technology at their disposal. They could not preserve food nor store it for future

wealth enjoyed by fewer than 30 nations, but still a hundred years of astonishing economic progress.”

³⁵ D’Antona “Labour Law at the Century’s End” in Conaghan, Fischl and Klare *Labour Law in an Era of Globalization* (2002) 32-49.

³⁶ *The Sovereign Individual* (1998) 61-81.

³⁷ *Ibid* 62.

use. Because of their nomadic lifestyle, possessions would have been an encumbrance. Consequently there was very little possibility for the accumulation of wealth. As a result there was little to steal and no incentive to work other than for purposes of mere survival. Survival dictated simple division of labour based on gender where the men hunted and the women gathered. This division of labour was enforced by the social mores of the time. That was all the 'labour law' that was required in order to attain the most beneficial prosperity for all concerned.³⁸

3 *The Agricultural Era*

The advent of agriculture led to social and economic revolutions. One may argue that 'revolution' is perhaps an inaccurate description of the advent of farming processes since it took thousands of years for this 'revolution' to run its full course. Nevertheless its impact was revolutionary. The story of mankind is about survival. As the hunter-gatherers became more skilful and advanced and acquired the skill to make weapons and tools they acquired strength and superiority beyond their physical capabilities. They advanced to the extent that they had no natural predators other than themselves. This resulted in a population explosion and consequently competition for land (hunting grounds). This instigated the migration of mankind.³⁹

By 10 000 BC man occupied every corner of the earth except Antarctica.⁴⁰ The planting of crops (agriculture) and domestication of animals was the natural response to the scarcity of meat that could be hunted. It was simply a survival tactic. For the first time in history man began to live beyond the present. The direct result of the advent of agriculture was the emergence of property. The concepts of ownership and property began to develop. This created the incentive for a socio-economic revolution. Stable communities and permanent living structures were created. An entirely different lifestyle emerged. The hand-to-mouth nomadic

³⁸ *Ibid* 64 where the authors stated: "The livelihoods of hunter-gatherers depended upon their functioning in small bands that allowed little or no scope for a division of labour other than along gender lines."

³⁹ *Ibid* 76.

⁴⁰ D'Adamo *The Eat Right Diet* (1998) 12.

existence was replaced with a more stable stationary and co-operative society. A division of labour other than on gender terms was developed. For the first time there was an incentive to work, other than for the survival of the present time. Food could be stored for the future. Crops and animals now became assets, which could be kept and stored, or plundered and stolen. The skills necessary for hunting were replaced by specific skills which were dependent on someone else's skill to do something else. As explained by Davidson and Rees-Mogg, "Farmers and herders specialised in the production of food. Potters produced containers in which food was stored. Priests prayed for bountiful rain and bountiful harvests. Specialists in violence, the forefathers of government, increasingly devoted themselves to plunder and protection from plunder. Along with the priests they became the first wealthy persons in history."⁴¹ In exchange for protection against plunder provided by the specialists in violence farmers traded part of their output.

In short, the agricultural revolution created an incentive to work and the survival of the human race depended on a new division of labour. Employment and slavery emerged. A new socio-economic era evolved where the creation of assets such as land, crops, irrigation systems, domestic animals, stored food and so on could be plundered and stolen. This created not only an incentive for violence and work but the beginning of trade and barter.⁴²

It took thousands of years for the Agricultural Revolution to take form. Farmers living in sparsely populated areas lived for thousands of years, farming on a small scale with very little interference from plunderers. The owners of land and other assets needed those who worked the land to be loyal and obedient. During the time of feudalism their survival was dependent on their co-operation, and therefore, attaining such obedience was not difficult. The order of things was thus moulded as a result of the socio-economic exigencies of the time. This arrangement has been referred to by anthropologists and social historians as the

⁴¹ *Op cit* 66.

⁴² *Ibid* 69.

‘closed village’.⁴³ This closed village operated as follows: “Unlike more modern forms of economic organization, in which individuals tend to deal with many buyers and sellers in an open market, the households of the closed village joined together to operate like an informal corporation, or a large family, not in an open marketplace but in a closed system where all the economic transactions of the village tended to be struck with a single monopolist – the local landlord, or his agents among the village chiefs. The village as a whole would contract with the landlord, usually for payment in kind, for a high proportion of the crop, rather than a fixed rent.”⁴⁴

The landlord was required to save part of the harvest. This served as a kind of insurance against starvation for the peasants. Without such arrangement a bad harvest would mean mass starvation. The peasants therefore preferred to forgo prosperity and sell their produce cheaply and provide the landlord with in-kind labour in exchange for survival, albeit at monopoly prices.⁴⁵

David and Rees-Mogg observed, “In general, a risk-averse behaviour has been common among all groups that operated along the margins of survival. The sheer challenge of survival in pre-modern societies always constrained the behaviour of the poor... this risk aversion... reduced the range of peaceful economic behaviour that individuals were socially permitted to adopt. Taboos and social constraints limited experimentation and innovative behaviour, even at the obvious cost of forgoing potentially advantageous improvements in settled ways of doing things.”⁴⁶ The need to survive therefore served to constrain any behaviour which was not in line with preserving the status quo where the worker was a servant. This was all the ‘labour law’ that was required. The agricultural era therefore was characterized by a proprietorial relationship of master and servant. Only later in the industrial era was this relationship transformed to a contractual relationship between employer and employee.

⁴³ *Idem.*

⁴⁴ *Idem.*

⁴⁵ *Idem.*

⁴⁶ *Ibid* 169-170.

A little more than a century ago South Africa could have been characterised as having an agricultural economy. Most people lived and worked on farms.⁴⁷ Legislation was not necessary. The common law based on master and servant was all that regulated the relationship.⁴⁸ The only legislation in place was the Master and Servants Acts in all the former South African provinces. The main aim of this legislation was to protect the mostly illiterate workers from employer abuse.⁴⁹

4 The Industrial Era

4.1 General

Despite the popular image of the industrial revolution as being a time for exploitation of workers, the truth is that the industrial revolution resulted in unprecedented economic well-being for the masses.⁵⁰ The industrial era has also been called the ‘mechanical age’ and the ‘modern period’.⁵¹ Generally the industrial era is presumed to have begun in the 18th century. In Western Europe in about 1750, partly as a result of warmer weather but mainly due to technological innovation, incomes for unskilled workers began to rise significantly.⁵² The industrial revolution is defined as “changes in the relation between employers and employee brought about in the late eighteenth and early nineteenth centuries

⁴⁷ See Van Jaarsveld, Fourie and Olivier “Labour Law” in Joubert *The Law of South Africa* (2001) vol 13 part 1 6. (Van Jaarsveld, Fourie and Olivier “Labour”.)
Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* (2004) par 3.

⁴⁹ *Idem* par 325.

⁵⁰ Carlyle “Signs of the Times: The Mechanical Age” (this text is part of Internet’s *Modern History Sourcebook*, copyright Paul Halsall), accessed at <http://www.fordham.edu/halsall/mod/carlyle-times.html> on 10 February 2001, expresses this sentiment as follows: “What wonderful accessions have thus been made, and are still making, to the physical power of mankind, how much better fed, clothed, lodged and, in all outward respects, accommodated men now are, or might be, by a given quantity of labour, is a grateful reflection which forces itself on everyone. What changes to, this addition of power is introducing into the Social System; how wealth has more and more increased, and at the same time gathered itself more and more into masses, strangely altering the old relations, and increasing the distance between the rich and the poor...”

⁵¹ *Idem*.

⁵² Davidson and Rees-Mogg *The Sovereign Individual* (1998) 128.

especially by mechanical inventions”.⁵³ With the industrial era factories replaced village shops. Once again, the driving force behind the entry into this new socio-economic era was technology. Huge advances in technology resulted in grave shifts in cultural and economic forces.

Although more conventional historians set the beginning of the industrial revolution at the middle of the 18th century Davidson and Rees-Mogg are of the opinion that it started much earlier, namely with the introduction of the printing press at the end of the 15th century.⁵⁴ Their reason for setting the beginning of the industrial revolution in the 18th and 19th century is that this was the time when mass production processes resulted in a rise in living standards amongst unskilled workers.⁵⁵ However, the advent of the printing press seems to be more accurate, since this invention gave birth to the principles of mass production. Davidson and Rees-Mogg argue that the invention of the printing press and chemically powered weapons approximately five centuries ago precipitated the collapse of feudalism and hence marked the beginning of the industrial era and that these inventions also resulted in the development of mass production⁵⁶ and the division of labour.⁵⁷

If the industrial revolution is perceived as a period of sustained growth in national incomes, it should be noted that different countries experienced their industrial revolutions at different times. In Japan the rise of living standards only occurred at the end of the 19th century, while in some African states this rise only came about in the 20th century. Some third world states have still to experience any form of sustained growth.⁵⁸

Whatever one’s interpretation of the meaning of the term industrial revolution, be it the advent of the factory and mass production, or the eventual widespread use of

⁵³ *The Oxford Advanced Dictionary* (1985) 435.

⁵⁴ *Loc cit* 128.

⁵⁵ *Idem*.

⁵⁶ “Mass production” is defined in the *Oxford Dictionary* (1999) 336 as “the production of large quantities of standardized articles by standardized mechanical processes”.

⁵⁷ *Op cit* 83.

⁵⁸ *Ibid* 97.

such technology for mass production resulting in a tremendous rise in living standards, what is certain is that the advent of technology in the mechanical age or modern era resulted in an unparalleled rise in living standards and profound shifts in cultural and economic forces.⁵⁹ The consequent changes within the legal framework were probably more gradual but no less revolutionary. Concepts of work, worker and working relationships had to be of necessity reshaped.

4.2 *Fordism*

The height of the industrial era has been referred to as “Fordism”.⁶⁰ “Fordism” lasted from approximately 1950 to 1980.⁶¹ “Fordism” is the term is used to describe the industrialisation strategy of the USA and other industrialised countries at the turn of the century, but especially after the Second World War.⁶² This strategy relies on the concepts of mass production and mass consumption. Highly paid unskilled workers use their income to sustain high consumption of mass produced products. During the era of “Fordism” workers were arranged like an army in a hierarchy from top management, middle management, and line management all the way down to unskilled labour. In this system employees had

⁵⁹ The industrial era rendered the ‘welfare state’ possible, see Coyle *The Weightless World* (2002) ch 2 and ch 6.

⁶⁰ Slabbert *et al The Management of Employment Relations* (1999) 87 explain the term “Fordism” as follows: “The term Fordism is used quite often to describe the industrialisation strategy of the United States and other countries after the turn of the century, but more specifically in the period after the Second World War. The strategy relies on mass production runs complemented by the creation of a mass market to consume the goods produced. Henry Ford’s metaphor of the worker who earns “five dollars a day” explains the logic behind the system: if a large number of workers are employed for relatively high wages, these workers will in turn become the consumers who buy the products. The two elements of mass production coupled with mass consumption are therefore the two most important ingredients for Fordism. But Fordism also has a negative ring to it, especially in terms of the impact that it has on the levels of skills of the working class. Since it builds on the production strategy of assembly line production, certain academics and union activists, following the American author Harry Braverman, argue that Fordism will lead to the systematic deskilling of the working class in general. Assembly line production separates conception from execution, building on FW Taylor’s ideas of scientific management. Fordism therefore became synonymous with the degradation of work.”

⁶¹ Blanpain “Work in the 21st Century” (1997) *ILJ* 189.

⁶² Slabbert *et al op cit* 86.

clear-cut job descriptions. This hierarchical structure resulted in clear-cut and detailed divisions of labour with strict control on employees and centralised management structures.⁶³ During this era of the huge factory where unskilled employees were mere tools in the production process, the relationship between producers and consumers became one shrouded with mystery and alienation. Mass media in advertising and mass production depersonalised the relationship between producers and consumers. The chasm between buyers and sellers/producers made marketing and market research big business.⁶⁴

Mass production does not lend itself easily to customised or individually tailored production. Henry Ford is remembered for saying: "They can have any colour they want as long as it is black".⁶⁵ Ford's attitude toward customer choice was viable in the industrial era with few competitors in leading industries.⁶⁶ The reasons for such lack of competition were:⁶⁷

- (i) High cost of entry into enterprises of economies of scale made it impossible for most people to start their own businesses. The assembly line of mass production during the twentieth century resulted in sharp rises in the size and cost of setting up enterprises;
- (ii) aside from the costs of setting up enterprises of mass production those enterprises were protected from competitors operating outside national borders by trade tariffs, and they were protected from national competition by collectively bargained wages at central level; and

⁶³ Slabbert and Villiers *The South African Organisational Environment* (2002) 3rd ed 21.

⁶⁴ Levin *Cluetrain Manifesto* (2001) 34.

⁶⁵ According to the Department of Social Science of the Lianing College of Education, website addresses <http://www.edu.cn/depart/skb/english/eeconomics0202.htm> accessed on 15/02/2004. The reason for Ford's success was that the assembly line method of production kept prices low. However, this also meant lack of choice.

⁶⁶ See Davidson and Rees-Mogg *The Sovereign Individual* (1998) 151 where it is explained that during the industrial period it was not uncommon for a very small number of firms to dominate billion dollar markets.

⁶⁷ *Ibid.*

- (iii) the level of wealth of the unskilled workforce was unprecedented. Relatively well paid unskilled workforce had money at their disposal to fuel demand for the mass produced products.

Blanpain⁶⁸ describes “Fordism” as follows:

- (i) “almost everyone who could work had a job, neatly ‘tailored’;
- (ii) almost everyone earned a ‘reasonable’ salary; and
- (iii) was a brave consumer.”

There was enough money to finance transfers for the benefit of the sick and the handicapped, to pay for pensions, to support (some) unemployed and the like. Employers and trade unions regularly programmed – with success – social progress. Everyone had a place in the labour market, often colourless and boring, but could see himself and especially his children grow in the system. The children would study, do better and climb the social ladder. There was a ‘social arrangement’ in which employers and employees could find common ground: economic growth on the one hand and social progress on the other were monitored collectively by employers and trade unions, including through collective bargaining, often with the consent of or in concert with the welfare state. Consumption then was geared to what we would now call rather primary needs. Everybody wanted a TV, a refrigerator, a car, and a roof over his head. Our society was one of consumers, targeting useful things: ‘a society of the useful’. Steady consumption made the economic machine run smoothly. Those glorious 30 years are definitely behind us. ‘Fordism’ is over; ‘Gatesism’, named after Bill Gates of Microsoft, is ushering us into a new world. Freer, but less secure.”

During this ‘glorious’ era of ‘Fordism’ most industrialised countries adopted a pluralist approach towards labour relations. “At one time or another in the 20th century this view has found favour in all liberal democracies”.⁶⁹ The pluralist approach was a natural consequence of the socio-economic forces prevalent at

⁶⁸ *Op cit* 189-190.

⁶⁹ Creighton and Stewart *Labour Law: An Introduction* (2002) 5.

the time. The industrial era transformed “the legal conception of work, the worker and work relationships. The transformation of the proprietary 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 or free will. Work was the 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”⁷⁰

These work relationships were premised on contract. Without a contract of employment there was no employer-employee relationship. This individual contract of employment created the employer-employee relationship and has been referred to in traditional labour-law literature as encompassing the individual aspect of labour law. It follows that in the traditional view, labour law also contains a collective component. This collective component is characteristic of the industrial era factory vision of labour⁷¹. What renders the labour law ‘collective’ is the presence of trade unions to represent the employees. The industrial era created the factory worker, who combined in order to more effectively make demands on the employer. Initially trade unions were resisted and prohibited in terms of legislation.⁷² However as the trade union movement became stronger in industrialised states collective bargaining and consequently trade unions were recognised by the law as being integral to labour relations. The reason for such acceptance by the law was simply that socio-economic forces demanded it. As explained by Mitchell:⁷³ “In the context of mass consumption and full employment economy, trade unions were able to exert unprecedented power, and to enter collective arrangements directly covering more than 50 per cent of the workforce in

⁷⁰ Owens “The Traditional Labour Law Framework: A Critical Evaluation” in Mitchell *Redefining Labour Law* (1995) 6.

⁷¹ Owens *op cit* 12.

⁷² Van Jaarsved, Fourie and Olivier “Labour Law” in Joubert *The Law of South Africa* (2001) vol 13 part 1 par 110.

⁷³ Owens *op cit* 11.

most countries, and considerably more in many.” This ‘unprecedented power’ of trade unions was rendered possible by the socio-economic forces present in the ‘glorious’ years of Fordism (± 1940 – 1975) i.e. mass production and consumption and low rates of unemployment.

The role of the law therefore in the words of Davis is: “...that of control and regulation in order to preserve the essential socio-economic structures of society. The state as the author of the law has as its major role the preservation of the very coherence of the society so as to protect the interests of those who essentially rule that society.”⁷⁴ This is the reason why trade unions were originally resisted. Since they were not sufficiently powerful to have any great effect on employers their actions were prohibited and criminalized. However, as trade unions gained power mainly due to the socio-economic forces especially the full employment economy during the era of Fordism, labour law functioned merely to formalise an already existing situation. The reason for formalising the status quo it is submitted was to regulate and institutionalize and thereby control and confine industrial conflict so as to preserve the long term survival and interests of the socio-economic order.⁷⁵

In general it is not difficult to comprehend how some have perceived the function of labour law during the era of Fordism to have been to protect the employee and to, in the view of Kahn-Freund,⁷⁶ act as a countervailing force and counteracting the inequality of bargaining power inherent in the employer-employee relationship. The ultimate function as always, however, was to preserve and maintain the status quo so as to ensure the well-being of the economy. In short, Kahn-Freund’s interpretation of the function of labour law was accurate at the time. However, even at the time when he wrote, the reason for counteracting the inherent inequality of

⁷⁴ “The Functions of Labour Law” *CILSA* (1980) 214.

⁷⁵ This view of the function of Labour Law is in line with that of our legislature, see *Explanatory Memorandum to the Labour Relations Bill* in GG 16259 10 Feb 1995, 130.

⁷⁶ *Op cit* 12.

power was simply to control, regulate and institutionalise the conflict so as to ultimately ensure the well being of the economy.⁷⁷

5 The Information Era⁷⁸ (Post-Fordism Era)

The transition to the information era, in the words of Blanpain, was “as drastic, brutal and fundamental as the transition from the agricultural society to the industrial society in the 19th century, when our (great)-grandparents were driven from the barn and the field into the sweatshops and cities.”⁷⁹

Technology has changed the manner in which the economy works. This in turn has changed the world of work.⁸⁰ Labour laws have had to adapt to reflect these changes. Since the information revolution took only a few years to unfold, as opposed to the hundreds of years for the industrial revolution and thousands of years for the agricultural revolution, labour laws in some countries may not be adapted in time. Labour laws which do not adapt accordingly and still reflect the socio-economic reality of the industrial era cannot bring about social and economic justice. In the golden years of the industrial era the surest way of achieving socio-economic justice was by the achievement of a situation of full employment or at least very low rates of unemployment.⁸¹

⁷⁷ See for example Steenkamp, Stelzner and Badenhorst “The Right to Bargain Collectively” 2004 *ILJ* 943, 949.

⁷⁸ Slabbert and De Villiers *The South African Organisational Environment* (2002) 15 refer to the ‘information age’, while Davidson and Rees-Mogg, *The Sovereign Individual* (1998) 41, refer to “The Information Age”, “Cyber Society” and “Post Modern”.

⁷⁹ “Work in the 21st Century” 1997 *ILJ* 189; Davidson and Rees-Mogg *op cit* 32 express this transition rather colourfully: “The civilization that brought you world war, the assembly line, social security, income tax, deodorant and the toaster oven is dying. Deodorant and the toaster oven may survive. The others won’t.”

⁸⁰ See Mhone “Atypical Forms of Work and Employment and Their Policy Implications” 1998 *ILJ* 197; Olivier “Extending Labour Law and Social Security Protection: The Predicament of the Atypically Employed” (1998) *ILJ* 669; Blanpain “Work in the 21st Century” 1997 *ILJ* 189; Thompson “The Changing Nature of Employment” (2003) *ILJ* 1793; Theron “Employment Is Not What It Used To Be” 2003 *ILJ* 1247.

⁸¹ Social security systems of the industrialised world were successful in attaining a certain level of socio economic justice because full employment (or almost full employment) economies were able to sustain the funds necessary to foot the social security bills.

Cheaper, faster, more varied and an easily accessed means of communication has created a new economy.⁸² The result is profound changes in the structure of markets and organisations and established patterns of economic behaviour.⁸³ The content and quality of jobs, the skills required, the content and duration of the contracts, the pay structures and so on have all changed in the era of digital globalization.⁸⁴ South Africa is no exception to this⁸⁵ and “most analysts agree that increases in atypical forms of employment are a global phenomenon.”⁸⁶

These changes in the labour market which have had profound effects on the organisation of work have prompted the term ‘post-Fordism’.⁸⁷ According to the post-Fordists a new era began to develop in the 1970’s when new production methods based on flexibility began to emerge. Specialisation as opposed to mass production is essential for the survival of companies.⁸⁸ In other words, companies have to restructure and decentralise in order to be more flexible. The result is that organisations in the era of post-Fordism have the following characteristics:⁸⁹

- (i) smaller enterprises;
- (ii) smaller teams of core workers;
- (iii) more skilled workers and flexible tools;
- (iv) outsourcing; and
- (v) flatter hierarchical structures.

⁸² Blanpain *op cit* 191.

⁸³ See in general Levin *Cluetrain Manifesto* (2001) where some of the reasons underlying this transition are explained.

⁸⁴ See ILO (2003) “The Scope of the Employment Relationship” Report V for International Labour Conference, ILO, Geneva.

⁸⁵ The prevalence of casualisation, externalisation and atypical forms of work generally, in South Africa is discussed in ch 6 *infra*, under the sub-heading “South Africa”.

⁸⁶ See Cheadle *et al* (2004) *Current Labour Law* 135.

⁸⁷ See Slabbert *et al* *The Management of Employment Relations* (1999) 88.

⁸⁸ See Blanpain *op cit* 190 and Slabbert *et al loc cit* where this phenomenon is referred to as “flexible specialisation”.

⁸⁹ Blanpain *op cit* 191.

In order to be sufficiently flexible to respond to consumer demand and preferences, as opposed to reliance on mass consumption as was the case in the era of Fordism, specialisation and focus is essential. A company can no longer do everything. In the words of Blanpain “Gone are the days of enterprises that controlled raw materials, having their own coal and ore mines; their own railway system and so on up to the final product, including its distribution. Outsourcing is in.”⁹⁰ Not only are manufacturing tasks outsourced to other companies or individuals, but so are services. Gone are the days of the in-house legal adviser or marketing manager. These and other services are outsourced on an ad hoc basis if and when required. In other words the company only pays for what it gets, when it needs it, at competitive prices without the costs of ‘fringe benefits’ associated with the typical employee of the industrial era.⁹¹

Specialisation results in the flexibility to respond to changing consumer demand. Focus and specialisation result in smaller enterprises which in turn results in smaller teams. A smaller team in turn is conducive to multi-skilling. All these organisational changes are ill-suited to the hierarchical organisational structures prevalent in the industrial era. Since the workers operate in smaller teams the control mechanisms in the form of hierarchical structures made up of managing director and board of directors at the top, descending to top management, middle management, then line management down to blue collar-workers at the bottom are unsuitable.⁹² This bureaucracy of military-like subordination where control was a major function of management cannot work in today’s world of work, characterized by flatter structures with horizontal lines of communication, self regulation, and multi skilling. A small core of permanent multi-skilled staff is assisted on an *ad hoc* basis by peripheral workers as a team. The flatter structures with workers working as equals and being rewarded for the value they bring, is conducive to an ethos of team work. Clearly, in such an environment the supervisor whose only function is

⁹⁰ *Ibid* 92.

⁹¹ See *NEHAWU v University of Cape Town* [2002] 4 BLLR 311 (LAC); 2003 ILJ 95 (CC).

⁹² Blanpain *op cit* 193.

that of control, supervision and enforcement of rules has little value to offer the enterprise. Hierarchical control has been rendered redundant.⁹³

This huge shift in organizational structure has resulted in trade unions becoming weaker through loss of trade union members. Trade unions are still fighting for stable jobs that no longer exist. As the scale of enterprise diminishes so it becomes more difficult for trade unions to organise. The potential harm or damage that a trade union can wield in a huge organisation typical of the industrial era is dissipated in a small enterprise.⁹⁴ The bargaining power of trade unions in times of high unemployment combined with the new structure of organisations and the predominance of small organisations has been severely eroded.⁹⁵ For the meantime, the point is that the exigencies of the new world of work have led to a move toward decollectivisation of employment relations.⁹⁶ Although the view that neo-liberalist government policies have been important in the world-wide decline of trade unions has been put forward,⁹⁷ it cannot be denied that even if this is so, such policies are not and cannot be “the sole or even major cause of union decline.”⁹⁸

A national labour law dispensation that unashamedly emphasizes the collective dimension of labour is out of kilter with reality and as will be demonstrated in this discussion cannot contribute to the attainment of social or economic justice. A new approach to the labour law dispensation is required; in the words of D’Antona:⁹⁹ “a labour law that is no longer identified with the nation state (as political actor, normative power, or national community) and that therefore realizes a complex ‘denationalization’; that no longer has as its exclusive centre of gravity the labour relations of stable, full-time workers, and might, therefore, be defined as

⁹³ Finnemore and Van Rensburg *Contemporary Labour Relations* (2000) 221.

⁹⁴ Davidson and Rees-Mogg *The Sovereign Individual* (1998) 189 -190.

⁹⁵ The reasons for a general decline of union power in most states are discussed in ch 5 infra.

⁹⁶ See ch 5 and ch 6 infra.

⁹⁷ Raday “The Decline of Union Power” in Conaghan, Fischl and Klare *Labour Law in an Era of Globalization* (2002) 375 –377.

⁹⁸ *Ibid* 357.

⁹⁹ *Op cit* 39-40.

‘post-occupational’; and that does not merely look after the material needs of a standardized worker, conceived abstractly as the weaker party to the contract who is subject to risks in the face of the employer’s hierarchical organization, but increasingly stresses the worker in flesh and bone, as a person bearing his or her own identity, comprised not only of equality, but also of differences that call for respect and that for this reason might be termed ‘postmaterial’.”

F The View of Otto Kahn-Freund

Kahn-Freund’s statement that “the main object of labour law has always been, and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining inherent in the employment relationship”¹⁰⁰ has often been quoted to show that labour law has mainly a protective function.¹⁰¹ However Kahn-Freund perceived law and indeed labour law as a means of regulating social power. He argued that although laws can restrain, enforce, support and even create social power, laws are not the main source of such power. He continued by saying: “The principal purpose of labour law, then, is to regulate, to support and to restrain the power of management and the power of organised labour.”¹⁰² Kahn-Freund argued that since the individual employee in most cases, has very little bargaining power, he/she has to accept conditions imposed by the employer. However a number of individual employees acting collectively have more social power. This collective power then helps redress the imbalance inherent in the relationship between employer and employee.¹⁰³

In Kahn-Freund’s view there can be no employment relationship without a power to command and a duty to obey. The law can limit the employee’s duty to obey and expand his/her freedom and he stated: “This without any doubt, was the original and for many decades the primary function of labour law”.¹⁰⁴ However, Kahn-

¹⁰⁰ *Op cit* 18.

¹⁰¹ See Creighton and Stewart *op cit* 14.

¹⁰² *Op cit* 14.

¹⁰³ *Ibid* 15.

¹⁰⁴ *Ibid* 18.

Freund was well aware of the fact that the forces of the market have a much more profound effect than the law, on the welfare of employees. He stated that “the law can make only a modest contribution to the standard of living of the population... the level of wages nominal or real, and the level of employment, which are vital issues, can only marginally be influenced by legal rules and institutions, and this truism holds good for a communist as well as for a capitalist society... These are marginal influences (i.e. the law) on social welfare, and in times of recession it is quickly apparent how very marginal they are. This same social welfare depends in the first place upon the productivity of labour, which in turn is to a very large extent the result of technical developments. It depends in the second place on the forces of the labour market, on which the law has only a slight influence. It depends thirdly on the degree of effective organisation of the workers in trade unions to which the law can make only a modest contribution.”¹⁰⁵ He also explained further: “Where labour is weak – and its strength or weakness depends largely on factors outside the control of the law – Acts of Parliament, however well intentioned and well designed, can do something, but cannot do much to modify the power relation between labour and management. The law has important functions in labour relations but they are secondary if compared with the impact of the labour market (supply and demand) and which is relevant here, with the spontaneous creation of social power on the workers’ side.”¹⁰⁶

Although Kahn-Freund lists the effectiveness of trade unions as the third most important factor in determining social welfare, he, however, realises that the strength of unions gained through membership is largely dependent on the market forces. This is apparent when he states: “The effectiveness of unions, however, depends to some extent on forces which neither they nor the law can control. If one looks at unemployment statistics and at the statistics of union membership, one can at least at certain times, see a correlation. Nothing contributed to the strength of the trade union movement as such as the maintenance over a number

¹⁰⁵ *Ibid* 13.

¹⁰⁶ *Ibid* 19.

of years of a fairly high level of employment.”¹⁰⁷ As mentioned earlier¹⁰⁸ this high level of employment was characteristic of the era of Fordism as was the presence of strong unions.

A further illustration of the fact that the market forces have a more marked effect on the strength of trade unions than the law, is the fact that despite the non-interventionist *laissez faire* approach to labour law adopted in Britain in the post World War II era,¹⁰⁹ it is a well documented fact that trade unions in post World War II British industrial society were a force to reckon with.¹¹⁰ Examples of such non interventionist stance are the fact that collective agreements were (and still are) not legally binding¹¹¹ and the fact that there was no legislative protection of the freedom of association in the 1950’s.¹¹²

It is also noteworthy that Kahn-Freund held that conflict was inherent in the employment relationship *in an industrial society* (my emphasis).¹¹³ One might infer from this statement that if it is not an ‘industrial society’, conflict between capital and labour might not necessarily be inherent in the relationship, thus possibly erasing the need for a pluralistic approach. Kahn-Freund further states: “This system of collective bargaining rests on a balance of collective forces of management and organised labour. To maintain it has on the whole been the policy of the legislature during the last hundred years or so. The welfare of the nation has depended on its continuity and growing strength.”¹¹⁴

From the above it is apparent that Kahn-Freund actually supported the ‘market view’ of the function of labour law. Clearly he believed that the major force behind the strength of unions was the market (e.g. high rates of employment) and not the

¹⁰⁷ *Ibid* 21.

¹⁰⁸ See 12 *supra*.

¹⁰⁹ See Davies and Freedland *Labour Legislation and Public Policy – A Contemporary History* (1993) ch 1 for a discussion of British labour law during this time.

¹¹⁰ *Idem*.

¹¹¹ *Idem* 18.

¹¹² *Op cit* 19.

¹¹³ *Op cit* 28.

¹¹⁴ *Op cit* 12.

law. Even more convincing, however is the fact Kahn-Freund stated that the function of labour law is to “regulate, to support and to restrain the power of management **and the power of organised labour** (my emphasis).”¹¹⁵ In other words, the function of labour law is not to protect the employee, but rather it is a “technique for the regulation of social power”.¹¹⁶

In summary therefore, Kahn-Freund perceived the law as only secondary. Trade unions in his view are far more influential in restraining the power of management than the law. The law in his view can only have a limited impact on the power of trade unions with other external forces such as supply and demand of labour being far more influential. Thus although he may have adhered to the ‘protective approach’ as to the function of labour law, he was very aware of the limitations of the law.

It should also be stressed that Kahn-Freund wrote in the 1950’s in the heyday of ‘Fordism’. As seen in the previous chapter at the time that Kahn-Freund wrote there were high levels of employment. This of course strengthened trade unions, and their bargaining power

Labour law may have a protective function if this is what market forces require. In the heyday of Fordism, with high rates of employment and trade tariffs protecting employers from competition, a protective approach could have been viable from an economic perspective. However, once the forces of the market alter the situation the argument that overprotection may result in economic inefficiencies come to the fore. Therefore the function of the law is to react and adjust to socio-economic forces in order to attain justice and equity. It is arguable whether such justice and equity will always be acquired by the law fulfilling a protective function. Secondly,

¹¹⁵ *Op cit* 15.

¹¹⁶ *Op cit* 14.

and most importantly the limitations of the law in acquiring justice cannot be stressed enough.¹¹⁷

G The View of Davis

According to Davis “...the true function of labour law can be described as the preservation of the social and economic structures prevailing in society at any given moment by the confinement and containment of the basic conflict of interests inherent in the relationship between employer and employee... The role of the law ...is essentially that of control and regulation in order to preserve the socio-economic structures of society. The state as the author of the law has as its major role the preservation of the very coherence of the society so as to protect the interests of those who essentially rule that society. The state cannot therefore be seen as a completely independent third party in the context of industrial legislation. The reason for this is that the state is in essence the instrument utilized by a coalition of classes with employer hegemony at the forefront, and as such the state machinery has as its major objective the preservation of the coherence of the social formation and safety conditioning of the long term interests of the social system”.¹¹⁸

¹¹⁷ As pointed out by Kahn-Freund *op cit* 14: “Power - the capacity effectively to direct the behaviour of others - is unevenly distributed in all societies. There can be no society without a subordination of some of its members to others, without command and obedience, without rule makers and decision makers. The power to make policy, to make rules and to make decisions, and to ensure that these are obeyed, is a social power. It rests on many foundations, on wealth, on personal prestige, on tradition, sometimes on physical force, often on sheer inertia. It is sometimes supported and sometimes restrained, and sometimes even created by law, but the law is *not* the principal source of social power.”

¹¹⁸ *Loc cit*. It appears that some twenty years or so later, Davis's views on the function of labour law have changed. He seems to have reverted to supporting the traditional view of the function of labour law and writes: “The inevitability of these developments means that managerial prerogative expands at the expense of legal principles enforcing a culture of managerial justification, thereby heralding the destruction of labour law's fundamental premise – that it provides a framework within which workers can build a countervailing power to that of management”. – “Death of a Labour Lawyer” in Conaghan, Fischl and Klare *Labour Law in an Era of Globalization* (2002) 160.

Davis then provides a brief summary¹¹⁹ of South African labour legislation beginning at the start of the 20th century proceeding to 1980. This serves to demonstrate that every piece of South African legislation was enacted in order to confine and institutionalize conflict between employer and employee so that the economic system could be preserved. Davis also argues that the exclusion of blacks from the legislation was not so much to protect non-blacks but more to protect employer interests.¹²⁰ This was achieved by providing the basis for class suppression by forming an aristocracy of white workers who would join forces with their employers in exploiting the black workers. The conclusion of Davis therefore is that “the true function of labour law can be described as the preservation of the social and economic structures prevailing in society at any given moment by the confinement and containment of the basic conflict of interests inherent in the relationship between employer and employee.”¹²¹ It appears therefore that Davis too, adopts the market view of the function of labour law and proves that this has been the view accepted by our legislature from the first piece of labour legislation up to 1980.

In 1973 widespread strikes by black workers which began in Durban and spread to the other centres demonstrated the de facto industrial muscle of black workers despite the lack of legal backing.¹²² Without formal recognition of trade unions the workers wielded immense power and brought industry to a standstill.¹²³ The government reacted by providing for the settlement of disputes by means of works or liaison committees within the organisation in terms of the Black Labour Relations Regulation Amendment Act.¹²⁴ These committees were mainly employer initiated and there was minimal (if any) bargaining power for the black workers. These committees were resented by the black workers and referred to as “toy

119 *Op cit* 215-216.

120 *Op cit* 216.

121 *Idem*.

122 Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* (2004) par 327.

123 See Bendix *Industrial Relations in the New South Africa* (1998) 86.

124 Act 70 of 1973.

telephones".¹²⁵ From 1973 – 1977 the power of unregistered trade unions grew.¹²⁶ This was a natural consequence of the prevalent socio-economic and political circumstances. More and more employers had no choice but to enter recognition and procedural agreements with these trade unions. A dual system of collective bargaining was created with the formal legislative system catering for White, Coloured and Indian trade unions and the informal recognition system whereby plant level collective bargaining between employers and unregistered black trade unions took place.

Only in 1981 in terms of the Labour Relations Amendment Act¹²⁷ were trade union rights extended to every worker in South Africa irrespective of race and all racial restrictions were removed. In the 1980's, while the vast majority of the South African population enjoyed only limited political rights, trade unions became the vehicles for political expression. The black trade union movement grew extremely rapidly despite officials and members of trade unions being subjected to various penal sanctions and police harassment,¹²⁸ including torture and ultimate death while in police custody.¹²⁹ Meetings were banned and legislation such as the Intimidation Act¹³⁰ and the Trespass Act¹³¹ were applicable to trade union members and officials.¹³² These facts prove Kahn-Freund's assertion that the law is only a secondary force in according trade union power. Of more relevance are socio-economic forces and in South Africa political factors also played a major role especially in the 1980's. In the 1980's the trade union movement in South Africa was the fastest growing union movement in the world.¹³³

¹²⁵ Finnemore and Van Rensburg *op cit* 35.

¹²⁶ By 1976 more than 170 trade unions were registered consisting of approximately 650,000 members, Van Jaarsveld, Fourie and Olivier *Principles* par 327.

¹²⁷ 57 of 1981.

¹²⁸ Finnemore and Van Rensburg *op cit* 39.

¹²⁹ *Idem*.

¹³⁰ 72 of 1982.

¹³¹ 6 of 1959.

¹³² *Idem*.

¹³³ For a discussion of political unionism of the 1980's see Finnemore and Van Rensburg *op cit* 38-41.

Thus it appears that Davis' 1980 analysis of the function of labour legislation in South Africa, up to the time that the cited article was written, is also applicable from 1980 onwards. The government continued to promulgate legislation in response to socio-economic and political pressures and demands in order to preserve the status quo. The market and political forces operating in the 1980's ensured that trade unions were strong. No legislation was required to neither create nor maintain this situation. As a result of unemployment, sanctions, disinvestment, capital flight, a failing and expensive apartheid system and crime and violence there was no alternative but to change the labour dispensation.¹³⁴ In other words legislature had to react and concede to the socio-economic forces.

The process of transition until the first democratic elections in 1994 began in 1990.¹³⁵ The new democratic government embarked on a policy of transformation of labour legislation in order to align South African labour law with the Constitution and the standards of the International Labour Organisation. The process of transition in 1990 until the elections in 1994 was also in response to socio-economic and political forces.

H Other Views of Importance

1 Mischke and Garbers

Mischke and Garbers define labour law as follows: "Labour law is a body of legal rules which regulate relationships between employers and employees, between employers and trade unions, between employers' organisations and trade unions, and relationships between the State, employers, employees, trade unions and employers' organisations."¹³⁶ According to these writers "labour law, as we can see from our preliminary definition, regulates all kinds of relationships in the working environment and provides a structure or a legal foundation for many of those

¹³⁴ See Du Toit *et al Labour Relations Law* (2000) 8-15.

¹³⁵ For a summary of such transition, see Van Jaarsveld, Fourie and Olivier *Principles* par 332 – 341.

¹³⁶ Basson *et al Essential Labour Law* 3rd ed (2002) vol 1 2.

relationships”¹³⁷ There is no denying that labour law does regulate these relationships, however, these authors do not delve into the reasons for such regulation. There could be a number of reasons for such regulation, including the maintenance of industrial peace, the protection of the employee against possible employer abuse or both. It is submitted that if both these reasons for the regulation of these employment relationships are accepted as being correct this does not detract from the validity of the argument that ultimately the purpose of such regulation is the preservation of the socio-economic status quo so as to “protect the interests of those who essentially rule that society.”¹³⁸

2 Van Wyk

According to Van Wyk labour laws serve to protect employees from employer abuses that result from the imbalance of power that is inherent in the relationship between employer and employee. He states: “Labour laws are enacted to counter this kind of asymmetry in employment contracts by creating, *inter alia*, minimum conditions of employment which the parties may not ignore, even if both are perfectly willing to do so.”¹³⁹ Essentially this is the protective view. Nevertheless, it could be argued that the ultimate purpose of offering a measure of protection to employees is to maintain labour peace, higher rates of productivity and, ultimately, preserve the socio-economic fibre of society.

3 Brassey

Brassey,¹⁴⁰ on the other hand, takes a more profound view.¹⁴¹ Brassey’s point of departure is that in determining the function of labour law the first step is to ascertain the true intention of the legislature.¹⁴² Although Brassey expressed his

¹³⁷ *Ibid* 3.

¹³⁸ Davis *op cit* 212, 214.

¹³⁹ Du Plessis, Fouche and Van Wyk *A Practical Guide to Labour Law* (2000) 3rd ed 4.

¹⁴⁰ Brassey *et al The New Labour Law* (1987) 61-64.

¹⁴¹ Brassey concedes that many do not share his view. He refers to the writings of Davis and Pretorius wherein the protective view is endorsed and it is assumed that labour law has a protective function and it exists to redress the inherent imbalance of power between employer and employee. (Brassey *et al op cit* 63-64).

¹⁴² Brassey *et al op cit* 61.

view in 1986, prior to the promulgation of the present Labour Relations Act,¹⁴³ it is submitted that his opinion is still valid with reference to today's labour law dispensation. He argues that the object of the legislature (as it was in 1986), "is manifest in almost every section: it is to ensure that, so far as is possible, there will be industrial peace. It is to this end that the legislature places curbs on strikes and lock-outs so that they are either entirely prohibited or suspended until an attempt has been made to avert them."¹⁴⁴ To the same end it has made provision for the establishment of industrial councils and conciliation boards, which are respectively given the duty to 'endeavour by the negotiation of agreements or otherwise to prevent disputes from arising and to settle disputes that have arisen or may arise' and to, 'consider and if possible, settle' disputes. Likewise it has provided for the resolution of disputes by way of mediation and arbitration."¹⁴⁵ Brassey summarises: "More specifically, it is not the function of the jurisdiction to improve the lot of employees; nor is its function to redress the bargaining imbalance that is said to exist between them and their employers and from which they are said to suffer."¹⁴⁶ Clearly Brassey does not adhere to the protective view of labour law.

¹⁴³ 66 of 1995.

¹⁴⁴ The same applies to our present labour law dispensation : Chapter IV of the LRA imposes procedural requirements, namely that the dispute first be referred to conciliation [s64(1)(a)], that a certificate stating that the dispute remains unresolved must be issued, or a period of 30 days from the date of referral of the dispute must elapse (*ibid*), and the other party to the dispute must be given at least 48 hours written notice of the commencement of the strike or lock-out [s 64(1)(d)]. Where the State is the employer the required notice period is 7 days [s 64(1) (d)]. Secondly, a strike over a justiciable dispute (rights dispute) does not enjoy legislative protection [s65 (1)9c)]. Thirdly persons engaged in essential and maintenance services are prohibited from partaking in industrial action [s65 (1) (d)]. Furthermore no-one may take part in a strike or lock-out if that person is bound by a collective agreement that regulates the issue in dispute [s 65(3)(a)(i)]. Also, where there is an arbitration award that regulates the issue in dispute no person who is bound by such award may partake in industrial action if the dispute is regulated by the award [s 65(3)(a)(i)]. Lastly, where a person is bound by a determination made by the Minister in terms of s 44 that regulates the issue, industrial action over that dispute is prohibited during the first year of that determination [(s 65(3)(b)]. For a discussion of these provisions see Du Toit *et al/ Labour Relations Law: A Comprehensive Guide* (2003) 4th ed 235-248, and Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* pars 916-920.

¹⁴⁵ Brassey *et al op cit* 62.

¹⁴⁶ *Ibid* 63.

It could be argued that Brassey's suggestion that the function of labour law is to prevent labour unrest and industrial action also in terms of our present legislation. The objects' clause of the Labour Relations Act¹⁴⁷ specifically includes labour peace¹⁴⁸ as one of its objects. The other stated objects are the advancement of economic development, social justice and the democratisation of the workplace.¹⁴⁹ It is submitted that the attainment of these objects would assist in the realisation of labour peace. From this perspective therefore the ultimate object of the LRA appears to be the prevention of industrial action and the attainment of labour peace. In turn, the purpose of such an objective, it could be argued, is the preservation of the socio- economic structures of society.

4 Du Toit

While writing about the aims and objectives of the South African labour law dispensation, Du Toit seems to ascribe a "market view" to the bundle of legislation: "The new labour statutes have ambitious goals. They seek to redress the adversarial heritage and injustices of the old industrial relations system as well as the distorted and inefficient labour market it supported. In so doing they aim to facilitate the development of a new system able to meet the challenges to economic development in the era of globalisation. The Labour Relations Act provides the foundation. Its point of departure is voluntary collective bargaining. Its primary focus is the industrial relations system: it seeks to move industrial relations along a spectrum from adversarialism towards consensus-seeking around common goals, with conflict institutionalised as far as possible. Given the interdependence of the statutes, a basis of sound industrial relations and effective voice regulation will be critical in achieving their common objective of transforming the labour market in a way that promotes efficiency rather than rigidity."¹⁵⁰

¹⁴⁷ 66 of 1995.

¹⁴⁸ S 1.

¹⁴⁹ S 1.

¹⁵⁰ *Labour Relations Law - A Comprehensive Guide* (2003) 4th ed 38.

5 Grogan

In referring to the objects clause of the Labour Relations Act¹⁵¹ Grogan states: “As these objectives indicate, the aims of the new LRA are wider and more ambitious than those of its predecessor, which aimed mainly at avoiding industrial unrest. While the 1956 LRA left it to the labour courts to encourage collective bargaining as the preferred method of resolving workplace disputes, the current LRA expressly commits employers and employees to workplace democracy, which entails the active promotion of participative management and joint decision making. A noticeable theme running through the LRA is a preference for voluntarism... By providing for and limiting protected strikes to such matters as cannot be resolved by statutory dispute settlement procedures the legislature sought to limit adversarial bargaining to distributive issues such as wages and general conditions of service. For the rest, the hope was that co-operation between labour and management would be promoted by compulsory conciliation and joint decision making, or by conciliation.”¹⁵²

The emphasis in this cited passage appears to be similar to Kahn-Freund’s view that the function of labour law is “a technique for the regulation of social power.”¹⁵³

I Conclusion

So far the view that the function of labour law is to preserve the socio-economic order of the period within which it operates in order to legitimise government has been put forward. This view is shared by D’Antona when he states:¹⁵⁴ “The concrete developing history of labour law manifests the aspiration of the nation-state to contain social conflicts within their proper boundaries using diverse modalities of intervention: first the corporative state, and then successively, the

¹⁵¹ S1 of Act 66 of 1995.

¹⁵² *Workplace Law* 7th ed (2003) 273-274.

¹⁵³ *Op cit* 14.

¹⁵⁴ *Op cit* 33.

welfare state, the distributive state of Keynesian fault, and the entrepreneurial state, as necessary to preserve the mechanisms of capitalist accumulation and, at the same time maintain social order and the bases of democratic legitimization of the state itself.”

Preservation of the socio-economic order of the day is dependent on an efficient economy. In similar vein Collins writes that the function of labour law in terms of the “Third Way” for labour law is “set by the political goals of combating the origins of social exclusion and improving the competitiveness of business.”¹⁵⁵ It is submitted that if the surrounding socio-economic forces and conditions are not properly considered in drafting a labour law dispensation, neither social nor economic justice will be achieved. Since “the only claim of law to authority is its delivery of justice”¹⁵⁶ such labour law dispensation will have no ‘claim to authority’.

¹⁵⁵ “A Third Way in Labour Law” in Conaghan, Fischl and Klare *op cit* 468.

¹⁵⁶ Owens “The Traditional Labour Law Framework: A Critical Evaluation” in Mitchell *Redefining Labour Law* (1995) 3

CHAPTER 3

SOUTH AFRICAN LEGISLATIVE FRAMEWORK REGARDING COLLECTIVE BARGAINING

ABRIDGED CONTENTS

	Page
A Introduction	57
B Government Labour Policy	57-61
C The Labour Relations Act	
1 Objectives of the LRA.....	61-63
2 Freedom of Association.....	63-66
3 Organisational Rights.....	66-75
4 Forums for Collective Bargaining.....	75-83
5 Collective Bargaining Through Industrial Action.....	83-85
D Conclusion	85-86

A Introduction

The purpose of this chapter is to highlight the objectives of the South African labour law dispensation and government policy regarding the labour market. The way the legislature has attempted to achieve these objectives will also be explained. The survey of the South African legislative framework with reference to collective labour law demonstrates that our legislature adopts a pluralist¹ approach to labour relations and therefore strongly supports trade unions and collective bargaining, especially at sectoral level. This brief overview of the regulation of collective labour law in terms of the Labour Relations Act² is necessary to explain the background and structures for subsequent chapters wherein the appropriateness of our legislature's approach will be discussed.

B Government Labour Policy

The government's social and economic policy is the basis of the labour law dispensation.³ At the outset it is of primary relevance to ascertain the labour policy of the government of the day. The present government's labour policy can be summarised as follows:⁴

- (i) the maintenance of peace in the sphere of labour;⁵
- (ii) full employment to counteract the problem of unemployment as far as possible;
- (iii) an improvement in the training skills and productivity of employees;
- (iv) workplace safety and social security for employees;

¹ See ch 2 par C for the meaning of this term.

² Act 66 of 1995 (hereinafter referred to as the LRA)

³ Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* (2004) 11 and see Du Toit *et al Labour Relations Law: A Comprehensive Guide* (2003) 4 ed 5 where the authors state: "Following the transition to political democracy, the LRA encapsulated the new government's aims to reconstruct and democratise the economy and society in the labour relations arena."

⁴ Van Jaarsveld, Fourie and Olivier *op cit* 11.

⁵ See Thompson and Benjamin *South African Labour Law* (1997) vol 1 A1-68 where the authors express the view that collective bargaining is one of the most appropriate means for the attainment of labour peace.

- (v) the promotion and implementation of affirmative action in the workplace;
- (vi) the democratisation of the workplace;⁶
- (vii) the promotion of orderly collective bargaining; and
- (viii) the economic development⁷ of South Africa and the promotion of social justice.⁸

⁶ Brassey *Employment and Labour Law* (2000) A1: 5 states: "Democratisation is the process by which those to whom decisions relate are given a greater say in the process of decision-making; the right to vote, which (for example) union members enjoy under s 4(2), is but one manifestation of the democratic process; others include the right to be consulted or heard before a decision is taken. The collective bargaining institutions of the act are underpinned by democratic conceptions and so, in a rather more obvious way, are workplace forums: ..." Earlier (A113) he also stated: "By making economic development a purpose of the Act, the legislature has sought to ensure that the Act is interpreted in a way that will promote the interests not merely of capital and labour but of the general public as well: *Business South Africa v COSATU* 1997 18 ILJ 474 (LAC) at 481 E-F. The main objective of economic development is to raise the living standards and general well-being of the people in the economy. The process refers to the growth in total and per capita income in developing countries accompanied by fundamental changes in the structure of their economies. These changes generally consist in the increasing importance of industrial as opposed to agricultural activity, migration of labour from rural to industrial areas, lessening dependence on imports for the more advanced producer and consumer goods, and on agricultural or mineral products as main exports, and finally a diminishing reliance on aid from other countries to provide funds for investment and thus a capacity to generate growth themselves." According to Thompson and Benjamin *op cit* vol 1 A1-68: "The principal way in which the statute promotes social justice is through satisfying the preconditions for successful collective bargaining providing for full freedom of association, and the freedom to withdraw labour. In this way a reasonable balance between organise labour and business can be achieved. Other statutes, already mentioned, assist by prescribing basic conditions of work and minimum health and safety standards. But the legislative preoccupation with collective bargaining also suggests a more fundamental principle of social justice: that industrial citizens should have the right to participate in decision-making which affects their lives. This is a powerful proposition, more than the administrative right to be heard not only because of the mutuality of the process but also because of the collective dimension. It is constitutive of a democratic society, and the courts are better placed than the legislature to give it meaningful content, and develop it over time." Brassey *op cit* A1: 4 states: "Social justice is concerned with the way in which benefits and burdens are distributed among members of society. Justice in this context postulates a substantive moral criterion or set of criteria by reference to which the distribution should be made. The choice of criterion or criteria is value-laden and provides fertile ground for argument and controversy over the years writers have constructed models that variously emphasise distributions based on need, status, merit and investment but, when investigated, each seems merely to reflect one specific vision of how the world should be. The most celebrated recent theorist within this field is John Rawls who advances a model of justice that would,

Since the democratic elections of South Africa in 1994 the government has undertaken extensive reforms in the labour law dispensation. Given the fact that the Confederation of South African Trade Unions (COSATU) was instrumental in bringing the African National Congress (ANC) to power, great influence was exercised by COSATU in the creation and promulgation of these statutes.⁹ The ANC's re-election commitment in the form of the Reconstruction and Development Programme (RDP), gave special attention to worker and labour rights. The object specifically was to provide for equal rights for all employees, the protection of organisational rights (including the right to strike and to picket on all social and economic matters, and the right of trade unions to information from employers); a centralised system of collective bargaining as well as the right to worker participation in decision-making at the workplace.¹⁰ Based on this statement of intent in the RDP, COSATU had high expectations that the gains made by labour through their struggles would be confirmed and fortified by the new government.¹¹

Shortly after having been elected to govern, the ANC government, through the assistance of the Department of Labour, put forward a five year plan for the radical transformation of labour legislation and the development of an active labour market policy. This five year plan is encapsulated by four items of labour legislation, namely:

- (ix) the Labour Relations Act¹² (hereinafter referred to as the LRA);
- (ii) the Basic Conditions of Employment Act¹³ (hereinafter referred to as BCEA);

within a liberal matrix, maximise the benefits of the least well off. Rawls claims his model would be favoured by rational people who were constructing a society without knowing what position each would occupy within the resulting society...Given the seemingly eternal uncertainty within this area, we must expect the courts to be modest in their use of this objective as an interpretive aid.

⁹ Du Toit *et al op cit* 16-17.

¹⁰ African National Congress *The Reconstruction and Development Programme: A Policy Framework* (1994) pars 4.8.2, 4.8.3, 4.8.7, 4.8.8 and 4.8.9.

¹¹ Patel *Engine of Development? South Africa's National Economic Forum* (1993) 4; Du Toit *et al op cit* 17.

¹² Act 66 of 1995.

- (iii) the Employment Equity Act¹⁴ (hereinafter referred to as the EEA); and
- (iv) The Skills Development Act¹⁵ (hereinafter referred to as the SDA)

The LRA is the cornerstone of the transformation process. This view is confirmed by Du Toit *et al* in the following words: “the LRA encapsulated the new government’s aims to reconstruct and democratise the economy and society in the labour relations arena.”¹⁶ The BCEA provides a statutory minimum for employment standards for all employees.¹⁷ It serves to provide a safety net for employees whose working conditions are not covered by collective agreements.

The EEA serves to eliminate all forms of discrimination in the workplace and to redress the imbalances created by the past¹⁸ through the implementation of

¹³ Act 75 of 1997.

¹⁴ Act 55 of 1998.

¹⁵ Act 97 of 1998.

¹⁶ *Op cit* 5.

¹⁷ The Act applies to all employees and employers except members of the National Defence Force, the National Intelligence Agency and the Secret Service. An employee is defined in both the BCEA (s1) and the LRA (s 213)

“(a) any person, excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and

(b) any other person who in any manner assists in carrying on or conducting the business of an employer.”

Both the LRA (S200A) and BCEA (S83A) in terms of the 2002 amendments contain a rebuttable presumption that a person is an employee if one or more of the following factors exists (This presumption is not applicable to persons who earn in excess of approximately R 115 500 per annum)

- (i) Employer exercise control or direction in the manner of person works
- (ii) Employer exercises control or direction in a person’s hours of work
- (iii) Person forms part of the organisation
- (iv) An average of 40 hours per month has been worked in the last 3 months
- (v) Person is economically dependent on the provider of work
- (vi) Person is provided with tools and equipment
- (vii) Person only works for one person.

¹⁸ The preamble to the Act reads as follows: “Recognising that, as a result of apartheid and other discriminatory laws and practices, there are disparities in employment, occupation and income within the national labour market; and those disparities create such pronounced disadvantages for certain categories of people that they cannot be redressed simply by repealing discriminatory laws.

Therefore in order to-

promote the constitutional right of equality and the exercise of true democracy; eliminate unfair discrimination in employment;

affirmative action measures.¹⁹ Employment equity and affirmative action are beyond the scope of this contribution and will not be discussed herein.²⁰ The SDA aims to address the severe skills shortage and to provide the South African workforce with skills that are relevant and needed in the labour market. The SDA is also beyond the scope of this contribution.²¹

The discussion that follows is limited to the centrepiece of this transformation process, namely the LRA.

C The Labour Relations Act²²

1 Objectives of the LRA

The objectives of the LRA are rather ambitious and are stated as follows:²³

“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;

ensure the implementation of employment equity to redress the effects of discrimination;
achieve a diverse workforce broadly representative of our people;
promote economic development and efficiency in the workforce;
give effect to the obligations of the Republic as a member of the international labour organisation.”

¹⁹ S 15(1) of EEA.

²⁰ For a discussion of the EEA, see Du Toit *et al Labour Relations Law: A Comprehensive Guide* 4th ed (2003) 589-705; Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* (2004) par 700-751 and Grogan *Workplace Law* (2003) 7th ed 245-270.

For discussion of this Act see Du Toit *et al op cit* 37-38; Grogan *Workplace Law* (2003) 7th ed 8-9.

²² Act 66 of 1995. Only the provisions that deal with collective bargaining will be discussed hereunder i.e. the provisions dealing with unfair dismissals and unfair labour practices will not be addressed here. For a detailed explanation of the provisions of LRA see Grogan *Workplace Law* (2003) 7th ed 103- 374, Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* (2004) par 350- 555; 770- 1039; Du Toit *et al op cit* 165-474; Basson *et al Essential Labour Law* (2003) vol 1 121-302, Brassey *Employment and Labour Law* (2000) section A..

²³ S 1.

- (b) to give effect to the obligations 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;
- (d) 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.”

The emphasis in the LRA is clearly on collective labour law as opposed to individual labour law.²⁴ The Act contains ten chapters. Chapter I is entitled “Purpose, Application and Interpretation”. Chapters II to VII inclusive all deal with collective issues. Chapter III, which is the longest chapter of the Act, is titled “Collective Bargaining”. Chapter VII deals with dispute resolution procedures, chapter VIII deals with individual labour law and covers unfair dismissals, while chapter IX is titled “General Provisions”. In short, only one chapter, a relatively short one at that, (chapter VIII) deals with individual labour matters while six of the chapters deal with collective issues.

The backbone of the LRA is its emphasis on collective bargaining especially at industrial or sectoral level.²⁵ The intention of the legislature was to create an orderly collective bargaining system with an emphasis on centralised bargaining forums representing all sectors.²⁶ It appears that the most important means of achieving the stated objectives of social justice, economic development and so

²⁴ See Mischke "Getting a Foot in the Door: Organisational Rights and Collective Bargaining in Terms of the LRA" 2004 *Contemp LL* vol 13 6 51.

²⁵ See Grogan *Workplace Law* (2003) 7th ed 293, 274.

²⁶ See Du Toit *et al op cit* 41, 244.

forth was perceived to be through collective bargaining especially at sectoral or industry level.²⁷

The LRA provides a framework that is conducive to collective bargaining.²⁸ It provides for simple registration procedures for trade unions and employers organisations;²⁹ the application of the principle of freedom of association;³⁰ the granting of extensive organisational rights to sufficiently representative trade unions,³¹ the creation of *fora* for collective bargaining;³² and the right to strike supplemented by the protection of employees from dismissal for partaking in a strike.³³

The hope of the legislature was that this enabling framework would result in employers and trade unions setting conditions of work in the different sectors and resolving their own disputes, thus resulting in social justice and economic development.³⁴

2 Freedom of Association³⁵

2.1 General

An entire chapter in the LRA is dedicated to the freedom of association.³⁶ This is in line with South Africa's obligations as a member of the International Labour

²⁷ See s 1(d) (ii).

²⁸ See Grogan *Workplace* 299, Du Toit *et al op cit* 167, Basson *et al op cit* vol 2 22-24.

²⁹ S 96.

³⁰ Ch II

³¹ Ch III part A.

³² Ch II part C, D and E.

³³ Ch IV.

³⁴ See Grogan *Workplace* 304; Du Toit *et al op cit* (2003) 227.

³⁵ For a discussion of this fundamental right see Basson *et al op cit* vol 2 26-34, Du Toit *et al op cit* 169-182, Brassey *op cit* A2 1-17, Van Jaarsveld, Fourie and Olivier *op cit* par 356-359, 370.

³⁶ See ch II.

Organisation³⁷ (ILO) and the Bill of Rights.³⁸ The concept of ‘freedom of association’ was given content in terms of s 23(2)-(5) of the Constitution as follows:

- “(2) Every worker has the right-
- (a) to form and join a trade union;³⁹
 - (b) to participate in the activities and programmes of a trade union;⁴⁰ and
 - (c) to strike.⁴¹
- (3) Every employer has the right -⁴²
- (a) to form and join an employers’ organisation; and⁴³
 - (b) to participate in the activities and programmes of the employers’ organisation.⁴⁴
- (4) Every trade union and every employers’ organisation has the right-⁴⁵
- (a) to determine its own administration, programmes and activities;⁴⁶
 - (b) to organise;⁴⁷
 - (c) to bargain collectively;⁴⁸ and

³⁷ ILO *Convention 87 Freedom of Association and Protection of the Rights to Organize* (1948).

³⁸ S 23 of the Constitution of South Africa Act 108 of 1996.

³⁹ In *SA National Defence Union v Minister of Defence & another* 1999 20 ILJ 2265 (CC) the Constitutional Court upheld an application challenging the constitutionality of a provision in the Defence Act 44 of 1957 that prohibited members of the South African National Defence Force from joining trade unions or participating in trade union activities. See also Basson "Die Vryheid om te Assosieer" 1991 SAMLJ 181-182. See also *Bader Bop (Pty) Ltd & another v National Bargaining Council & others* 2001 220 ILJ 2431 (LC); *Bader Bop (Pty) Ltd v National Union of Metal Workers of SA & others* 2002 23 ILJ 104 (LAC); *National Union of Metal Workers of SA v Bader Bop (Pty) Ltd & another* 2003 ILJ 305 (CC); Le Roux "Organisational Rights" 1993 *Contemp LL* 2 109.

⁴⁰ *SA National Defence Union v Minister of Defence & another op cit supra*

⁴¹ S 64(1) of the LRA; s 23(2) (c) of Constitution of the RSA Act 108 of 1996; Maserumule "A Perspective on Developments in Strike Law" 2001 ILJ 45; Brassey "The Dismissal of Strikers" 1990 ILJ 233; Van Jaarsveld, Fourie and Olivier *op cit* par 908; Craemer "Towards Asymmetrical Parity in the Regulation of Industrial Action" 1998 ILJ 1; Du Toit *et al Labour Relations Law: A Comprehensive Guide* 4th ed (2003) 273.

⁴² S 6 (1) (a) (b) of the LRA also provides for these rights.

⁴³ S 23(2).

⁴⁴ S 23(3).

⁴⁵ S 8 of the LRA also provides for similar rights which are discussed *infra*.

⁴⁶ S 23(4).

⁴⁷ S 23(4).

⁴⁸ S 23(5).

- (d) to form and join a federation.⁴⁹
- (5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining.⁵⁰
- (6) The provisions of the Bill of Rights do not prevent legislation recognising union security arrangements contained in collective agreements."⁵¹

The rights provided for in terms of the Bill of rights are also of relevance to individuals, trade unions and employer organisations in cases where the LRA is not applicable. In such situations an aggrieved party can rely on the rights provided for in terms of the Constitution.⁵²

In terms of the LRA freedom of association for an employee entails the following rights:⁵³

- (i) The right to participate in the founding of a trade union;⁵⁴
- (ii) the right to join a trade union of his/her choice;⁵⁵
- (iii) the right to participate in trade union activities;⁵⁶

⁴⁹ S 23(4).

⁵⁰ In *SA National Defence Union & another v Minister of Defence* 2003 24 ILJ 2101 (T) the court held that since s 23(5) of the Constitution granted trade unions, employers' organisations and employers the right to engage in collective bargaining it followed that the Minister of defence had a correlative duty to engage in the process of collective bargaining with the union. See also *Bader Bop (Pty) Ltd & another v National Bargaining Council & others supra*; *Bader Bop (Pty) Ltd v National Union of Metal Workers of SA & Others* 2002 ILJ 104 (LAC); *National Union of Metal Workers of SA v Bader Bop (Pty) Ltd & Another* 2003 ILJ 305 (CC); Van Jaarsveld "Reg op Kollektiewe Bedinging: Nog Enkele Kollektiewe Gedagtes" 2004 *De Jure* 349.

⁵¹ Closed shops and agency shops are discussed *infra*, under sub-heading 3.4.

⁵² *SA National Defence Union v Minister of Defence* cases *supra*.

⁵³ See Du Toit *et al op cit* (2003) 170-172; Grogan *Workplace Law* (2003) 7th ed 277.

⁵⁴ S 4(1) (a); *SANDU v Minister of Defence* [1999] 6 BCLR 615 (CC).

⁵⁵ S 4(1)(b); see also *MEWSA v Alpine Electrical Contractors* 1997 ILJ 1430 (CCMA); *Oostelike Gauteng Diensteraad v Tvl Munisipale Pensioenfonds* 1997 ILJ 68 (T); *SA Defence Union v Minister of Defence* 1999 ILJ 299; *Nkutha v Fuel Gas Installations (Pty) Ltd* 2000 ILJ 218 (LC); Le Roux "Trade Union Rights for Senior Employees" 2000 CLL 58; Grogan "Double Cross - Manager's Right to Hold Union Office" 1999 EL 5; *FGWU v Minister of Safety and Security* [1999] 4 BCLR 615 (CC).

⁵⁶ S 4(2) (a).

- (iv) the right to participate in the election of trade union officials and office bearers;⁵⁷
- (v) the right to be appointed as an office-bearer, official or trade union representative.⁵⁸

Furthermore, no employee or job applicant may be prevented from being a trade union member or becoming a trade union member or exercising any rights granted in terms of LRA.⁵⁹ No employee or job applicant can be prejudiced against by an employer on account of the exercise of his/her association rights.⁶⁰

3 Organisational Rights⁶¹

3.1 Prerequisites for Acquisition of Organisational Rights

Organisational rights can be acquired by a trade union⁶² in terms of a collective agreement.⁶³ The statutory organisational rights act as a floor or minimum which can be demanded under certain circumstances (which will be discussed hereunder), and there is nothing precluding the existence of a collective agreement granting a trade union(s) more extensive organisational rights.⁶⁴

⁵⁷ S 4(2) (b).

⁵⁸ S 4(2) (c) and (d); *IMATU v Rustenburg Transitional Council* [1999] 12 *BLLR* 1299 (LC).

⁵⁹ S 5(2)(c)(i),(ii),(iii); *MEWSA v Alpine Electrical Contractors supra*; *Nkutha v Fuel Gas Installations (Pty) (Ltd) supra*; Grogan "Double Cross - Manager's Right to Hold Office" 1999 *EL* 5.

⁶⁰ S 5(1); *SAUJ v SABC* [1999] 11 *BCLR* 1137 (LAC).

⁶¹ See generally Du Toit *et al op cit* 198-223; Grogan *Workplace Law* (2003) 7th ed 282-291; Basson *et al Essential Labour Law* (2003) vol 2 35-55; Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* (2004) pars 370-387; Brassey *op cit* (2000) A3: 1-35; Thompson and Benjamin *South African Labour Law* (1997) AA2-5- AA2-11.

⁶² For a discussion on the definition of a trade union, see s 213 of the LRA and Du Toit *et al op cit* 167-168.

⁶³ S 21. See also Mischke "Getting a Foot in the Door: Organisational Rights and Collective Bargaining in Terms of the LRA" 2004 *Contemp LL* vol 13 No 6 51 53-60 for a discussion on the acquisition of organisational rights; Du Toit *et al op cit* 201-205; Van Jaarsveld, Fourie and Olivier *op cit* pars 372A-375 for an explanation of the different ways of acquiring organisational rights.

⁶⁴ Du Toit *et al op cit* 202.

Where an employer refuses to grant such organisational rights they can be obliged to, provided the union is registered⁶⁵ and it possesses the required threshold of representivity at the employer's workplace⁶⁶ for the organisational right(s) it seeks to enforce. Different thresholds of representivity are required for the different organisational rights. However unions that are parties to a bargaining council or a statutory council automatically have rights of access⁶⁷, and rights to stop order facilities⁶⁸, irrespective of the extent of their representivity⁶⁹.

3.2 Specific Rights

The LRA provides for the following organisational rights:⁷⁰

- (i) access to the employers premises for the purpose of recruiting new members and servicing their members⁷¹
- (ii) stop order facilities⁷²
- (iii) unpaid leave for union office bearers⁷³
- (iv) the right to elect a prescribed number of trade union representatives (shop stewards) depending on the number of employees⁷⁴

⁶⁵ For an explanation of the process of registration see Van Jaarsveld, Fourie and Olivier *op cit* pars 388-393; Du Toit *et al op cit* 183-185.

⁶⁶ For a discussion on the meaning of 'workplace', see Du Toit *et al op cit* 203-204; *Oil, Chemical, General and Allied Workers Union and Volkswagen of SA (Pty) Ltd* 2000 ILJ 220; *SACCAWU v Specialty Stores (Pty) Ltd* [1998] 4 BCLR 352 (LAC); *OCGAWU v Total SA (Pty) Ltd* [1999] BCLR 678 (CCMA); (2002) EL vol 18.

⁶⁷ S 12.

⁶⁸ S 13.

⁶⁹ S19.

⁷⁰ Ch III part A sections 11-19.

⁷¹ S 12; *UPUSA v Komming Knitting* [1997] 4 BLLR 508 (CCMA).

⁷² S 13; *UPUSA v Komming Knitting supra*; *NPSU v National Negotiating Forum* 1999 ILJ 1081 (LC); *SACTWU v Marley (SA) (Pty) Ltd t/a Marley Flooring (Mobeni)* 2000 ILJ 425 (CCMA).

⁷³ S 15; *NUMSA v Exacto Craft (Pty) Ltd* 2000 ILJ 2760 (CCMA); *CWIU v Sanachem* 1998 ILJ 1638 (CCMA).

⁷⁴ S 14(2); *SACCAWU v Woolworths (Pty) Ltd* 1998 ILJ 57 (LC); *SATAWU and Autonet* [2000] 7 BLLR 83 (IMSSA). See also *Bader Bop (Pty) Ltd & Another v National Bargaining Council & Others supra*; *Bader Bop (Pty) Ltd v National Union of Metal Workers of SA & Others supra*; *National Union of Metal Workers of SA v Bader Bop (Pty) Ltd & Another supra*; Bosch "Two Wrongs Make it More Wrong, or a case for Minority Rule" 2002 SALJ 501; Grogan "Organisational Rights and the Right to Strike" 2002 11(7) *Contemp LL* 69; Grogan "Wagging the Dog: Minority Unions Strike Back" 2003 EL 19(1) 10; Grogan "Minority Unions (1): No Right to

- (v) paid time off for union representatives for the purpose of undergoing training for their union responsibilities⁷⁵
- (vi) the right of union representatives to monitor union compliance with labour laws⁷⁶ and access to information necessary for the performance of these functions⁷⁷
- (vii) the right to access to information which is necessary for meaningful negotiation and consultation.⁷⁸

3.3 Organisational Rights and Union Representativeness⁷⁹

A registered union that is 'sufficiently representative'⁸⁰ (which term is not defined in the Act) or two or more unions that are jointly 'sufficiently representative' have the right to the following organisational rights:

- (i) access to the workplace;⁸¹
- (ii) stop order facilities;⁸² and
- (iii) leave for trade union activities.⁸³

Strike" 2002 18(1) *EL* 4; Grogan "Minority Unions (2): Raising the Threshold" 2002 18(1) *EL* 10.

⁷⁵ S 14(5); *NACTWUSA v Waverley Blankets Ltd* 2000 *ILJ* 1910 (CCMA).

⁷⁶ S 14(4).

⁷⁷ S 16(2).

⁷⁸ S 16; *NUMSA v Atlantis Diesel Engines (Pty) Ltd* 1993 *ILJ* 642 (LAC); *Atlantis Diesel Engines (Pty) Ltd v NUMSA* 1994 *ILJ* 1247 (A); *NEWU v Mintroad Saw Mills (Pty) Ltd* 1998 *ILJ* 95 (LC).

See in general Du Toit *et al Labour Relations Law: A Comprehensive Guide* 4th ed (2003) 205 -209.

⁸⁰ See *SACTWU v Marley supra*; *SACTWU v Sheraton Textiles (Pty) Ltd* [1997] 5 *BLLR* 662 (CCMA); *Bader Bop (Pty) Ltd & Another v National Bargaining Council & others supra*; *Bader Bop (Pty) Ltd v National Union of Metal Workers of SA & Others supra*; *National Union of Metal Workers of SA v Bader Bop (Pty) Ltd & Another supra*; *Bosch loc cit*; Grogan "Organisational Rights" 69; Grogan "Wagging the Dog" 10; Grogan "Minority Unions(1)" 4; Grogan "Minority Unions (2)" 10.

⁸¹ S 12; *SACTW U v Marley supra*; *NUMSA & others v Eberspacher SA (Pty) Ltd* 2003 *ILJ* 1704 (LC); *UPUSA v Komming Knitting supra*.

⁸² S 13; *UPUSA v Komming Knitting supra*, *SACTWU v Marley supra*; *NPSU v National Negotiating Forum supra*; *SACTWU v Sheraton Textiles supra*; *OCGAWU v Woolworths (Pty) Ltd* [1999] *BALR* 813 (CCMA).

⁸³ S 15; *NACTWUSA v Waverley Blankets Ltd supra*; *FAWU v Bokomo Feeds* [2001] 6 *BALR* 599 (CCMA); *NUMSA v Exacto Craft (Pty) Ltd* [2000] 11 *BALR* 126 (CCMA).

These rights are subject to “conditions as to time and place that are reasonable” and necessary to safeguard life or property or to prevent the undue disruption of work.⁸⁴

Majority representative trade unions have the right to the abovementioned organisation rights in addition to:

- (i) the right to elect trade union representatives;⁸⁵ and
- (ii) the right of access to information.⁸⁶

A majority representative trade union is a union or a number of unions acting jointly that represent 50% plus one of the employees at a particular workplace.⁸⁷ A ‘sufficiently representative’ trade union is not defined in the Act. Arbitrators dealing with disputes over whether a union is sufficiently representative “must seek to:

- (i) minimise the proliferation of trade union representation in a single workplace and, where possible, to encourage a system of a representative trade union in a workplace,⁸⁸ and
- (ii) to minimise the financial and administrative burden of requiring an employer to grant organisational rights to more than one registered trade union”.⁸⁹

⁸⁴ S 12(4); *NUMSA & others v Eberspacher supra*; *NF Dye Casting (Pty) Ltd (Wheel Plant) v NAWUSA* [1998] 2 *BALR* 60 (CCMA).

⁸⁵ These trade union representatives may assist employees at grievance and disciplinary procedures; monitor an employer’s compliance with employment laws and collective agreements; report workplace contraventions to their union and the responsible authorities; perform any other function agreed to by the employer and union concerned.

⁸⁶ S 16; See Brand and Cassim "The Duty to Disclose - A Pivotal Aspect of Collective Bargaining" 1980 *ILJ* 249; Rycroft "The Duty to Bargain in Good Faith" 1998 *ILJ* 202; Landman "Labour's Right to Employer Information" 1996 *Contemp LL* 21; Promotion of Access to Information Act 2 of 2000; *CWIU v Sanachem* [1998] 7 *BALR* 827 (CCMA); *NACTWUSA v Waverley Blankets* [2000] 6 *BALR* 692 (CCMA).

⁸⁷ S 14; Regarding the concept 'workplace', see *OCGAWU v Total SA (Pty) Ltd* 1999 *ILJ* 2176 (CCMA); *Specialty Stores v CCAWU* 1997 *ILJ* 192 (LC); *FAWU v Wilmark (Pty) Ltd* 1998 *ILJ* 928 (CCMA); *SACTWU v The Hub* 1999 *ILJ* 479 (CCMA); *OCGAWU v Volkswagen of South Africa (Pty) Ltd* 2002 *BLLR* 60 (CCMA).

⁸⁸ *OCGAWU v Woolworths (Pty) Ltd* [1999] 7 *BALR* 813 (CCMA).

The commissioner (arbitrator) is also obliged to consider:⁹⁰

- (i) the nature of the workplace
- (ii) the nature of the organisational rights sought
- (iii) the nature of the sector
- (iv) the organisational history of the workplace or of any other workplace of the employer.⁹¹

However, the parties to a bargaining council⁹² or a majority representative trade union, may by collective agreement with the employer establish the thresholds of representativeness for the acquisition of organisational rights.⁹³

As discussed above, once it is established or accepted that a trade union is 'sufficiently representative' or that it represents the majority of the employees at a particular workplace that union is entitled to certain organisational rights. Where it is accepted that such trade union is not 'sufficiently representative', the question as to whether that union will be in a position to embark on protected strike action in order to demand certain organisational rights has arisen. Recently the Labour Court,⁹⁴ the Labour Appeal Court⁹⁵ and the Constitutional Court⁹⁶ have all had an opportunity to pronounce on this vexed issue.⁹⁷ These decisions all concerned the same set of facts: Bader Bop (Pty) Ltd employed 1 108 employees. The majority of

⁸⁹ S 21 (8) (a); See also *SACTWU v Sheraton Textiles supra*; *SACTWU v Marley supra*; *SADTU v Ebrahim's Taxis* [1998] 11 BALR 1480 (CCMA); *SACCAWU v The Hub* [1998] 12 BALR 1590 (CCMA).

⁹⁰ S 21(8) (b); *SACTWU v Sheraton Textiles supra*; *SACTWU v Marley supra*.

⁹¹ *SACTWU v Sheraton Textiles supra*; *SACTWU v Marley supra*; *CCAWU v Specialty Stores* 1998 ILJ 557 (LAC); *SACCAWU v The Hub supra*.

⁹² Bargaining councils are forums for collective bargaining at sectoral level and are discussed hereunder in par 4.

⁹³ S 18.

⁹⁴ *Bader Bop (Pty) Ltd & Another v National Bargaining Council & Others* 2001 ILJ 2431 (LC).

⁹⁵ *Bader Bop (Pty) (Ltd) v National Union of Metal & Allied Workers of SA & Others* 2002 ILJ 104 (LAC).

⁹⁶ *National Union of Metal & Allied Workers of SA v Bader Bop (Pty) Ltd & Another* 2003 ILJ 305 (CC).

⁹⁷ Grogan "Organisational Rights and the Right to Strike" 2002 *Contemp LL* 11(7) 69.

these employees belonged to GIWUSA, a registered trade union, while another registered trade union, NUMSA, had a membership of 26% of the total workforce. Bader Bop (Pty) Ltd had granted GIWUSA as a majority union the organisational right provided for in s 14 of the LRA⁹⁸. NUMSA had been granted the organisational rights in terms of s12⁹⁹ and s13¹⁰⁰ but not those in terms of s14. NUMSA demanded s14 organisational rights and Bader Bop refused to grant them these rights on the basis that only majority representative trade unions are entitled to these rights. The union declared a dispute over the question of organisational rights and referred the matter to the CCMA. The matter remained unresolved and the union informed Bader Bop (Pty) Ltd of its intention to embark on strike action in support of its demand to be granted the right to elect trade union representatives.

Bader Bop (Pty) Ltd approached the Labour Court for an interdict prohibiting the strike. The application was dismissed whereupon Bader Bop appealed to the Labour Appeal Court. The majority view of the Labour Appeal Court per Zondo JP and Du Plessis AJA was that only majority representative trade unions are entitled to the organisational rights provided for in terms of s 14 and that consequently, trade unions that do not enjoy majority representation can neither demand these organisational rights and nor can they embark on lawful strike action to pursue such a demand. Although Du Plessis AJA conceded that the LRA does not specifically preclude trade unions that are not sufficiently representative from attaining organisational rights through collective bargaining, or even striking, he nevertheless concluded that such insufficiently representative trade unions were precluded from embarking on protected strike action to attain organisational rights. The basis for this conclusion is that this would be tantamount to permitting trade

⁹⁸ These rights relate to the election of trade union representatives.

⁹⁹ These rights relate to access to employer premises. Grogan "Wagging the Dog: Minority Unions Strike Back" 2003 *EL* 19 1) 10; Grogan J "Minority Unions (1): No Right to Strike" 2002 *EL* 18(1) 4; Grogan "Minority Unions (2): Raising the Threshold" 2002 *EL* 18(1) 10.

¹⁰⁰ These rights relate to deduction of union subscriptions from employees who are members of a 'sufficiently representative' trade union.

unions to circumvent the provisions of part A of ch III of the LRA.¹⁰¹ In his view the purpose of these provisions is to avoid disputes and therefore to allow trade unions the ability to ignore these provisions would render these provisions meaningless. Both Zondo JP and Du Plessis AJA therefore concluded that this limitation on the right to strike did not constitute an unacceptable inroad into the constitutional right to strike.

Davis AJA delivered a dissenting minority judgment. He stated:¹⁰²

“The argument in favour of prohibition must run as follows: A strike can only take place regarding an issue in dispute. The issue in dispute concerns organisational rights as contained in part A of chapter III. The only dispute which can take place insofar as those rights are concerned is a dispute regarding representivity. Once a union concedes that it is not sufficiently representative as defined in the Act, there can be no issue in dispute regarding the obtaining of such rights. Accordingly there can be no right to strike for there is no issue in dispute of a kind which would give rise to the right to strike in terms of s 64 of the Act. This argument misconstrues the nature of the dispute in the present case. In the present case respondents employed industrial action namely a strike, in order to fortify a demand that certain union members be afforded representative status so that they too could perform some or all of the functions which trade union representatives have the right to perform in terms of s 14 of the Act.” Davis AJA then concluded that it would constitute an unjustified limitation on the constitutional right to strike to read such limitation on the right to strike into the LRA.

The matter was then referred to the Constitutional Court. The applicants argued that the interpretation of the Labour Appeal Court of the relevant provisions of the LRA constituted an inroad into the constitutional right to strike, or, in the alternative, that if such interpretation was correct, the LRA was unconstitutional in that it unjustifiably limited the right to strike. O’Regan J, for the majority of the court

¹⁰¹ In terms hereof, where there is a dispute as to whether a trade union is sufficiently representative the matter must be determined by means of arbitration provided the conciliation procedure did not result in settlement of the matter.

¹⁰² 140 G-J.

emphasized the relevance of the right to strike as part and parcel of any successful system of collective bargaining. The court opined that there is nothing in part A of chapter III of the Act that precludes unions that admittedly do not meet the requisite threshold membership levels from concluding a collective agreement with the employer in terms of which they are granted these rights. In the light of the purpose of the LRA as contained in s 1 and South Africa's obligations in terms of international law, and the fact that the right to strike is part of the collective bargaining system, the court preferred a more expansive interpretation of the LRA that would not limit the constitutional right to strike.

It is my view that the fact that the LRA provides for the dispute resolution process of conciliation followed by arbitration in order to establish whether a union meets the required threshold of representivity, does not prevent a union that admittedly does not meet that required threshold of representivity from pursuing those rights by means of collective bargaining and hence striking. This must be so because the LRA specifically provides that a union can obtain organisational rights in terms of a collective agreement.¹⁰³ In other words, what is arbitrable is whether or not the trade union is sufficiently representative, not whether the employer should grant the union the organisational rights it demands. In *casu* the trade union conceded that it was not sufficiently representative, but it nevertheless wanted the organisational rights that majority representative trade unions are automatically entitled to. Whether or not the employer should grant a union which is not 'sufficiently representative' these organisational rights is not an arbitrable issue and therefore it is an issue that is subject to collective bargaining and ultimately, if the union deems it necessary, a strike. The fact that trade unions that represent a minority of the employees do not automatically become entitled to these rights does not signify that they cannot become entitled to them through the process of collective bargaining.¹⁰⁴

¹⁰³ S 20; see also *Federal Council of Retail and Allied Workers v Edgars Consolidated Stores* 2002 ILJ 1796 (LC).

¹⁰⁴ See O'Regan's judgement in *National Union of Metal & Allied Workers of SA v Bader Bop (Pty) Ltd & Another* 2003 ILJ 305 (CC) and the dissenting judgement of

3.4 Closed Shops and Agency Shops¹⁰⁵

The LRA makes provision for both closed shops¹⁰⁶ and agency shops¹⁰⁷. Only trade union(s) that represent a majority of the workers at a workplace may enter into such collective agreements with the employer.¹⁰⁸ A closed shop agreement is an agreement between an employer and a majority representative trade union (or 2 or more unions acting jointly that represent a majority) in terms of which all employees at the particular workplace are obliged to become members of the trade union or one of the trade union acting jointly.¹⁰⁹ An agency shop agreement is an agreement between an employer and a majority representative trade union or number of trade unions acting jointly which together represent a majority, in terms of which all employees at a particular workplace are obliged to pay union fees irrespective of whether they are union members¹¹⁰. The provision regarding the granting of organisational rights and closed shops and agency shops demonstrate the legislature's preference for majoritarianism, an attempt to prevent a proliferation of smaller trade unions, and a definite bias in favour of the creation and maintenance of power of the super unions.¹¹¹

Davis AJA in *Bader Bop (Pty) Ltd v National Union of Metal & Allied Workers of SA & Others* 2002 ILJ 104 (LAC).

¹⁰⁵ See generally Basson *et al Essential Labour Law* (2003) vol 2 69-75; Grogan *Workplace Law* (2003) 7th ed 175-181; Brassey *Employment and Labour Law* vol 3 A3: 44- A3: 57; Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* (2004) par 360-368; Landman "The Closed Shop Born Again: A Surprise From the New LRA" 1995 *EL* 10.

¹⁰⁶ S 26(1).

¹⁰⁷ S 25(1).

¹⁰⁸ S 25(2) and S 26(2); *National Manufactured Fibres Association v Bikwani* [1997] 10 *BLLR* 1076 (LC).

¹⁰⁹ The constitutionality of such agreements has often been questioned. See Du Toit *et al Labour Relations Law: A Comprehensive Guide* 4th ed (2003) 175-178 (closed shops) and 179-181 (agency shops); and Olivier and Potgieter "The Right to Associate Freely and the Closed shop" 1994 *TSAR* 289-305 and 1994 *TSAR* 443-469.

¹¹⁰ For discussion of the statutory requirements for closed and agency shop agreement see *National Manufactured Fibres Association v Bikwani supra* and Du Toit *et al op cit* 175-177 and 179-180.

¹¹¹ Despite this theme of majoritarianism throughout the LRA, as seen above under the sub-heading "Prerequisites for the Acquisition of Organisational Rights", the Constitutional Court in the case of *National Union of Metal Workers of SA v Bader*

As will be seen hereunder the theme of majoritarianism is repeated with reference to the creation of *fora* for collective bargaining such as bargaining councils and workplace forums.

4 Forums for Collective Bargaining

4.1 General

Aside from the provision of organisational rights and the protection of freedom of association the Act makes provision for *fora* for collective bargaining as well as the enforcement of collective agreements. The Act unashamedly encourages collective bargaining particularly at sectoral or industrial level.¹¹² It provides for the creation of bargaining councils and statutory councils.

4.2 Bargaining Councils

The key institution of the LRA is the bargaining council. Its primary functions are collective bargaining, the conclusion of collective agreements and the resolution of

Bop (Pty) Ltd supra nevertheless held that it was not unlawful for a trade union that did not enjoy majority representation at a particular workplace to pursue the attainment of organisational rights ordinarily reserved for majority representative trade unions by means of collective bargaining and consequently and ultimately strike action.

¹¹² S1(d)(ii) of LRA provides that one of the purposes of the LRA is “to promote collective bargaining at sectoral level; see also O’Regan J in *National Union of Metal Workers of SA & another v Bader Bop (Pty) Ltd supra* at 322 where she states: “Finally the Act seeks to promote orderly collective bargaining with an emphasis on bargaining at sectoral level...”. In *Milltrans and National Bargaining Council for the Road Freight Industry 2002 ILJ 1930 (BCA)*, and *Ram International Transport (Pty) Ltd & National Bargaining Council for the Road Freight Industry 2002 ILJ 1943 (BCA)* where in both instances exemption from a bargaining council collective agreement by a non-party was sought, and the exemption body justified its refusal to grant exemption on the basis that the principle of centralized collective bargaining is a paramount and primary objective of the LRA. In *Profal (Pty) Ltd & National Entitled Workers Union 2003 ILJ 2416 (BCA)*, a bargaining council agreement had been extended to non-parties, these non-parties were bound by the provisions in the agreement prohibiting plant-level bargaining. See also Du Toit *et al op cit* 29-30 and Grogan *Workplace* 293.

disputes.¹¹³ Bargaining councils are voluntarily created, on application by one or more registered trade unions and one or more registered employers' organizations and/or the state if it is an employer in the sector and area for which the bargaining council is established.¹¹⁴

Collective agreements reached at a bargaining council are binding on the following parties:

- (i) the parties to the bargaining council who are also parties to the collective agreement;

¹¹³ The functions of bargaining councils are provided for in s 28 as follows:

- (a) to conclude collective agreements;
- (b) to enforce those collective agreements;
- (c) to prevent and resolve labour disputes;
- (d) to perform the dispute resolution functions referred to in section 51;
- (e) to establish and administer a fund to be used for resolving disputes;
- (f) to promote and establish training and education schemes;
- (g) to establish and administer pension, provident, medical aid, sick pay, holiday, unemployment and training schemes or funds or any similar schemes or funds for the benefit of one or more of the parties to be bargaining council or their members;
- (h) to develop proposals for submission to the National Economic, Development and Labour Council or any appropriate forum on policy and legislation that may affect the sector and area;
- (i) to determine by collective agreement the matters which may not be an issue in dispute for the purposes of a strike or lock-out at the workplace; and
- (j) to confer on workplace forums additional matters for consultation."

See also *Adonis v Western Cape Education Department* 1998 ILJ 806 (LC); *Kemlin Fashions CC v Brunton* 2000 ILJ 1357 (LC), 2000 ILJ 109 (LAC); *KwaZulu-Natal v Sewtech CC* 1997 ILJ 1355 (LC); *Mandhla v Belling* [1997] 12 BLLR 1605 (LC); *Seardele Groups Trading (Pty) Ltd v Andrews NO* [2000] 10 BLLR 1605 (LC); *Portnet v La Grange* 1999 ILJ 916 (LC); *NUMSA v Driveline Technologies (Pty) Ltd* 1999 ILJ 2900 (LC), 2000 ILJ 142 (LAC); *BCFMI v Unique Kitchen Designs* 2000 ILJ 419 (CCMA). The 2002 amendments to the LRA have further extended the functions of bargaining councils to include (s 33 of Act 12 of 2002):

- (i) the provision of industrial support services; and
- (ii) the extension of the service and functions of bargaining councils to informal and domestic workers.

¹¹⁴ S 27. For a detailed explanation concerning the procedures and requirements for the establishment of a bargaining council see Du Toit *et al op cit* 245-247 Van Jaarsveld, Fourie and Olivier *op cit* pars 439-450.

- (ii) each party to the collective agreement and the members of every other party to the collective agreement in so far as the provisions thereof apply to the relationship between such a party and the members of such other party; and
- (iii) the members of a registered trade union that is a party to the collective agreement and the employers who are members of a registered employers' organisation that is such a party,
- (iii) if the collective agreement regulates –
 - (aa) terms and conditions of employment; or
 - (bb) conduct of the employers in relation to their employees or the conduct of the employees in relation to their employers.¹¹⁵

Section 32 of the LRA provides that a collective agreement reached at a bargaining council can be extended and made applicable to non-parties who fall within the registered scope of the council provided the following requirements are met:

- (i) One or more unions whose members constitute a majority among the unions which are party to the council, and one or more employers' associations whose members employ the majority of employees employed by party employers, have voted in favour of such extension.¹¹⁶
- (ii) The Minister must be satisfied that the union parties represent a majority of employees within the registered scope of the council and that the employer parties employ a majority of employees in the councils' registered scope.¹¹⁷
- (iii) Non-parties to whom the request is applicable fall within the registered scope of the council.¹¹⁸

¹¹⁵ S 32; See as well *Bargaining Council in the Clothing Industry (Natal) v COFESA* 1999 ILJ 1695 (LAC).

¹¹⁶ S 32(1) (a) and (b).

¹¹⁷ S 32(3) (b) and (c).

¹¹⁸ S 32(3) (d).

- (iv) Originally the Act provided that the agreement should make provision for exemption to be granted by an independent body. However, the 1998 amendments to the Act provide that applications for exemptions must be made to the council itself. The role of the independent body is now to hear appeals brought against a bargaining council decision not to grant an exemption.¹¹⁹
- (v) The agreement must contain criteria which must be applied in granting such exemptions. Also, there is the requirement that the agreement does not discriminate against non-parties.¹²⁰
- (vi) The Minister can extend a collective agreement where the parties enjoy mere “sufficient representation”, if he is satisfied that failure to extend the agreement would be detrimental to collective bargaining at sectoral level.¹²¹ Since the term “sufficiently representative” is not defined in the Act and the other requirements are also vague and open to subjective interpretation by the Minister, the Minister has *quasi* legislative power to impose the terms of collective agreements on non-parties wherever he deems fit.¹²²

The 2002 amendments to the LRA¹²³ provide bargaining councils with extensive powers for the promotion, monitoring and enforcement of bargaining council

¹¹⁹ S 32(3) (e) and (f); Du Toit *et al Labour Relations Law: A Comprehensive Guide* (2003) 4th ed 266.

¹²⁰ S 32(3) (a).

¹²¹ S 32(5).

¹²² See Du Toit *et al op cit* 266-267 where the view is taken that the extension of an agreement of a bargaining council whose parties are merely sufficiently representative "is particularly vulnerable to Constitutional challenges on the grounds of violation of the employer's property rights or the right to engage in economic activity." In *Bargaining Council for the Contract Cleaning Industry and Gedeza Cleaning Services & Another 2003 ILJ 2017 (CCMA)* the argument that if a bargaining council agreement is extended to non-parties in terms of s 32 of the LRA, this would offend against the employer's constitutional right to free economic activity, was put forward by the employer.

¹²³ S 33 inserted in terms of the Labour Relations Amendment Act 12 of 2002 provides for the appointment of agents to promote, monitor and enforce compliance with bargaining council agreements. It further provides that an agent may:

- (i) publicize the contents of an agreement

agreements. According to commentators “this provision addresses difficulties experienced by many bargaining councils seeking to enforce the terms of their collective agreements. One of the significant policy considerations underlying the LRA 1995 was to decriminalize labour law. The Act gave effect to this policy by abolishing the jurisdiction of the criminal courts in respect of failures to comply with a collective agreement entered into by a bargaining council and introduced a system of arbitration to enforce these agreements. In many instances this created practical difficulties for councils that lacked the infrastructure to establish panels of arbitrators, and in some instances bargaining councils appointed their own officials as arbitrators, thus becoming judges in their own cause....”¹²⁴

4.3 Statutory Councils

- (ii) conduct inspections
- (iii) investigate complaints
- (iv) use any other means adopted by the council for enforcement
- (v) perform any other functions conferred or imposed by the council.

124

See Van Niekerk and Le Roux “A Comment on the Labour Relations Amendment Bill 2001 and the Basic Conditions of Employment Bill 2001” 2001 *ILJ* 2164, 2165-2166 ; Du Toit *et al op cit* 267-268 state the following in this regard: "Against a background of controversy surrounding the enforcement of bargaining council agreements the 2002 amendments to the LRA inserted a provision that, despite any other provision of the Act, a bargaining council may monitor and enforce compliance with its collective agreements [s 33A(1)]. The amendments fill a hiatus that has existed since the LRA took effect. Prior to the amendment, bargaining councils were confined to requesting the Minister of Labour to appoint designated agents with powers of investigation but limited possibilities of enforcement. Section 33 now states that the functions of designated agents are 'to promote, monitor and enforce compliance with the council's collective agreements' [s 33(1)]. A collective agreement may authorise a designated agent to issue compliance orders requiring a person bound by the agreement to comply within a specified period [s 33A (3)]. A designated agent may also secure compliance by publicising the contents of the agreements, conducting inspections, investigating complaints or any other means the council may adopt [s33(1A)(a)]. He/she may also perform any other functions conferred on him/her by the council [s33 (1A) (b)] and exercise the powers set out in Schedule 10 within the council's registered scope [s33 (3)]. Prior to the above amendments it was accepted, though not without controversy, that a council may be party to arbitration proceedings through which it seeks to enforce a collective agreement, at least where arbitration is conducted by an independent body appointed by the council. It is now provided expressly that a council may refer an unresolved dispute regarding compliance with its collective agreement to arbitration by an arbitrator appointed by the council [s33A (4) (a)]. If a party to the dispute who is not a party to the council objects to the arbitrator, the council must request the CCMA to appoint an arbitrator [s33A (4) (a)]. Such an arbitrator must be paid for by the council and the arbitration will not fall under the auspices of the CCMA [s33A (4) (c)]."

The provisions relating to statutory councils were the result of a compromise between government and the big unions to allay union fears that bargaining councils would not do enough to promote centralised collective bargaining.¹²⁵ Only 30% representivity on the part of trade unions and employers organisations is sufficient for the establishment of a statutory council. Its functions are more limited but similar to those of a bargaining council. They also include dispute resolution and the entering into of collective agreements.¹²⁶

Unlike bargaining council membership, which is voluntary, membership of statutory councils by unions or employer organisations can be enforced by ministerial order.¹²⁷ Another inroad into voluntarism and flexibility is the fact that a statutory council that has less than 30% representivity can still impose its agreements on other parties in the sector by submitting the agreements to the Minister, who may promulgate the agreements as if they were determinations under the BCEA.¹²⁸

As seen above, the legislature was intent on enforcing sectoral regulation of conditions of employment by conferring *quasi* legislative powers on the Minister by the extension of bargaining council and statutory council agreements to non-parties in the sector.¹²⁹

4.4 Workplace Forums¹³⁰

¹²⁵ See Grogan *Workplace Law* (2003) 7th ed 302-303.

¹²⁶ In terms of s 43 other functions include the promotion and establishment of training and education schemes, the establishment and the administration of social security schemes. These powers can be extended by agreement (s 43(2)).

¹²⁷ S 41.

¹²⁸ S 44.

¹²⁹ For critical comments regarding these provisions see Barker “The Implications of Labour Legislation for the Performance of the Labour Market” in Finnemore and Van Rensburg *op cit* 2000 156-157; Bendix *Industrial Relations in the New South Africa* (2002) 286-287; Du Toit *et al op cit* 266-267 and Du Toit *et al Protecting Workers or Stifling Enterprise? Industrial Councils and Small Business* (1995) 2-5.

¹³⁰ See generally Grogan *Workplace* 293-298 ; Du Toit *et al Labour Relations Law: A Comprehensive Guide* 4th ed (2003) 323-359; Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* (2004) pars 495-524; Basson *et al Essential Labour Law* (2003) vol 2 182-195.

The idea behind workplace forums is that worker participation will result in workplace democracy¹³¹ which in turn would engender high rates of productivity and labour peace enabling South African companies to compete globally.¹³² The Act makes provision for the establishment of workplace forums¹³³ for the promotion of worker participation at the workplace in order to achieve the legislature's stated objective of workplace democracy.¹³⁴ The intention of the legislature was that there should be a dual system of collective bargaining: more antagonistic forms of negotiation concerning distributive issues such as wages and benefits should not occur at plant level but rather at industrial or sectoral level (i.e. at bargaining councils).¹³⁵ Co-operative joint problem solving and decision making with worker

¹³¹ See Basson *et al op cit* vol 2 25.

¹³² Olivier "Workplace Forums: Critical Questions from a Labour Law Perspective" 1996 *ILJ* 812 813; Finnemore and Van der Merwe *Introduction to Labour Law in South Africa* (1996) 154-155; Bendix *op cit* 338; Summers "Workplace Forums from a Comparative Perspective" 1995 *ILJ* 803 where it is stated "Examination of various labour relations systems shows, I believe that no industrial society can compete and prosper in the world market unless there is cooperation and mutual problem solving between management and workers. Workers – even unskilled and uneducated workers – know things about the reality of production processes in their workplaces, the causes of defective products, lost time and work injuries, and the potential for improvement which management never learns.... Every knowledgeable personnel expert agrees that giving the workers a voice in the decisions which affect their working life is essential for productivity and profitability. And giving workers a voice is equally essential for improving the quality of employees' working life and providing a democratic workplace. The worker's voice cannot be shouts of protest or demands, answered by the employer's assertion of management prerogatives. The workers' voice must be one which answers management's seeking of assistance with a willingness to share in problem solving and a willingness to consider employees not as suppliers of hours of labour but as partners in the enterprise."

¹³³ S 213 defines a workplace as the place or places where the employees of an employer work. If an employer conducts two or more operations that are independent of one another by reason of their size, function or organisation, the place or places where employees work in connection with each independent operation, constitutes the workplace. See also in this regard Van Jaarsveld, Fourie and Olivier *op cit* par 500. Ch V of the LRA regulates workplace forums and defines who an employee is for the purposes of a workplace forum. In this context an employee is any person, except a managerial employee whose contract of employment or status confers the authority to represent the employer in dealings with the workplace forum or determine policy or take decisions that may be in conflict with the representation of the employees in the workplace. See Van Jaarsveld, Fourie and Olivier *op cit* par 499 in this regard.

¹³⁴ See Basson *et al op cit* vol 2 182-183.

¹³⁵ Grogan *Workplace* 293.

participation concerning matters of mutual interest between employer and employees, such as strategic business decisions, the introduction of new technology, health and safety, affirmative action measures and the like should be reserved for collective bargaining at the workplace itself.¹³⁶

Some trade unions especially the larger ones felt that consultative bodies at the workplace might threaten their position in the collective bargaining system.¹³⁷ Trade union leaders felt that a workplace forum might usurp their functions since workplace forums represent all employees irrespective of whether they are trade union members or not.¹³⁸ In order to allay these trade union fears the legislature made provision only for union initiated workplace forums.¹³⁹ Furthermore, in line with the legislature's stance in favour of majoritarianism, only a trade union or a number of trade unions that jointly represent the majority of employees at a workplace can initiate the creation of a workplace forum.¹⁴⁰ Another requirement is that there must be a minimum of 100 employees at the workplace.¹⁴¹

The Act provides for certain matters over which the employer is obliged to:

- (i) consult with the workplace forum;¹⁴²
- (ii) give information to the workplace forum¹⁴³; and
- (iii) make joint decisions with the workplace forum.¹⁴⁴

In line with the legislature's stance on voluntarism the parties can through collective bargaining regulate matters for consultation¹⁴⁵ and joint decision making¹⁴⁶ by the workplace forum.

¹³⁶ Bendix *op cit* 564, 307, 343, 565; Summers "Workplace Forums From a Comparative Perspective" 1995 *ILJ* 803.

¹³⁷ Olivier *op cit* 812 813.

¹³⁸ S 79(a); Van Holdt "Workplace Forums: Can They Tame Management or Not?" (1995) *SA Labour Bulletin* 19(1) 32, 61; Du Toit "Collective Bargaining and Worker Participation" 1996 *ILJ* 1547.

¹³⁹ S 80(2)

¹⁴⁰ S 80(2); See Olivier *op cit* 810-812 for a discussion of the manner in which the LRA provides for majority union preference with reference to workplace forums.

¹⁴¹ S 80(1).

¹⁴² S 84.

¹⁴³ S 89.

¹⁴⁴ S 86.

5 **Collective Bargaining Through Industrial Action**

Without the right to strike, unions have very limited bargaining power in the collective bargaining process.¹⁴⁷ In *National Union of Metal Workers of SA & others v Bader Bop (Pty) Ltd* ¹⁴⁸ the Constitutional Court states: “The right to strike is essential to collective bargaining. It is what makes collective bargaining work. It is to the process of bargaining what an engine is to a motor vehicle”. Van Jaarsveld, Fourie and Olivier explain: “The right to strike must not be seen in isolation but viewed and understood against the background and in the context of employees’ right to associate and organise themselves and then to exercise the right to bargain collectively.”¹⁴⁹ The authors then quote Basson to support their argument: “Once employees are organised in trade unions, they are able to conduct negotiations with the employer on a more or less equal footing. But effective collective bargaining can still take place only if the demands made by the trade union are accompanied by the capacity to embark upon collective action in the form of collective withdrawal of labour as a counterweight to the power of the employer to hire and fire employees or to close its plant.”¹⁵⁰

The Constitution provides that every worker has the right to strike.¹⁵¹ The right to strike is also provided for in the LRA.¹⁵² Although the Constitution does not make provision for the employer’s right to lock out the LRA does; the definition of a lock-

¹⁴⁵ S 84(1).

¹⁴⁶ S 86(1).

¹⁴⁷ *Bendix op cit* 522.

¹⁴⁸ *Supra* 355.

¹⁴⁹ *Op cit* par 908.

¹⁵⁰ Basson “The Dismissal of Strikers in South Africa (Part 1) “ 1992 *SAMLJ* 292.

¹⁵¹ S 23(2) (c); *Ex parte Chairperson Constitutional Assembly: In re Certification of the Constitution of the RSA*, 1996 1996 *ILJ* 821 (CC), *Betha v BTR Sarmcol CA Division of BTR Dunlop Ltd* 1998 *ILJ* 459 (SCA); Maserumule “A Perspective on Developments in Strike Law” 2001 *ILJ* 45; Basson “Die Vryheid om te Assosieer” 1991 *SAMLJ* 181-182.

¹⁵² S 64(1).

out however, is more limited than the definition of a strike¹⁵³ and is consequently of more limited practical application.¹⁵⁴

Where employees strike over matters that they are entitled to strike (*inter alia* disputes of interest),¹⁵⁵ and the prescribed procedure is followed,¹⁵⁶ strikers are protected from dismissal for partaking in the strike, and the employer cannot claim damages for loss of income resulting from the strike either from the trade union(s)

¹⁵³ S 213.

¹⁵⁴ See too s 64(1) of LRA.

¹⁵⁵ S 65 provides:

- (1) No person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if-
 - (a) that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute;
 - (b) that person is bound by an agreement that requires the issue in dispute to be referred to arbitration;
 - (c) the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act;
 - (d) that person is engaged in-
 - (i) an essential service; or
 - (ii) a maintenance service.
- (2)
 - (a) Despite section 65 (1)(c), a person may take part in a strike or a lock-out or in any conduct in contemplation or in furtherance of a strike or lock-out if the issue in dispute is about any matter dealt with in sections 12 to 15.
 - (b) If the registered trade union has given notice of the proposed strike in terms of section 64 (1) in respect of an issue in dispute referred to in paragraph (a), it may not exercise the right to refer the dispute to arbitration in terms of section 21 for a period of 12 months from the date of the notice.
- (3) Subject to a collective agreement, no person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or lock-out-if that person is bound by-
 - (i) any arbitration award or collective agreement that regulates the issue in dispute; or
 - (ii) any determination made in terms of section 44 by the Minister that regulates the issue in dispute; or
 - (iii) any determination made in terms of the BCLA and that regulates the issue in dispute, during the first year of that determination.

¹⁵⁶ S 64 (1); see also Du Toit *et al Labour Relations Law: A Comprehensive Guide* 4th ed (2003) 296; Basson *et al Essential Labour Law* (2003) vol 2 104; Grogan *Workplace Law* (2003) 7th ed 331; Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* (2004) par 916.

or the strikers themselves.¹⁵⁷ Where an employer dismisses an employee for taking part in a protected strike i.e. a strike where the correct procedure has been followed and where striking is the appropriate dispute resolution procedure it will constitute an automatically unfair dismissal.¹⁵⁸

The legislature's stance therefore with reference to industrial action is that it has a legitimate role to play in the system of collective bargaining provided it is preceded by attempts at reaching settlement through negotiation and conciliation and no other remedies are available.¹⁵⁹

D Conclusion

This brief overview of the sections of the LRA that deal with collective labour law serves to demonstrate the legislature's faith in the ability of collective bargaining to achieve the Act's ambitious objectives. The legislature provided a framework which encourages collective bargaining by 'super' unions¹⁶⁰ especially at sectoral level with the intention of achieving the following:

- (i) minimum conditions of work and wages could be collectively bargained and set by employers and trade unions within each sector. This would result in uniformity and equality within industries; and
- (ii) the parties themselves would settle their own disputes resulting in a type of self-governance within industries.¹⁶¹

¹⁵⁷ S 67.

¹⁵⁸ S 187(1) (a); *Adams v Coin Security Group (Pty) Ltd supra*; *SACWU v Afrox Ltd* 1999 ILJ 1718 (LAC).

¹⁵⁹ Grogan *op cit* 326 and Basson *Essential Labour Law* (2002) vol 2 103.

¹⁶⁰ An exception is illustrated by the fact that even unions that do not enjoy 'sufficient representivity' are entitled to bargain collectively with the employer and even strike in order to attain organisational rights (*Bader Bop (Pty) Ltd v National Union of Metal and Allied Workers of South Africa & Others* 2002 ILJ 104); *National Union of Metal & Allied Workers of Sa v Bader Bop (Pty) Ltd & Another* 2003 ILJ 305.

¹⁶¹ See Baskin "South Africa's Quest for Jobs Growth and Equity in a Global Context" 1998 ILJ 986.

Finally as Summers suggests,¹⁶² successful implementation of workplace forums would result in democratisation of the workplace accompanied by enhanced cooperation between the parties and consequently higher rates of productivity.¹⁶³

¹⁶² *Op cit* 812.

¹⁶³ See Basson *et al op cit* vol 2188.

CHAPTER 4

COLLECTIVE BARGAINING

ABRIDGED CONTENTS

	Page
A Introduction	88-90
B Development and Historical Background of Trade Unions	
1 Development of Trade Unions.....	90-92
2 Reasons for Increase in Trade Union Power.....	92-93
3 Historical Background of Trade Unionism in South Africa.....	93-102
C Objectives and the Right to Collective Bargaining	
1 Meaning of the Concept.....	102-103
2 Objectives of Collective Bargaining.....	103-104
3 Right to Collective Bargaining.....	104-105
D Levels and Requirements for Collective Bargaining	
1 Introduction.....	105-106
2 The Position in South Africa.....	106
3 Levels of Bargaining in Foreign Countries.....	106-108
4 Requirements for Collective Bargaining.....	108-112
E Comparative Survey	
1 Sweden.....	112-115
2 Germany.....	115-117
3 United States of America.....	117-119
4 Japan.....	120-121
5 England.....	122-126
6 Belgium.....	126-129
F Conclusion	130-132

A Introduction

The purpose of this chapter is to examine the origins, historical development and functions of trade unions and collective bargaining. A comparative study will be undertaken in order to demonstrate the different systems of collective bargaining that have developed. Explanations for these differences will be put forward. The reasons for the phenomenal growth of trade unions in the era of Fordism will also be examined.¹

One of the major functions of trade unions is that of procuring better working conditions and wages and salaries for its members.² This is achieved through the process of collective bargaining. The most important instrument of serving the interests of the members of trade unions is by collective bargaining. As seen in the previous chapter the LRA strongly supports collective bargaining, especially at sectoral level as the most important mechanism of setting conditions of service.³

The primary role played by collective bargaining in South African labour law in terms of the LRA is extended to non-distributive or production-related issues. This is apparent in the provisions regarding workplace forums.⁴ The collective

¹ See par B *infra*.

² Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* (2004) par 354-355, Grogan *Workplace Law* (2003) 275; Basson *et al Essential Labour Law* (2002) vol 2 36.

³ See "Explanatory Memorandum" 1995 *ILJ* 279 at 293 where the Ministerial Task Team, in explaining the Draft Bill of the LRA 66 of 1995, stated: "While giving legislative expression to a system in which bargaining is not compelled by law, the draft Bill does not adopt a neutral stance. It unashamedly promotes collective bargaining. It does so by providing for a series of organisational rights for unions and by fully protecting the right to strike..." See also ch 3 *supra*.

⁴ S 84(1) of the LRA provides: "Unless the matters for consultation are regulated by a collective agreement with the representative trade union, a workplace forum is entitled to be consulted by the employer about proposals relating to any of the following matters -

- (a) restructuring the workplace, including the introduction of new technology and new work methods;
- (b) changes in the organisation of work;
- (c) partial or total plant closures;

bargaining forums for sectoral level collective bargaining (bargaining and statutory councils) are also accorded primacy with reference to the settlement of disputes arising within their jurisdiction.⁵ This system is in accordance with the traditional view of the function of labour law as espoused by Kahn-Freund⁶, where the individual contract of employment plays a subordinate role and collective agreements are the primary vehicle for the determination of terms and conditions of employment.⁷ Terms of collective agreements take precedence over those in

-
- (d) mergers and transfers of ownership in so far as they have an impact on the employees;
 - (e) the dismissal of employees based on operational requirements;
 - (f) exemptions from any collective agreement or any law;
 - (g) job grading;
 - (h) criteria for merit increases or the payment of discretionary bonuses;
 - (i) education and training;
 - (j) product development plans; and
 - (k) export promotion."

S 86(1) of the LRA provides: "Unless the matters for joint decision-making are regulated by a collective agreement with the representative trade union, an employer must consult and reach consensus with a workplace forum before implementing any proposal concerning-

- (a) disciplinary codes and procedures;
- (b) rules relating to the proper regulation of the workplace in so far as they apply to conduct not related to the work performance of employees;
- (c) measures designed to protect and advance persons disadvantaged by unfair discrimination; and
- (d) changes by the employer or by employer-appointed representatives on trusts or boards of employer-controlled schemes, to the rules regulating social benefit schemes.

⁵ S 51 of LRA; the bargaining councils enjoy primacy in the sense that if there is a bargaining council under whose scope the parties to the dispute fall, the bargaining council and not the Commission for Conciliation Mediation and Arbitration (CCMA) must settle the dispute.

⁶ See ch 2 *supra*.

⁷ Davies and Freedland *Kahn-Freund's Labour and the Law* (1983) 8-9, wrote: "The law has important functions in labour relations but they are secondary if compared with the impact of the labour market and with the spontaneous creation of social power on the workers' side to balance that of management. The law does, of course, provide its own sanctions, administrative, penal and civil and their impact should not be underestimated but in labour relations legal norms cannot often be effective unless they are backed up by social sanctions as well, that is by the countervailing power of trade unions and of organised workers asserted through consultation and negotiation with the employer and ultimately, if this fails, through withholding their labour." See also Olivier "The Regulation of Labour Flexibility and the Employment Relationship: Paradigm Shifts on the Horizon" 1998 *TSAR* 536 where he stated: "Apart from the subordinate role played by the individual contract

individual contracts of employment and rights acquired through collective agreements cannot be contracted out of or waived.⁸ Where the agreement was entered into by a majority union at plant level even non-members are bound.⁹ As seen in the previous chapter collective agreements reached at sectoral level can be extended to non-parties.

Given the primacy accorded to collective agreements by the South African labour legislation and the fact that collective bargaining is traditionally the main function of trade unions, the concept of collective bargaining, its functions, historical foundations, the coverage and content of collective agreements, the different levels of collective bargaining, the types of bargaining forums and units, and so on will be discussed hereunder.

B Development and Historical Background of Trade Unions

1 Development of Trade Unions

The origins of trade unions in different states and the type and levels of collective bargaining that emanated at the different times serves to demonstrate that the system(s) of collective bargaining were the result of national and international socio-economic phenomena.¹⁰

of employment in this regard, collective agreements have been the primary vehicle for determining in particular terms and conditions of employment and regulating the employment relationship and labour flexibility generally. In fact, the statutory framework existing in South Africa has undoubtedly reinforced and supported the pre-eminent position enjoyed by collective bargaining as far as these matters are concerned."

⁸ S 23(3) states: "Where applicable, a collective agreement varies any contract of employment between an employee and employer who are both bound by the collective agreement."

⁹ S 23 (1) specifies: "A collective agreement binds employees who are not members of the registered trade union or trade unions party to the agreement if-

- (i) the employees are identified in the agreement;
- (ii) the agreement expressly binds the employees; and
- (iii) that trade union or those trade unions have as their members the majority of employees employed by the employer in the workplace."

¹⁰ See Huiskamp "Collective Bargaining in Transition" in Ruysseveldt *et al/ Comparative Industrial and Employment Relations* (1995) 137-138.

Trade unions and hence collective bargaining began to emerge in the early stages of industrialization. As mentioned earlier¹¹, different states experienced industrialization at different times, and indeed some countries have yet to become industrialised. The industrial revolution created a new breed of employer and employee which revolved around mass employment and mass production. The result was a market polarisation between employees and the owners of production. The result was a potential for conflict.¹² Collective bargaining was a means of institutionalising and containing such conflict. In the earlier stages of the industrial revolution when workplaces were smaller it was easier to contain the conflict. Consequently in these early stages of industrialisation trade unions were not recognised by employers or the state.¹³ They were repressed and outlawed, with unionists often being arrested or even killed. In fact well into the 19th century unions were considered illegal in England, the United States and most common law countries.¹⁴

However, as factories became bigger and employed more people trade unions gained more power. Collective bargaining was a system of institutionalising conflict that “suited the sociological features of manufacturing industries which concentrated sizeable groups of wage earners doing similar tasks into workplaces that were relatively large”.¹⁵ Before this most firms were small and family run and it was seldom tenable for combinations of employees to coerce the employer to providing higher wages and better working conditions.¹⁶

During the era of "Fordism" with its mass production systems fuelled by mass consumption trade unions gained impressive power vis-à-vis the employer.¹⁷ Large

¹¹ Ch 2 *supra*.

¹² Davidson and Rees-Mogg *The Sovereign Individual* (1997) 148

¹³ See Bendix *Industrial Relation in the New South Africa* (1998) 166.

¹⁴ See Adams "Regulating Unions and Collective Bargaining: A Global, Historical Analysis of Determinants and Consequences" 1993 14 *Comparative LLJ* 272, 282 ("Regulating Unions").

¹⁵ Blanpain *et al Comparative Labour Law and Industrial Relations in Industrialised Market Economies* (2001) ch 21 p 3.

¹⁶ Davidson and Rees-Mogg *op cit* 148.

¹⁷ *Idem*.

factories, typical of this era were softer targets for unions to exploit than the smaller firms that have now replaced the giant manufacturing plants.¹⁸ It is ironic that smaller firms were characteristic of the early stages of industrialisation, and as seen above, trade unions were consequently relatively weak.

2 *Reasons for Increase in Trade Union Power*

As the scale of enterprise rose in the era of Fordism unions became more powerful for the following reasons:¹⁹

- (i) Organisations were tied down to specific locations due to the high natural resource content of most industrial products. Factories that were placed where they could gain easy access to raw materials experienced considerable cost advantages. This made it easier for unions to coerce employers to pay higher wages;
- (ii) large economies of scale with expensive machinery and capital equipment necessary for production lines rendered it impossible for the bulk of the population to compete in leading industries as the capital required to enter such markets was beyond most people's reach. This meant that large segments of the population were employed by fewer firms. This concentration of industries combined with the ability of nation-states before globalisation to protect national industries by the imposition of trade tariffs enabled employers to charge monopoly prices for their products. Since this was possible, the expense of paying wages above market related wages could be passed on to the consumer. The payment of wages higher than market value was rendered even easier in an environment of very low unemployment rates that fostered mass consumption. Trade unions could demand higher wages since employers could afford to pay them. Globalisation and international competition has rendered this less tenable;
- (iii) the concentration of industries and large firms resulted in a depersonalisation of the company or enterprise. Usually shares in a company were owned by hundreds or even thousands of individuals, who

¹⁸ *Ibid* 146-157.

¹⁹ Davidson and Rees-Mogg *op cit* 148.

relied on company directors to protect their property. This depersonalisation of ownership weakened resistance to union extortion and it was easier for employees to ignore owner's property rights;

- (iv) the vast numbers of employees also engendered feelings of solidarity amongst employees²⁰ and unions were a convenient vehicle for expressing such solidarity;
- (v) the small number of competitors in leading industries as a result of the huge capital outlays necessary to enter the market, made these organisations easy targets. It is easier to coerce five or ten firms than it is to coerce one thousand firms;
- (vi) due to the huge capital requirements of setting up a firm; plant closures would result in massive losses. Inevitably it would make more economic sense to give in to demands for higher wages than risk closure;
- (vii) assembly line economies rendered factories vulnerable to strikes since a partial stoppage in just one section of the assembly line would result in retardation and even stoppages of subsequent sections, bringing the whole production process to a standstill. The assembly line production process meant that any production standstill, no matter how brief would result in massive losses to the enterprise.

In short therefore, the economies of scale of large factories with their assembly line production processes rendered these enterprises soft targets for coercion in the form of industrial action (strikes) by unions.

3 Historical Background of Trade Unionism in South Africa

3.1 Introduction

Three different policies towards trade unions have been identified: ²¹These policies can be applied to the development of trade unions in South Africa:

- (i) deterrence is a policy that deters or, prevents or limits union activity;

²⁰ Blanpain *et al loc cit.*

²¹ Raday "The Decline of Union Power:" in Conaghan, Fischl and Klare *Labour Law in the Era of Globalization* (2002) 358.

- (ii) neutral policy is a policy of non-intervention; and
- (iii) supportive intervention is a policy whereby incentives for union development and collective bargaining are provided by the political and legal systems. The general perception is that government policy towards trade unions in industrialised states developed in a linear fashion through these three approaches.²²

This brief overview of the history of trade unionism in South Africa that follows serves to demonstrate that the successive South African governments' policies towards trade unions have generally followed the sequence of policies which has just been indicated above.

3.2 *Period 1900- 1930's*

Repression of trade unions was the order of the day in the nineteenth and early twentieth centuries.²³ At the beginning of the twentieth century (the early years of industrialisation in South Africa) industrial action was prohibited and trade unions were not recognised until 1924 with the enactment of the Industrial Conciliation Act.²⁴ However trade unions representing blacks were not recognised in terms of this Act. Only in 1979 were all employees given equal rights in terms of labour legislation. Thereafter the government took a non-interventionist stance until 1988 and labour relations were left to run their own natural course.²⁵ The trade union movement grew significantly during the 70's and 80's.²⁶ In 1994 the first democratically elected government espoused a policy of supportive intervention.²⁷ It appears therefore that this linear progression from repression to support of trade unions is also reflected in the South African experience, which is discussed hereunder.

²² *Idem.*

²³ *Idem* and Davidson and Rees-Mogg *The Sovereign Individual* (1997) 148.

²⁴ 11 of 1924.

²⁵ Finnemore and Van Rensburg *Contemporary Labour Relations* (2000) 35-42.

²⁶ *Idem.*

²⁷ See ch 3 *supra*.

At the beginning of the 20th century strike action in South Africa was on the increase.²⁸ It culminated with large scale strikes by white mine workers in 1913 followed by strikes by black mine workers in the same year. These were followed by strikes at the railways and power stations. In 1914 there was a general strike by white employees. The government reacted by enacting the Act of Indemnity and the Riotous Assemblies Act, which prohibited certain industrial actions.²⁹

As secondary industries began to flourish the establishment of numerous unions ensued. The proliferation of unions on the mines and in the manufacturing sector resulted in the creation of federations.³⁰ There was a brief period of industrial peace following the First World War and the Chamber of Mines recognised unions representing white miners. In 1919 a national conference of employers and employees was held where it was resolved that industrial conflict would be alleviated by the recognition of unions. However the downturn in prosperity in the early twenties and the drop in the gold price contributed to industrial unrest. The infamous Rand Rebellion of 1922, when 25 000 white miners went on strike, was crushed by the army. Of these, 153 miners were killed and 500 were wounded. Another 500 were arrested and four of them were hanged for treason.³¹

Having realised the strength of the workers, the government gave urgent attention to labour relations. After appointing a commission to investigate the labour situation the government enacted the Industrial Conciliation Act.³² Its main purpose was the containment of industrial unrest by means of institutionalisation. Machinery for collective bargaining and conciliation in the event of a dispute was provided for in this Act. Employees could only strike if the dispute resolution procedure provided for in the Act had been exhausted.³³ The structures for collective

²⁸ Finnemore and Van Rensburg *Contemporary Labour Relations* (2000) 28-33.

²⁹ See Jones and Griffiths *Labour Legislation in South Africa* (1980) 3-15 and Thompson and Benjamin *South African Labour Law* (1997) A1-22.

³⁰ Finnemore and Van Rensburg *op cit* 32.

³¹ See Oberholzer *Die Randse Staking van 1922* (1980) (Unpublished thesis University of Pretoria).

³² See Du Toit *et al Labour Relations Law* (2003) 4th ed 6.

³³ *Idem*.

bargaining created in terms of this Act made for a centralised system of collective bargaining with trade unions bargaining with employers' organisations.³⁴ This trend of centralised collective bargaining was to continue for the next 50 years.³⁵ However, Blacks were excluded from this system since no unions representing Black males could register under this Act.³⁶ The result was the unions representing Black employees could not take part in the official collective bargaining process at the industrial councils, could not instigate the creation of a conciliation board to settle a dispute, and its members could therefore not embark on a legal strike.³⁷ However the Wage Act of 1925³⁸ provided for minimum wage rates for all employees irrespective of race, where collective bargaining structures were not in place.

3.3 *Period 1930's and 1940's*

Trade union membership grew considerably after the depression years of the thirties and the collective bargaining system as well as the conciliation procedure provided for in terms of the Industrial Conciliation Act was extensively used.³⁹ Nevertheless, unions representing Blacks were not recognised and in the twenties legislation was introduced which was used against Black unionists.⁴⁰

The Pact Government followed a labour policy that privileged White employees. Discrimination against Blacks with reference to job opportunities and wages was provided for by legislation.⁴¹ The notorious job reservation laws were first implemented in the so-called White areas in the mining industry and were extended to all industries despite the opposition of many employers. This policy

³⁴ *Idem.*

³⁵ *Ibid* 7.

³⁶ Finnemore and Van Rensburg *op cit* 31.

³⁷ *Idem.*

³⁸ 27 of 1925.

³⁹ See Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* (2004) par 326.

⁴⁰ The Native Administration Act of 1927 made it an offence to promote 'hostility' between the races.

⁴¹ See Du Toit *et al op cit* 10.

was called the 'Civilized Labour Policy' and it entailed the promotion of the use of white, especially Afrikaans employees at higher wages.⁴²

The Industrial Conciliation Act⁴³ resulted in the polarisation of Black unions.⁴⁴ Growth in the manufacturing and service industries in the thirties and forties led to the creation of many unions and the fact that unions representing black employees were not allowed to partake in the official collective bargaining process did not deter their creation.⁴⁵

3.4 *Period Late 1940's – 1960's*

In 1948 the National Party appointed the Botha Commission to investigate labour legislation since South Africa was experiencing great industrial expansion as well as heightened labour unrest.⁴⁶ The Commission recommended that Black trade unions be recognised, albeit subject to stringent conditions and without the right to strike. The government however, did not wish to adopt a policy or legislation that might encourage trade unions and rejected the recommendation to recognise Black trade unions.⁴⁷ In order to contain labour unrest, the National Party passed the Black Labour Relations Regulation Act⁴⁸, which made provision for the establishment of worker's committees for Black employees. The object was to avert trade unionism among Black employees.⁴⁹ These committees did not prove to be very effective as very few Black employees supported these committees and most lacked the expertise to represent their grievances effectively. By 1973 only 24 such committees had been registered in terms of the Act.⁵⁰ Effective representation by means of these committees was not possible since only one committee consisting of a maximum of five members was allowed per plant. This committee system was the only legitimate system of representation for Black

⁴² S 77 of the Industrial Conciliation Act 28 of 1956.

⁴³ 11 of 1924.

⁴⁴ Finnemore and Van Rensburg *op cit* 34-35.

⁴⁵ *Idem.*

⁴⁶ See Van Jaarsveld, Fourie and Olivier *op cit* par 327.

⁴⁷ Bendix *Industrial Relation in the New South Africa* (1998) 86.

⁴⁸ 48 of 1953.

⁴⁹ Van Jaarsveld, Fourie and Olivier *loc cit.*

⁵⁰ *Idem.*

employees until 1979. It is clear therefore that government policy with reference to the bulk of the labour force (i.e. Black employees) was one of deterrence of trade unions.

Other legislation such as the Industrial Conciliation Act (also known as the Labour Relations Act) of 1956⁵¹ also polarised the Black on White trade union movement. It prohibited the registration of mixed unions, except with ministerial permission and excluded all Blacks from the ambit of the legislation. This and other legislation entrenched racial division in the conduct of employment relations.⁵² The period 1950-1970 was characterised by relative labour peace and a marked polarisation between employees of different races.

3.5 *Period 1970's – 1980's*

In the 1970's, with the economy still growing black people became more aware of their rights. As they constituted a majority of the population and the workforce it began to become clear to everyone, including government that Black trade unions, despite a lack of formal recognition wielded immense power. This awareness was reflected in the advent of recognition agreements between employers and trade unions at the workplace and the subsequent collective bargaining that resulted. By 1976 the registered trade union movement had grown to approximately 650 000.⁵³

From 1974 onwards the government began banning individuals who were involved in the organisation and promotion of Black trade unions. Government policy and the recession following the 1976 riots resulted in a loss of momentum for the trade union movement. Numerous strikes occurred in 1970's.⁵⁴ The government reacted by enacting the Black Labour Relations Regulation Act⁵⁵, which provided for the establishment of Black liaison committees at plant level. This system was introduced to replace the collective bargaining system (i.e. at central level) and

⁵¹ 28 of 1956.

⁵² Du Toit *et al Labour Relations Law: A Comprehensive Guide* (2003) 4th ed 9-11.

⁵³ Van Jaarsveld, Fourie and Olivier *loc cit*.

⁵⁴ *Idem*.

⁵⁵ 70 of 1973.

thereby curtail power of Black trade unions. Employers responded enthusiastically to this system and many liaison committees were established, mostly on the initiative of the employer.⁵⁶ This Act also gave Black employees a limited right to strike once certain procedural and dispute settlement requirements had been adhered to.⁵⁷ However, only a few unions representative of Black employees made use of these procedures.⁵⁸ The liaison committees designed to improve communications between employer and Black trade unions did not succeed in curtailing militancy amongst Black employees.⁵⁹

The Wiehahn Commission was therefore appointed in 1977 to investigate labour legislation. In 1979 the first Report of the Commission recommended inter alia the following:⁶⁰

- (i) trade union rights should be granted to Black workers;
- (ii) stringent requirements were needed for trade union registration;
- (iii) job reservation should be abolished;
- (iv) a new industrial court should be established;
- (v) a national manpower commission should be appointed;
- (vi) provision should be made for legislation concerning fair labour practices
- (vii) separate facilities in factories, shops and offices should be abolished and
- (viii) the name of the Department of Labour should be changed to Department of Manpower.

Various legislative amendments arising from the 1979 Wiehahn recommendations were adopted. In 1980 and 1981 Parts 2 to 4 and 6 of the Wiehahn Report were published. Part 5 was released in September 1981. Included in this part, were the following recommendations:⁶¹

⁵⁶ Bendix *op cit* 94.

⁵⁷ Bendix *op cit* 93.

⁵⁸ *Ibid* 94.

⁵⁹ *Ibid* 93.

⁶⁰ Van Jaarsveld, Fourie and Olivier *op cit* par 329.

⁶¹ See Van Jaarsveld, Fourie and Olivier *op cit* par 330.

- (a) “labour laws and practices should correspond with international conventions and codes;
- (b) statutory requirements and procedures for registration of trade unions should be revised;
- (c) urgent attention should be given to specific defects of the industrial court;
- (d) bargaining rights of workers; councils should be laid down by statute;
- (e) the position of closed shop agreements should be clarified;
- (f) basic labour rights should be extended to the public sector;
- (g) specific legislation should be adopted regarding unfair labour practices;
- (h) the Wage Act should be retained but amended; and
- (i) conditions of employment and working circumstances of female employees should be revised in various aspects.”

Government reacted positively to most of these recommendations by giving effect to them in subsequent legislation.⁶²

The Black trade unions did not react positively to their inclusion in the existing official centralised system of collective bargaining. Instead they continued to bargain collectively at plant level in terms of recognition agreements entered into with the relevant employer. Initially employers were reluctant to recognise these unions at plant level. The result was increased strike activities culminating in a strike wave on the East Rand in early 1982. Gradually employers began to sign more and more recognition agreements to the extent that even today it is a practice that is entrenched in our labour relations system. The trade union movement grew significantly in the 1980's.⁶³

⁶² *Idem.*

⁶³ According to the Department of Manpower *Report* for 1990 there was a total registered membership of 2 458 712. This excluded membership of non-registered unions. This amounted to an increase of members of registered unions by one and a half million since 1980.

Strike frequency increased from 101 strikes in 1979 to 1 148 in 1987 and 1 025 in 1988⁶⁴. Since Blacks were denied franchise rights unions played a major political function, fighting for both economic and political rights of the working class.⁶⁵ Even though the collective bargaining system espoused by legislation had always been a system of centralised collective bargaining, a two-tier system with Black unions bargaining mainly at plant level emerged during the 1980's.⁶⁶

3.6 *Period 1980-1990*

During the 1980's the government took a neutral stance toward labour relations and left the parties to themselves. The Director General of the Department of Manpower (now the Department of Labour) repeatedly stated that government policy was that employees and employers should regulate their own employment relationship and that self-governance should prevail.⁶⁷ This policy persisted until 1988 when government gave in to employer pressure to make legislative amendments to oppose union growth.⁶⁸ These amendments⁶⁹ were strongly resisted by the union movement and mass protests ensued until the government repealed them in 1991.⁷⁰

3.7 *Period 1990 - 2004*

In the 1990's the previously banned political organisations were unbanned, Nelson Mandela was released, government was under international pressure and sanctions adopted a more corporate stance towards labour relations.⁷¹ In April 1994 the first democratically elected government, the ANC, came to power. The ANC was supported extensively by The Confederation of South African Trade Unions (COSATU) and as a result of this COSATU and its members had great

⁶⁴ Bendix *Industrial Relation in the New South Africa* (1998) 98.

⁶⁵ *Ibid* 99.

⁶⁶ Cameron, Cheadle and Thompson *The New Labour Relations Act* (1989) 4.

⁶⁷ *Ibid* 98-103.

⁶⁸ *Idem*.

⁶⁹ Labour Relations Amendment Act 83 of 1988. See Cameron, Cheadle and Thompson *op cit* for a comprehensive analysis of this Act.

⁷⁰ Labour Relations Amendment Act 9 of 1991.

⁷¹ See Finnemore and Van Rensburg *Contemporary Labour Relations* (2000) 43 for a summary of the major milestones of political change from 1990 to 1994.

expectations with reference to what the ANC would deliver in terms of a new labour dispensation.⁷² It appears that “COSATU, by opting for centralised bargaining and closed shop agreements is attempting to entrench itself in a central position, although this could eventually lead to its demise”.⁷³ Government’s policy since 1994 has been one of promoting trade unions.⁷⁴ The recent amendments⁷⁵ continue with this policy and attempt to entrench the power of large trade unions and centralised collective bargaining even further.⁷⁶

This short summary of the history of trade unionism in South Africa serves to demonstrate that South African governments have followed the linear progression mentioned by Raday⁷⁷ (*supra*) where government policy towards trade unions progresses from repression through to neutrality and finally support.

C Objectives and the Right to Collective Bargaining

1 Meaning of the Concept

Grogan gives meaning to this concept of collective bargaining by stating as follows: “Collective bargaining is the process by which employers and organised groups of employees seek to reconcile their conflicting goals through mutual accommodation. The dynamic of collective bargaining is demand and concession; its objective is agreement. Unlike mere consultation, therefore, collective bargaining assumes willingness on each side not only to listen and to consider the representations of the other but also to abandon fixed positions where possible in order to find common ground.”^{78 79}

⁷² Du Toit *et al Labour Relations Law* (2003) 4th ed 17.

⁷³ Bendix *op cit* 103.

⁷⁴ See the following chapter for a discussion of the South African legislature’s response to trade union decline.

⁷⁵ Labour Relations Amendment Act 12 of 2002.

⁷⁶ See for example s 33A where the effective enforcement of compliance with bargaining council collective agreements is enhanced by various mechanisms to ensure compliance; see also s 189A where *inter alia*, trade unions are given an unprecedented election to strike over a dispute of right, namely dismissal on the basis of operational requirements.

⁷⁷ “The Decline of Union Power” in Conaghan, Fischl and Klare *op cit* 358.

⁷⁸ Grogan *Workplace Law* (2003) 304.

2 Objectives of Collective Bargaining

The objectives of collective bargaining may be described as the following:⁸⁰

- (i) The setting of working conditions and other matters of mutual interest between employer and employees in a structured, institutionalised environment;
- (ii) conformity and predictability through the creation of common substantive conditions and procedural rules;
- (iii) the promotion of workplace democracy and employee participation in managerial decision-making;
- (iv) the resolution of disputes in a controlled and institutionalised manner.

The main function of collective bargaining is the reaching of a collective agreement that regulates terms and conditions of employment.⁸¹ What renders the bargaining 'collective' is the presence of a trade union(s) that represents the interests of employees as a collective. The other party to collective bargaining is usually an employer. However it could be a number of employers or an employer's organisation. Representatives of government may form a third party to the

⁷⁹ Basson *et al op cit* vol 2 56 state: "The collective bargaining process can broadly be defined as a process whereby employers (or employer's organisations) bargain with employee representatives (trade unions) about terms and conditions of employment and other matters of mutual interest."; The Wiehahn Commission Part V par 2.6.2 defined collective bargaining as follows: "Collective bargaining is a process of decision -making between employers and trade unions with the purpose of aiming at an agreed set of rules governing the substantive and procedural terms of the relationship between them and all aspects of and issues arising out of the employment situation."; See also Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* (2004) par 533 where various definitions of collective bargaining are quoted. In the end the authors conclude: "From these definitions the following definition may be extrapolated: collective bargaining is a voluntary process by means of which employees in an organised relationship negotiate with their employers or employers in an organised relationship, with regard to employment conditions or disputes arising therefrom with the object of reaching an agreement on these matters."

⁸⁰ Finnemore and Van Rensburg *op cit* 276.

⁸¹ Bamber and Sheldon "Collective Bargaining" in Blanpain *et al Comparative Labour Law and Industrial Relations in Industrialised Market Economies* (2002) 1.

collective bargaining process so that a form of corporatism or tripartite collective bargaining can be instituted.⁸² Sometimes the state could be the employer party.⁸³

Both broad and narrow conceptions of collective bargaining exist.⁸⁴ In the broad sense collective bargaining is perceived as different types of bipartite and sometimes tripartite discussions concerning employment and industrial relations that have an impact on a group of employees.⁸⁵ The narrow sense of the word is limited to bipartite discussions.⁸⁶ The terms 'collective bargaining' on the one hand and 'consultation' on the other have been accorded different meanings. With consultation the prerogative remains the employer. However the employer is obliged to share relevant information with the trade union or employee representative and in good faith consider their proposals. Collective bargaining on the other hand implies an attempt by both parties to reach consensus usually by means of compromise.⁸⁷ Consultation therefore "is a less competitive and more integrative process whereby the parties will exchange views but not necessarily reach a formal agreement."⁸⁸

3 Right to Collective Bargaining

This applies to the right of employees to negotiate the terms and conditions of employment with their employer, through a trade union.⁸⁹ Although the ultimate objective is that agreement should be reached the right to collective bargaining does not entail a *ius contrahendi*, but merely entails a *ius negotiandi*.⁹⁰ In South

⁸² According to Bendix, *Industrial Relation in the New South Africa* (1998) 241, "Karl von Holdt describes corporatism as an 'institutional framework which incorporates the labour movement in the economic and social decision-making of society...generally corporatism tends to introduce a more cooperative relation between the three parties (capital, labour and the state) as well as the capacity to negotiate common goals.'"

⁸³ This is the case in the civil service.

⁸⁴ Bamber and Sheldon *op cit* 642.

⁸⁵ *Idem*.

⁸⁶ *Idem*.

⁸⁷ See Grogan *op cit* 293 and 304.

⁸⁸ Bamber and Sheldon *loc cit*.

⁸⁹ Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* (2004) par 537.

⁹⁰ *Idem*.

Africa the right to collective bargaining is recognised in terms of the Constitution⁹¹ and also in terms of the Labour Relations Act.⁹² This right, however, was recognised in South Africa before the enactment of the Interim and final constitutions as well as the Labour Relations Act. The old industrial court in giving content to unfair labour practices held that the right to bargain collectively existed in South African labour law.⁹³ Whether or not this right entails a corresponding duty to bargain is discussed in chapter 5 hereunder.⁹⁴

D Levels and Requirements for Collective Bargaining

1 Introduction

There are four possible levels of collective bargaining:

- (i) Multinational collective bargaining constitutes bargaining between trade unions or trade union federations and employers organisations on an international level;⁹⁵
- (ii) national level collective bargaining refers to collective bargaining between trade unions and employers and employers' organisations at national level;⁹⁶
- (iii) sectoral or centralised collective bargaining refers to bargaining between one or more unions and a group of employers from a particular industry or occupation;⁹⁷
- (iv) plant-level or organisational collective bargaining refers to bargaining between one or more unions and individual employers.⁹⁸

⁹¹ S 23(5) of Act 108 of 1996 states that every trade union, employer's organisation and employer has the right to engage in collective bargaining.

⁹² See ch 3 *infra* where the legislative framework regarding collective bargaining is discussed.

⁹³ *UAMAWU v Fodens (SA) (Pty) Ltd* 1983 ILJ 212 (IC); *East Rand Gold and Uranium Co Ltd v NUM* 1989 ILJ 683 (LAC); *NUM v East Rand Gold and Uranium Co Ltd* 1991 ILJ 221 (A).

⁹⁴ In section D, sub –heading 9.

⁹⁵ Summers "Comparison of Collective Bargaining Systems: The A Shaping of Plant Relationships and National Economic Policy 1995 *Comparative Labour Law Journal* 467.

⁹⁶ See ss 37 and 38 of LRA.

⁹⁷ See ss 27 and 28 of LRA.

2 The Position in South Africa

In South Africa collective bargaining takes place at national level at NEDLAC,⁹⁹ sectoral or centralised level¹⁰⁰ and at plant level.¹⁰¹ Since collective bargaining takes place at different levels the question as to at which level an employer should bargain has arisen. In *Besaans Du Plessis (Pty) Ltd v NUSAW*¹⁰² the employer was active in the metal industry and was represented on the national industrial council for that particular industry. The union, which represented the majority of the employees of the employer, was not a member of the industrial council. The employer refused to bargain collectively with the union. On appeal the Labour Appeal Court held that in the absence of manifest unfairness, the choice of bargaining forum should be left to be determined by the respective power of the parties.¹⁰³ This advantages and disadvantages of plant level and sectoral level bargaining are discussed in chapter 5 hereunder.¹⁰⁴

3 Levels of Bargaining in Foreign Countries

Differences in the collective bargaining systems of various countries have generally been determined by historical experience especially flowing from the effects of industrialisation.¹⁰⁵ In Western Europe, England, Australia and New Zealand employers joined in the negotiation process in order to counteract the force of unions that had organised on a national and industrial level in the metal industries.¹⁰⁶ In USA and Japan however since companies that emerged early on in the industrial era were relatively large, these companies were able to counteract union power at plant or enterprise level.¹⁰⁷ Consequently systems of multi-

⁹⁸ See ch V of LRA; for a comparative survey of plant level collective bargaining with the European Union, see Weiss "Workers' Participation: Its Development in the European Union" 2000 *ILJ* 737.

⁹⁹ National Economic Development and Labour Council.

¹⁰⁰ See ch 3 sub-heading C 4 *infra*.

¹⁰¹ See ch 3 sub-heading C 4 and Ch 5 sub-heading C *infra*.

¹⁰² *Besaans Du Plessis (Pty) Ltd v NUSAW* 1990 *ILJ* 690 (LAC).

¹⁰³ See Davis "Voluntarism and South African Labour Law- Are the Queensbury Rules an Anachronism?" 1990 *AJ* 45 for a discussion of the philosophy of voluntarism underlying South African labour law.

¹⁰⁴ Sub-heading C.

¹⁰⁵ *Ibid* 12.

¹⁰⁶ Bamber and Sheldon *op cit* ch 21 5.

¹⁰⁷ *Ibid* 6.

employer bargaining at industrial or sectoral level developed in Western Europe and Australasia, while the collective bargaining in the USA, Canada and Japan typically took place at plant organisational level.¹⁰⁸

Until the 1980 national level collective bargaining was the dominant system in the Scandinavian countries and in Austria.¹⁰⁹ However some countries that have centralised systems of collective bargaining taking place at industrial level have a dual system with plant level collective bargaining serving a complementary role. Germany is an example reflecting such dualistic system.¹¹⁰

It has been suggested¹¹¹ that where different levels of bargaining coexist in the same country this is a direct result of the different industries emerging at different stages of the industrial era. The older industries consisting of smaller firms tend to organise at industrial level with employers' organisations consisting of a number of employers negotiating with the union(s) representing the employees within a particular industry.¹¹² Examples of such industries are the engineering and printing industries. The large enterprises operating at the height of the industrial era often occupied monopoly or quasi-monopoly positions in the product market. The huge quantities of capital required to enter the market rendered it unnecessary for these organisations to co-operate with competitors in order to take wages out of competition.¹¹³ These larger organisations could counter union power at

¹⁰⁸ *Idem.*

¹⁰⁹ *Idem.*

¹¹⁰ See Summers "Comparison of Collective Bargaining Systems: The Shaping of Plant Relationships and National Economic Policy" 1995 *CLLJ* 467 at 475 where the author says: "The German system of labour relations is a dual system with both adversarial and cooperative components. The negotiation of collective agreements between unions and employers' associations at the industry level have marked adversarial qualities. Conversely, relations at the plant and enterprise level between the statutorily mandated works councils and individual employers have a marked cooperative quality."

¹¹¹ Huiskamp "Collective Bargaining in Transition" in Ruysseveldt *et al Comparative Industrial and Employment Relations* (1995) 137-138.

¹¹² *Idem.*

¹¹³ Bamber and Sheldon *op cit* state: "When, in earlier stages of industrial development, these markets were essentially local, multi-employer bargaining was one way to regulate competition. the greater scale and industrial concentration of

organisational or plant level, hence bargaining was localised. Examples of such newer industries include the chemical and oil refining industries.¹¹⁴

As industrialisation progressed further and the service and computer industries developed, bargaining tended to become individualised at the expense of collective bargaining.¹¹⁵

4 Requirements for Collective Bargaining

4.1 Introduction

Statutory mechanisms for the institutionalization of conflict through the medium of collective bargaining were introduced into South African labour law in 1924.¹¹⁶ Despite the provision of a legislative framework for collective bargaining, there still was an underlying philosophy of voluntarism underpinning the legislation.¹¹⁷ The voluntarism took the form of the employer and employee parties being able to freely regulate their relationship. The role of the state was to encourage collective bargaining by providing the framework for it.¹¹⁸ This philosophy endured. In 1979 the Wiehahn Commission Report stated that the role of the state is limited to “setting the broad framework within which the employer and employee should have the maximum degree of freedom to regulate their various relationships.”¹¹⁹ The Labour Relations Act¹²⁰ continues with this voluntarist philosophy in that the procedures or mechanisms and outcomes of the collective bargaining process are voluntary.¹²¹ Like its predecessors the Act provides a framework for collective

later industries worked against multi-employer bargaining by undermining the possibility of product market competition within single economies.”

¹¹⁴ *Idem.*

¹¹⁵ The “individualisation of employment relations” will be discussed ch 6 *infra*.

¹¹⁶ See Industrial Conciliation Act 11 of 1924.

¹¹⁷ Davis “Voluntarism and South African Labour Law” 1990 *AJ* 45, 50.

¹¹⁸ Davis *op cit* describes it thus: “...voluntarism in this context being something of a hybrid system in which the State provided the boxing ring and a copy of the Queensbury rules and then withdrew to allow the parties to fight it out in a manner whereby the party with the greater collective power becomes the victor.”

¹¹⁹ Wiehahn Commission Report Part V par 4.11.5.

¹²⁰ 66 of 1995.

¹²¹ Van Jaarsveld and Van Eck *Principles of Labour Law* (2005) par 791.

bargaining.¹²² Although there is no specific provision in the Act requiring the parties to bargain collectively, provision for extensive organisational rights is made.¹²³ Furthermore the Act provides that where the dispute concerns a refusal to bargain in different forms, after an advisory award has been made, the employees may strike.¹²⁴ The Constitution¹²⁵ provides “the right to engage in collective bargaining.”¹²⁶ Whether or not the right to engage in collective bargaining entails within it a corresponding duty to bargain¹²⁷ which is legally enforceable is a question that remains unsettled.¹²⁸

4.2 Requirement of Representativeness

Where there is more than one trade union that wishes to bargain collectively with an employer, the question arises as to which trade union the employer should bargain with. The following approaches to this dilemma have been identified:¹²⁹

- (i) Majoritarian approach: The employer bargains only with a trade union that represents a majority (more than 50%) of the employees.
- (ii) Pluralist approach: The employer bargains with all trade unions that represent a substantial percentage (usually 30% or more) of the employees.¹³⁰

¹²² See ch 3 *infra*.

¹²³ See ch 3 *infra*.

¹²⁴ S 64(2).

¹²⁵ Act 108 of 1996.

¹²⁶ S 23(5).

¹²⁷ If it is accepted that such a duty exists, it is not an absolute duty. For example in *SASBO v Standard Bank of SA Ltd* 1988 ILJ 223 (SCA) it was held that the duty to bargain collectively was not absolute and where managers were directly involved in collective bargaining on behalf of the employer, they should be excluded from the process in order to avoid a conflict of interest. Consequently, the court refused to order the bank to bargain collectively with the applicant union representing the respondent’s managerial employees on the ground that an unacceptable conflict of interest would be unavoidable in respect of some of the managers if they formed part of the collective bargaining unit.

¹²⁸ The different views are discussed in ch 5, subsection D.

¹²⁹ See Van Jaarsveld and Van Eck *Principles of Labour Law* (2005) par 797.

¹³⁰ In *Mutual & Federal Insurance Co Ltd v Banking Insurance Finance & Assurance Workers Union* 1996 ILJ 241 (AD) it was held that the union must be “sufficiently representative” of the employees in the appropriate bargaining unit before the duty to bargain arises.

- (iii) All comers approach: The employer bargains with all trade unions irrespective of their representivity.

4.3 *Conduct of Parties During Collective Bargaining*

As discussed¹³¹ the legislation displays a preference for collective bargaining as the main means for settling disputes and dealing with conflict. In order for collective bargaining to be effective the parties must bargain in good faith. It is impossible to draw up a *numerus clausus* of what constitutes good faith or bad faith bargaining. Good faith bargaining has been described as negotiating “with an honest intention of reaching an agreement, if this is possible.”¹³² Having recourse to court decisions Van Jaarsveld has drawn up a comprehensive list of both employer and employee conduct which the courts have considered to constitute negotiating in bad faith.¹³³ Such conduct includes *inter alia*:

- (i) making unrealistic, absurd, unfair or unlawful demands, insulting and offensive behaviour;
- (ii) refusing to supply information which is relevant to the negotiations;
- (iii) implementing unfair delaying tactics, *et cetera*.

4.4 *Aspects of Collective Agreements*

4.4.1 *Requirements for a Valid Collective Agreement*

The Labour Relations Act¹³⁴ defines a collective agreement as “a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand, and on the other hand-

- (a) one or more employers;
- (b) one or more registered employers’ organisations; or

¹³¹ See ch 3.

¹³² *East Rand Gold & Uranium Co Ltd V National Union of Mineworkers* 1989 ILJ 683 (LAC) 697F.

¹³³ Van Jaarsveld and Van Eck *Principles of Labour Law* (2005) par 802-804.

¹³⁴ 66 of 1995.

- (c) one or more employers and one or more registered employers' organisations"¹³⁵

It follows from this definition that in order for a collective agreement to be valid it must be in writing, the trade union concerned must be registered and the agreement must concern itself with conditions of employment or any other matter of mutual interest between the parties.¹³⁶ A matter of mutual interest includes "any matter that fairly and reasonably could be regarded as affecting the common interests of the parties concerned, or otherwise be directly or indirectly related thereto."¹³⁷ It is also generally accepted that all the usual common law requirements for a valid contract must be present.¹³⁸

4.4.2 *Legal Consequences of Collective Agreements*

The parties to the collective agreement, their members, the members of the registered trade unions and employers' organisations that are parties to the agreement are all bound to the collective agreement. Furthermore the agreement is also binding on employees who are not members of the registered trade union if: the trade union represents the majority of the employees employed by the employer at the workplace and these employees are identified and specifically bound to the agreement in terms of the agreement.¹³⁹ All trade union members are bound to the collective agreement irrespective of when they became members.¹⁴⁰ A collective agreement takes precedence over the individual contract of employment and any provisions in the individual contract of employment which are contrary to the collective agreement will be amended.¹⁴¹ Where the individual contract of employment purports to amend an applicable collective agreement these provisions are invalid.¹⁴² No provision in an individual contract of employment may

¹³⁵ S 213.

¹³⁶ See Basson *et al Essential Labour Law* (2002) vol 2 59.

¹³⁷ Van Jaarsveld and Van Eck *op cit* par 808; see

¹³⁸ *Ibid* par 809.

¹³⁹ S 23(1) (d); see also Basson *op cit* 60-63.

¹⁴⁰ S 23(2).

¹⁴¹ S 23(3); see Basson *op cit* 67-68 in this regard.

¹⁴² S 199(2).

permit an employee to be paid less remuneration than agreed to in terms of an applicable collective agreement.¹⁴³ No provision in an individual contract of employment may permit an employee to be treated less favourably or receive a benefit that is less favourable than that provided in terms of the applicable collective agreement.¹⁴⁴ An employee may not waive any rights contained in an applicable collective agreement in terms of an individual contract of employment.¹⁴⁵ A collective agreement remains in force for the whole period of the agreement,¹⁴⁶ and if it is concluded for an indefinite period its termination may be effected by either party giving the other party reasonable notice, unless the agreement contains a provision prohibiting this.¹⁴⁷

As industrialisation progressed further and the service and computer industries developed, bargaining tended to become individualised at the expense of collective bargaining.¹⁴⁸

E Comparative Survey

1 Sweden¹⁴⁹

The Swedish collective bargaining system has always been highly centralised.¹⁵⁰ Historically the bargaining partners have been nationally represented trade union federations on the one hand and national employers' associations on the other hand. The Social Democrats came to power in the 1930's and began a tradition of co-operative bargaining between the parties where the impact of the collective agreements on the economy, foreign trade and income distribution was of primary importance.¹⁵¹

¹⁴³ S 199(1) (a).

¹⁴⁴ S 199(1) (b).

¹⁴⁵ S 199(1) (c).

¹⁴⁶ S 23(2).

¹⁴⁷ S 23(4); Basson *op cit* 64-65.

¹⁴⁸ The "individualisation of employment relations" will be discussed ch 6 *infra*.

¹⁴⁹ Regarding the Swedish system in general, see Summers *op cit* 482-486.

¹⁵⁰ Austria, the Netherlands and Switzerland also have centralized systems of collective bargaining.

¹⁵¹ Summers *op cit* 482-483.

The Swedish Trade Union Federation (hereinafter LO) wields central control over other trade unions.¹⁵² Where a national union intends calling a strike, which would involve more than three per cent of its members, LO, approval is required. Since LO controls major strike funds it controls the ability of national unions to strike. This control enables LO to influence bargaining policy and the content of settlements.¹⁵³ After World War II the LO agreed to pay freezes. This later caused discontent as there were severe inequalities in wages. The result was a decision by LO to decentralise bargaining in 1951 and consequently national unions demanded higher wages for sectors that had lagged behind and had not enjoyed the higher wages given to other sectors.¹⁵⁴

During the 1950's an informal centralised bargaining system was adopted by the parties.¹⁵⁵ The bargaining parties were the Swedish Employer's Confederation (SAF) and LO. SAF was founded early in the twentieth century and has always been highly centralised, controlling a large fund to aid employees during strikes. The SAF had power to call national lock-outs and influence bargaining policies.¹⁵⁶ This informal process involved the leaders of the two central federations meeting informally with government officials in order to reach consensus on wages so that the national economy would not be adversely affected. The effect of the wages on the rate of inflation, economic growth and exports were major issues for consideration by the parties. Another aspect that was factored in was the intentional narrowing of differences between high and low wages. This was known as the 'solidarity policy' of the LO. In other words the lower income employees received higher increases than the higher income employees. This system was formalised in the 1960's. The negotiations always included consultations with government so that the projected effect of the increased wages on the economy could be considered. The LO would agree to limit wage increases in exchange for

¹⁵² *Ibid* 482.

¹⁵³ *Idem.*

¹⁵⁴ *Ibid* 483.

¹⁵⁵ *Idem.*

¹⁵⁶ *Ibid* 482.

government undertakings to increase spending on social security such as housing, medical care, pensions or alternatively changes in personal income taxes.¹⁵⁷

The Social Democrats remained in power until 1980. The Liberal Government's policy was that it should not interfere in the negotiation process and that collective bargaining was a matter between trade unions and employers.¹⁵⁸ Without the usual government assurances the unions were not prepared to limit wage demands. The result was strikes beginning in the public sector and spreading in the form of sympathy strikes and eventually bringing the Swedish economy to a virtual standstill for ten days. Eventually government had to intervene and mediate a settlement.¹⁵⁹

The LO's 'solidarity policy' which narrowed the wage differential between skilled and unskilled workers, may have contributed to the shortage of skilled workers in Sweden.¹⁶⁰ Consequently during the last fifteen odd years there have been moves by trade unions and employers alike to a more decentralized system. In 1984 unions negotiated independently. However by 1985 there was a return to coordinated and uniform, centrally negotiated agreements.¹⁶¹ Employer attempts to decentralise the system in the last few years have been thwarted by the unions. Nevertheless the system is still highly centralised and in 1998 85% of employees were covered by centrally negotiated agreements.¹⁶²

This highly centralised negotiation system managed to maintain a growth rate in the economy of 3,8 per cent from 1950 to 1973. The growth rate has subsequently declined to 1,5 per cent.¹⁶³ During the latter part of the 1980's Sweden

¹⁵⁷ *Ibid* 483.

¹⁵⁸ *Idem.*

¹⁵⁹ *Ibid* 484.

¹⁶⁰ *Idem.*

¹⁶¹ *Idem.*

¹⁶² *Idem.*

¹⁶³ Terblanche "A Comparison of the Social Security Systems of Sweden, Germany and the United States: Possible Lessons for South Africa" Paper read at a seminar presented by the Goethe-Institute on "Social Transformation Processes" Johannesburg 4 November 1998 12.

experienced higher levels of unemployment. Until 1986 Sweden was able to keep unemployment below 3 per cent.¹⁶⁴ The Swedish government was able to contain unemployment by the reason of jobs in the public sector in the newly created service industry. However by the early 1990's the rate of unemployment in Sweden was almost 10 per cent.¹⁶⁵ The centralised collective bargaining system in the new era of technology and globalisation has been unable to deliver both efficiency and welfare. During the 1980s and the 1990s "the strongly centralized bargaining system, which has given stability but also counteracted flexibility, has gradually disappeared."¹⁶⁶

2 Germany

Germany has a dualistic system of collective bargaining with negotiations taking place both at plant level as well as at industrial or sectoral level.¹⁶⁷ The bargaining style for industrial level collective bargaining is adversarial and the topics for negotiation are distributive issues. Collective bargaining at plant or organisational (enterprise) level on the other hand concerns productive issues and consequently is co-operative in nature.¹⁶⁸ The bargaining at plant or organisational level is conducted by works councils and individual employers,¹⁶⁹ whereas the industrial or central level collective bargaining is conducted by trade unions and employers' organisations.¹⁷⁰

Industrial level collective bargaining in the German system differs from the Swedish system in that the government is not involved in the negotiation

¹⁶⁴ *Idem*

¹⁶⁵ *Ibid* 3.

¹⁶⁶ Nystrom in Blanpain *Labour Law and Industrial Relations at the Turn of the Century* (1998) 368. The author concludes that "There is a tendency in Sweden today towards more individual protection."

¹⁶⁷ Fuerstenberg "Employment Relations in Germany" in Bamber and Lansbury *International and Comparative Employment Relations; A Study of industrialised Market Economies* (1998) 98.

¹⁶⁸ Bamber and Sheldon *op cit* 8.

¹⁶⁹ These works councils are "in some way, the extended arm of the union on the shop floor, despite the fact that they are elected by all workers of the plant, whether unionised or not," according to Daubler "Trends in German Labour Law" in Wedderburn *et al Labour Law in the Post-Industrial Era* (1994) 109.

¹⁷⁰ *Idem*.

process.¹⁷¹ The parties do not take responsibility for the possible repercussions of the final settlement or agreements on the national economy.¹⁷² Since central level collective bargaining is antagonistic and adversarial in nature each party attempts to gain at the other's expense irrespective of the possibly adverse effects on the national economy. The national economy is the government's problem not that of the negotiating parties.¹⁷³

The German Trade Union Federation does not exercise control over the national unions that make up the Federation. However the national unions are highly centralised and co-ordinated with local branches being controlled by the national unions. National unions however, do not exercise control over works councils.¹⁷⁴

After the Second World War unions exercised wage restraint as a matter of policy. Subsequently under Social Democratic Governments wage restraint on the part of unions was achieved by government undertakings to support price stability by fiscal and budgetary means. However, in the late 1960's strikes broke out as a result of lack of confidence in the unions. The strikes were resolved by work councils negotiating for better wages despite their lack of authority to do so.¹⁷⁵

Attempts at wage restraint are usually ineffective since works councils frequently negotiate improved benefits above those negotiated by the industrial level collective agreements.¹⁷⁶ These industrial level collective agreements can be extended to non-unionised work places in terms of legislation.¹⁷⁷ The main purpose of extensions of collective agreements to employers who were not party to the agreement was to eliminate competition from non-unionised employers. This

¹⁷¹ Summers "Comparison of Collective Bargaining Systems: The Shaping of Plant Relationships and National Economic Policy" 1995 *CLLJ* 475.

¹⁷² *Idem.*

¹⁷³ *Ibid* 485

¹⁷⁴ *Idem.*

¹⁷⁵ *Idem.*

¹⁷⁶ Du Toit "Workplace Forums from a Comparative Perspective" 1995 *ILJ* 1544 1548.

¹⁷⁷ Australia, Austria, Belgium, Denmark, France, Italy, Japan, South Africa, South Korea, Spain and Switzerland all have procedures for the extension of collective agreements to non-members within a particular sector.

objective however, can no longer be attained because globalisation and the resultant free markets have rendered the isolation of national markets impossible. Nevertheless the practice of extending agreements to non-parties is still very prevalent in France.¹⁷⁸

3 United States of America

There exists no legal framework for central level collective bargaining with all collective bargaining taking place at plant or organisational level. The negotiating style for collective bargaining in the USA is adversarial.¹⁷⁹ This style of negotiation means that a gain for one side necessarily entails a loss for the other side, unlike co-operative negotiating where the parties share a common interest in the prosperity of the enterprise. In the USA therefore, the only concern of unions is to achieve the best possible benefits for their members. The employers' financial circumstances are of no concern to the union. The traditional union stance is that all employers must pay the standard rate and an employer who cannot afford to should go out of business.¹⁸⁰ On the other hand, employer stance has historically been that since profits are the fruit of employers' risk they are none of the union's business.¹⁸¹

Despite the fact that the National Labour Relations Act of 1935 declared the national policy to be the promotion of collective bargaining, it appears that the state and the courts have done very little to prevent breaches of this Act and employer ploys to defeat trade unions.¹⁸² An increase in cases of discriminatory practices against union members for partaking in union activities from 1965 to the 1990's has been recorded. The ratio between the number of employees

¹⁷⁸ Bamber and Sheldon *op cit* 25

¹⁷⁹ *Ibid* 6.

¹⁸⁰ Summers *op cit* 468.

¹⁸¹ *Idem*.

¹⁸² *Ibid* 469 and Adams "Regulating Unions and Collective Bargaining: A Global, Historical Analysis of Determinants and Consequences" 1993 14 *CLLJ* 272, 280. See also Davis "Voluntarism and South African Labour Law – Are the Queensbury Rules an Anachronism?" 1990 *AJ* 45, 46-47.

discriminated against and the number of union members was 1 in 72 in 1965, 1 in 35 in 1975, 1 in 6 in 1985 and 1 in 7 in 1990.¹⁸³

The adversarial nature of collective bargaining in the USA has been entrenched by the following legal rules:¹⁸⁴

- (i) The principle of majoritarianism means that an employer need not negotiate with a trade union until it has proof that that trade union represents the majority of its employees. The election campaigns often result in unions promising prospective members large pay rises which if elected they are compelled to demand. Usually the employer has no choice but to reject unrealistic demands that would put the organisation in jeopardy. The resulting deadlock usually leads to antagonism and distrust.¹⁸⁵
- (ii) The underlying belief in an antagonistic system where employee and employer interests can never coincide has led to the rule that management staff are not entitled to join trade unions and bargain collectively since they are the employer's representatives. The philosophy that labour and management cannot be on the same side has also been supported by US court decisions.¹⁸⁶
- (iii) Another rule that entrenches this adversarial nature of collective bargaining is that unions are not entitled to information concerning the financial affairs of the enterprise unless the employer claims an inability to pay.¹⁸⁷ The underlying premise supporting this rule is that the prosperity of the

¹⁸³ Adams *Industrial Relations under Liberal Democracy* (1995) 469.

¹⁸⁴ *Idem.*

¹⁸⁵ *Ibid* 470.

¹⁸⁶ See *NLRB v Yeshiva University*, 444 US 672, 684 (1980) where it was held that since university professors exercised managerial functions in determining curricula, class schedules, teaching methods, grading policies, and admission and graduation policies, the university was not obliged to bargain with the union representing the professors. Similarly in *NLRB v Health Care & Retirement Corp* 114 S.Ct 1778 (1994) the court held that nurses who were put in charge of other nurses and who could make proposals with reference to promotions and dismissals were not entitled to union representation.

¹⁸⁷ Summers *op cit* 471.

enterprise is no concern of the union and that profitability of the enterprise is the sole responsibility of management.

- (iv) The concept of the employer's duty to bargain was accorded very limited scope by the US courts which have emphasised the concept of managerial prerogative.¹⁸⁸

Despite these rules and premises upon which an adversarial relationship is inevitably grounded, some employers and unions in the USA have developed co-operative relationships based on the recognition of a common interest.¹⁸⁹ Nevertheless the heritage of hostility was in place since the outset of industrialisation and the advent of the American labour unions¹⁹⁰ and consequently is deeply embedded in the American consciousness.¹⁹¹

4 Japan

Like USA collective bargaining does not take place at central level but rather at enterprise or plant level.¹⁹² However, unlike USA collective bargaining is co-operative in nature with the fundamental recognition that employer and trade unions have a common interest in the survival and prosperity of the enterprise.¹⁹³ This was not always the case and prior to the Second World War, trade unions

¹⁸⁸ See *First Nat'l Maintenance Corp v NLRB* 452 (1981)US 666 where it was held that an employer has no duty to inform or negotiate with the union about the matters concerning the day to day running of the enterprise such as the introduction of new products, or new production methods, or the restructuring or partial closing of the enterprise. In *Fibreboard Paper Prod. Corp. v NLRB* (1964) 379 US 203, 223 the court held that unions can be excluded from "managerial decisions which lie at the core of managerial control."

¹⁸⁹ Summers *op cit* 469-470.

¹⁹⁰ Gregory *Labour and the Law* (1946) 15.

¹⁹¹ This traditionally adversarial system of collective bargaining has not been able to withstand the changes brought about by globalisation and the rapid advances of technology since the early 1980s. Arthurs, in Blanpain *Labour Law and Industrial Relations at the Turn of the Century* (1998) 152, stated: "For one thing, the American system of collective bargaining is in decline. This decline began long before the shape of the so-called 'new economy' became visible in the 1980s, but it has certainly been exacerbated by stresses attributable to globalization, technological change and the ascendancy of anti-state ideologies."

¹⁹² Bamber and Sheldon *op cit* 5-6.

¹⁹³ Summers *op cit* 474.

were strongly opposed by employers and government alike. However by the 1950's the potential for destruction and unproductivity resulting from adversarial relationships swayed employers to embark on a more co-operative stance and the labour relations system was transformed to a system of co-operation between employer and trade unions.¹⁹⁴

Summers has identified the following principles and policies that form the basis of the Japanese system:¹⁹⁵

- (i) Unlike the American system where employees are perceived as mere suppliers of labour, employees in Japan are considered to be part of the enterprise. Employers have strong social and moral obligations not to dismiss employees despite economic downturns.¹⁹⁶ The practice of life-long employment has been the norm since the 1950's and sixties.¹⁹⁷ Even small employers will make every effort not to dismiss employees. This practice however has recently become less popular with the younger generation who sometimes prefer to negotiate better wages in exchange for less job security.¹⁹⁸
- (ii) Employees are entitled to full information since decisions concerning the enterprise must be made jointly by management and unions.
- (iii) Not only do employees share the responsibility of the viability of the enterprise but they also share in the profits.¹⁹⁹ Up to one third of employees' remuneration takes the form of a bonus that will vary according to the enterprise's profitability. Where company profits drop, management are the first to accept a cut in salary.

¹⁹⁴ Summers "Comparison of Collective Bargaining Systems: The Shaping of Plant Relationships and National Economic Policy" 1995 *Comparative LLJ* 473.

¹⁹⁵ *Ibid* 473-475.

¹⁹⁶ See Summers *op cit* 474-475.

¹⁹⁷ Nakakubu "Individualisation of Employment Relations in Japan: A Legal Analysis" in Deery and Mitchell *Employment Relations Individualisation and Union Exclusion* (1999) 172.

¹⁹⁸ This aspect is discussed in the next chapter where the worldwide trend towards the individualisation of the contract of employment is discussed.

¹⁹⁹ Nakata "Trends and Developments in Japanese Employment Relations in the 1980s and 1990s" in Deery and Mitchell *op cit* 188.

- (iv) Differences in wages, treatment, status and so on between management, staff and other employees is minimal.
- (v) Unlike the USA there is no separation between union and management.²⁰⁰

In summary therefore, employees and employers are 'partners' in the enterprise. In exchange for security in the form of life long employment employees and trade unions co-operate with employers with one of their objectives being the maintenance of the viability of the enterprise.²⁰¹ Joint responsibility is taken for the survival and prosperity of the company and profits are also shared. Since joint responsibility for the viability of the company is taken, employees and trade unions are essential parties to the decision making process. For this decision making process to be viable full disclosure of information by the employer is necessary. The sharing of information, joint responsibility for the fortune of the enterprise, joint decision making, life long employment and the sharing of profits all serve to contribute to a culture of employees being part of the organisation and having an interest in its long term survival.²⁰² Co-operative relationships are a necessary consequence of such principles.

²⁰⁰ Adams "Regulating Unions and Collective Bargaining: A Global, Historical Analysis of Determinants and Consequences" 1993 14 *CLLJ* 272.

²⁰¹ Yamakawa "The Role of the Employment Contract in Japan" in Betten et al *The Employment Contract in Transforming Labour Relations* (1995) 106.

²⁰² Summers *op cit* 474.

5 *England*

The labour relations system in England has often been referred to as voluntaristic.²⁰³ The reason for such categorisation is that the State has not played a major role with regard to labour legislation.²⁰⁴ For instance there is no law that compels an employer to bargain collectively with a trade union; even if such collective bargaining takes place and the parties reach agreement, such agreement is not legally binding; the law does not regulate the right to strike, there are no provisions governing the coverage of collective agreements, and so on.²⁰⁵ The State therefore has not played a direct role in the creation of the labour relations system. Nevertheless state policy toward collective bargaining has been far from neutral.²⁰⁶ Until 1979 when Margaret Thatcher came to power, British

²⁰³ See Kahn-Freund "Legal Framework" in Flanders and Clegg *The System of Industrial Relations in Great Britain* (1954) 44 where he stated: "British industrial relations have, in the main, developed by way of industrial autonomy. This notion of autonomy is fundamental and it is...reflected in legislation and in administrative practice. It means that employers and employees have formulated their own codes of conduct and devised their own machinery for enforcing them...within the sphere of autonomy, obligations and agreements, rights and duties are, generally speaking, not of legal character." Oliver "Trade Union Recognition: Fairness at Work" 1998 *Comparative Labor Law and Policy Journal* 33 states: Traditionally, U.K. labour law has been based on the theory of legal abstentionism - the idea that employers and employees should be left to bargain with each other freely over contractual terms and conditions without interference by legal regulation. This led to England being one of the first jurisdictions with a well-developed although largely unregulated system of collective bargaining, and as a result less statutory protection of workplace rights than comparable jurisdictions".

²⁰⁴ Kahn-Freund *op cit* 44 stated: "there is perhaps no major country in the world in which the law has played a less significant role in the shaping of (industrial) relations than in Great Britain and in which today the legal profession have less to do with labour relations."

²⁰⁵ Penceval "The Appropriate Design of Collective Bargaining Systems: Learning from the Experience of Britain, Australia and New Zealand" 1999 *Comparative Labor Law and Policy Journal* 447, 461.

²⁰⁶ As pointed out by Adams "Regulating Unions" 272, 295: "Despite the absence of extensive legislation, the policy of British governments in the 20th century has not been neutral, as the policy of voluntarism is sometimes interpreted to imply. In fact British policy has been to encourage collective bargaining. It has done so by notifying all public servants that collective bargaining is the preferred means of establishing conditions of work, by requiring government suppliers to recognize the freedom of their workers to join unions and engage in collective bargaining and by directly intervening in many disputes in order to pressure intransigent employers to recognize unions and to negotiate with them. These 'policies' were de-emphasized

national policy towards trade unions and collective bargaining was one of encouragement and the State contributed in an indirect manner to the growth of trade unions:²⁰⁷

- (i) Non-union firms with government contracts were required to pay union-negotiated wages.²⁰⁸
- (ii) Minimum wage regulations for specific industries were predominant in industries that employed mainly unskilled workers, until they were removed in the early 1990's.²⁰⁹
- (iii) The introduction by many governments of 'income policies' aimed at reducing wage and price inflation were usually accompanied by favours granted to unions in order to induce union co-operation.²¹⁰
- (iv) Since approximately a century ago until 1979, British governments have consistently discouraged competition in product markets. Prior to the second world war it was believed that monopolies or quasi monopolies in product markets could compete more effectively on the international level. After the second world war major industries such as coal, gas, electricity, urban transport, the railways, airlines, telecommunications and steel were state owned monopolies. Such nationalisation was supported by the union movement.²¹¹

Things changed from 1979 when Margaret Thatcher took over.²¹² The Thatcher administration privatised a number of industries, eliminated minimum wage floors

by British labour experts fixated on the romance of 'voluntarism' until Margaret Thatcher changed them in the 1980s".

²⁰⁷ Penceval *op cit* 462-464.

²⁰⁸ As Penceval points out, *op cit* 463: "Given the extensive role of government expenditures in the economy, these rules affected a number of employers."

²⁰⁹ *Idem.*

²¹⁰ *Ibid* 463.

²¹¹ Penceval *op cit* 465.

²¹² Oliver *op cit* says at 33: "...during the 1980's, the then conservative government systematically eroded the power and influence of trade unions at a time away from large manufacturing plants and heavy industry, coupled with an increase in service industries, an increase in the number of non-unionised part-time and female workers, and high unemployment. This led to the present position whereby no employer is compelled to recognize trade unions in the workplace, and collective consultation with employees is rarely compulsory except where required by

in specific industries and eliminated the practice of extending union negotiated wages to non-union employers.²¹³

In 1998 however, proposals were made concerning legislation which would provide for the statutory recognition of unions.²¹⁴ These proposals resulted in the Employment Relations Act 1999 (ERA). The policy consideration behind the legislation is the achievement of an effective partnership between the employer and the workforce and is encapsulated in the White Paper *Fairness at Work*

European legislation such as that relating to collective redundancies, transfers of undertakings, and health and safety." This erosion of union power by the Conservative Governments since 1979 took the form of new rules and regulations. In the words of Penceval *op cit* 465: "Foremost among these new regulations were rules concerning strikes. The Trade Disputes Act of 1906 established that a union could not be sued by an employer for damages resulting from a strike. Thatcher's administrations qualified this legal immunity from damages: A union became liable for damages if striking against a secondary employer; an employer could sue a union if the strike was not over industrial relations issues that the employer could address, but over, say, political issues or inter-union feuds that the employer had no control over; and a union would lose its immunity if the strike had proceeded without first secretly balloting its members and obtaining the support of the majority for the strike action. In those circumstances where the union lost its immunity its financial liabilities for damages were proscribed by law. In instances where the union undertook strike action without first balloting its members and ignored court injunctions to desist, the union's funds could be sequestered. The number and importance of strikes in Britain over the past thirteen years has fallen considerably, and it is tempting to attribute this decline in strike incidence to these legal changes. However there are many competing explanations for this change - strike activity has fallen in many countries - and it is difficult to determine the particular contribution of the law. [See ch 5 *infra* where the reasons for the worldwide trend of a decline in union power are discussed.] The Conservative Governments since 1979 also changed the law to make closed shops more difficult to maintain, in particular the 1988 Employment Act prohibited firms from dismissing non-union workers at the behest of the unions while the 1990 Employment Act made it illegal a non-union worker access to employment. In addition laws were introduced strengthening the rights of rank- and- file union members in dealing with their own organization. It was stipulated that direct, secret elections of union officials must occur every five years, while every ten years elections must be held to approve any political expenditures the union makes. Union members were given the rights to examine their union's accounting records. "See also in this regard Gould "Recognition Laws: The US Experience and its Relevance to the UK" 1999 *Comparative Labor Law and Policy Journal* 11.

²¹³ Penceval "The Appropriate Design of Collective Bargaining Systems: Learning from the Experience of Britain, Australia and New Zealand" *Comparative Labor Law and Policy Journal* (1999) 465.

²¹⁴ United Kingdom White Paper *Fairness at Work* (1998) and The Employment Relations Bill 1998.

(FAW).²¹⁵ This legislation in no way encourages centralised forms of collective bargaining or the extension of centrally bargained collective agreements. It is concerned with recognition of trade unions for the purpose of plant level collective bargaining. Aside from the fact that the legislation does not concern itself with centralised or industrial level collective bargaining, it also does not perceive trade unions as the only or necessarily the preferred vehicle or body for the representation of the workforce. In fact "the authors (of the legislation) make no secret of the fact that they regard the role of statutory recognition as a very marginal one, a mechanism of last resort, rather than as a way of developing a general paradigm. At one level, that represents no more than a preference for voluntarily agreed trade union recognition over recognition imposed by statutory machinery, a preference with which it is hard to quarrel. At another level, it is part of a persistent emphasis on the fact that representation of the workforce by trade unions, even if it is voluntary rather than statutory, is only one of the alternative methods of workforce representation, and by no means necessarily the preferred method...."²¹⁶The policy considerations which prompted this legislation is the notion that in order for companies to prosper and consequently boost the economy there needs to be an "effective partnership between the business and its workforce, permitting the most efficient and flexible harnessing and development of the skills and talents of the workforce. The partnership may be mediated through trade unions, but it is envisaged as underlying a partnership with the individual workers themselves."²¹⁷

The new legislation perceives statutory recognition as only one means ,and a relatively unimportant one at that, of achieving this effective partnership for the

²¹⁵ Freedland "Modern Companies and Modern Manors-Placing Statutory Trade Union Recognition in Context" *Comparative Labor Law and Policy Journal* 1998 3, 6.

²¹⁶ *Ibid* 6. The White Paper *Fairness at Work* par 4.10 states: "The Government accepts the importance of voluntary choices, and believes that mutually agreed agreements for representation whether involving trade unions or not, are the best ways of employers and employees to move forward."

²¹⁷ Freedland *op cit* 6-7. See ch 6 *infra* where the worldwide trend of individualisation of the employment relationship is discussed.

achievement of a stronger economy. More important in the achievement of this partnership is the promotion of "family friendly" policies.²¹⁸

The result of the changes affected by the Thatcher administration and consequent Conservative Governments was the creation of more competitive product and labour markets.²¹⁹ Consequently there has been a decrease in coverage of multi-employer agreements and an increase in coverage of agreements reached at plant level.²²⁰ This was recognised and encouraged even by Labour Governments as seen by the recent labour legislation discussed above. The central features of this legislation (ERA) which followed from the White Paper *Fairness at Work* were identified as being a culture of support for the family for the mutual benefit of the employee of the business, a culture of partnership between employer and employees, and equal and fair treatment for all in the workplace.²²¹ These objectives are to be attained through representation of the workforce. Schedule 1 of the ERA provides that where a majority of the workforce wants recognition or where more than 50% of the workforce are members of the union seeking recognition automatic statutory recognition will kick in. As a minimum collective bargaining must take place over the issues of pay, hours of work and holidays.²²² These agreements become legally binding contracts enforceable by a court of law. However, specific performance is the only remedy available for breach of such a collective agreement.²²³ This is problematic because specific performance is generally difficult to obtain.²²⁴

6 *Belgium*

²¹⁸ Freedland *op cit* 7. See ch 5 of FAW and clauses 8-10 of the ERA which deal with leave for family and domestic reasons.

²¹⁹ Penceval *op cit* 466 states: "There is wide agreement that, since 1979, the arbitrary power of unions in Britain has fallen, and part of the increased growth in productivity over the past eighteen years or so has been attributed to a decline in the obstructionist power of unions."

²²⁰ *Idem*. This issue is discussed in ch 5 *infra*.

²²¹ According to the Secretary of State for Trade and Industry when presenting the Bill to the House of Commons. See also Clause 5.5 of White Paper *Fairness at Work*.
²²² S 5 of ERA.

²²³ Schedule 1 clause 30 (6) ERA.

²²⁴ Oliver *op cit* 42.

The Belgian collective bargaining system is highly formalised.²²⁵ In Belgium collective agreements can be negotiated at the following levels:²²⁶

- (i) National level (National Labour Council- for all industries in the whole country).²²⁷ This forum negotiates the provisions governing working conditions and social security, and, advises the government on labour affairs and on disputes among Joint Management Labour Councils.²²⁸
- (ii) Regional (sector) and industrial level (National Joint Committee-for one sector of industry throughout the country);²²⁹ where wage rates, job classifications, general conditions of employment and training programs are negotiated.²³⁰
- (iii) Enterprise level (Works councils, Trade Union Delegation and the Health and Safety Committee) - for the particular employer and its employees.²³¹ All three of these bodies have overlapping functions and at times overlapping personnel.²³² The scope of collective bargaining issues differs from company to company and can include virtually all issues.²³³

The National Labour Council was created shortly after the Second World War.²³⁴ However its roots go as far back as 1886, when a large wave of industrial unrest led to the creation of the High Labour Council (Hogere Arbeidsraad) in 1892.²³⁵ The idea was that it was preferable to contain conflict by involving employer organisations and employees in the management of the national economy.²³⁶ Agreements reached at national and regional level can be declared to be of

²²⁵ Murg and Fox *Labour Relations Law (Canada, Mexico and Western Europe)* (1978) 943.

²²⁶ Potgieter "Die Reg op Kollektiewe Bedinging" 1993 *TSAR* 175,178.

²²⁷ Gower *Employment Law in Europe* (1995) 2nd ed 67.

²²⁸ Murg and Fox *op cit* 390.

²²⁹ Potgieter *op cit* 177.

²³⁰ Murg and Fox *op cit* 391.

²³¹ Gower *op cit* 67.

²³² Murg and Fox *op cit* 391.

²³³ *Idem*.

²³⁴ Jacobs "From the Belgian National Labour Council to the European Social Dialogue" in Blanpain *Labour Law and Industrial Relations at the Turn of the Century* (1998) 306.

²³⁵ *Idem*.

²³⁶ Jacobs *op cit* 106.

general application or extended to the parties throughout the country.²³⁷ The National Labour council has an equal number of representatives from trade union and employer organisations.²³⁸ These agreements take precedence over all other collective agreements as well as individual contracts of employment, customs and so forth, unless the latter are more favourable to the employee.²³⁹ These collective agreements can be enforced by the civil courts and by penalties in terms of the criminal law.²⁴⁰

There are three bodies that bargain collectively with the employer at enterprise level: The trade union delegation, the works council and the Health and Safety Committee.²⁴¹ All companies employing more than 150 employees are obliged to have a works council.²⁴² The main function of the works council is to promote co-operation between management and employees on working conditions, the organisation of work and the application of labour legislation.²⁴³ Each council consists of employee representatives and the head of the enterprise and employer representatives which may be appointed by the employer. However, there may not be more employer representatives than employee representatives.²⁴⁴ Trade union delegations are the bodies where most of the enterprise level collective bargaining takes place.²⁴⁵ Trade union delegations can be established by collective agreement either at enterprise level or at industrial level.²⁴⁶ A union delegation can only be established at the request of one or more representative trade unions, and the employer is obliged to comply with this request.²⁴⁷ These union delegations enjoy certain rights "which in other jurisdictions are typically extended to works councils -

²³⁷ Potgieter *op cit* 181.

²³⁸ *Idem.*

²³⁹ Jacobs *op cit* 309.

²⁴⁰ *Idem.*

²⁴¹ Murg and Fox *loc cit.*

²⁴² *Idem.*

²⁴³ Potgieter *op cit* 178.

²⁴⁴ Du Toit *et al Labour Relations Law* (2003) 4th ed 393.

²⁴⁵ Du Toit "Collective Bargaining and Worker Participation" 1996 *ILJ* 1545, 1551.

²⁴⁶ Du Toit *et al op cit* 392.

²⁴⁷ Du Toit *op cit* 1551.

- the supervision of the application of labour standards, labour laws, collective agreements and work rules;
- right to advance information on matters which could affect working conditions or remuneration methods;
- joint decision-making rights concerning measures to deal with increased workload, such as overtime and the use of temporary workers from an agency;
- in the absence of a Committee for Prevention (of accidents) and Protection at work, carrying out the duties normally assigned to such committee."²⁴⁸

Clearly union delegates are the key figures in enterprise level collective bargaining and it is accepted practice for employers to recognize and deal with union delegations.²⁴⁹ As such employers are obliged to inform union delegations of proposed changes to wages and working conditions.²⁵⁰ Union delegations are present in most enterprises and they enjoy the exclusive right to nominate the employee representatives for the works council.²⁵¹ In this way strong union presence and influence at enterprise level can be attained.

Since 1952 all enterprises employing fifty or more employees are obliged to have a Health and Safety Committee which is composed of worker representatives nominated by the three most representative trade unions in the workplace.²⁵²

F Conclusion

Trade unions emerged as a social response to the advent of industrialisation.²⁵³ Individual employees had to combine and consolidate their bargaining in order to

²⁴⁸ Du Toit *loc cit.*

²⁴⁹ Murg and Fox *op cit* 392.

²⁵⁰ *Idem.*

²⁵¹ Du Toit *op cit* 1559.

²⁵² Du Toit *et al op cit* 393.

²⁵³ The ability of trade unions to properly fulfil this function in the post-industrial era began to be questioned as the twentieth century was coming to an end. As pointed in Wedderburn *et al Labour Law in the Post-Industrial Era* (1994) 87: "In my view,

influence employers and bargain for better wages and working conditions. Trade unions were the vessel for such collective power and its main function has always been to bargain with employers in order to attain better working conditions for their members. As Adams states: "Indeed collective bargaining is generally considered to be the major contemporary function of trade unions. The two institutions are so intimately linked that many writers speak of them as if they were a single interwoven phenomenon."²⁵⁴

Collective bargaining can take place at various levels and in different forms. It was suggested that the systems of collective bargaining that have been adopted in different countries are a result of the historical and political influences present at the time that particular country became industrialised.²⁵⁵ Where unions organised along occupational or industrial lines employers were forced to counter union power by joining forces. Multi employer bargaining thus became the norm in Western Europe, Britain, Australia and New Zealand.²⁵⁶ However, where larger organisations emerged very soon these organisations were able to counter union powers at plant level without having to join forces with other employers. This was

the 20th century saw the rise and now sees the fall of the concept of collectivism. In the first decades of this century collectivities, unions, turned out to be a possibility to compensate for at least a great part of the inequality between employer and worker. Unions managed to bargain with employers and their organizations, and were able to reach more favourable working conditions than the worker could on his own. The blooming period of the unions lasted some decades during which workers themselves were very poorly trained, educated and skilled. In the meantime, however, the changing type of worker we meet now has less confidence in collectivities to defend his rights. A characteristic of the present time is the waning belief in the collective promotion of interests. The concept of collectivism is rapidly losing ground to that of individualism. The new type of worker thinks he can look after his own interests. He refrains from joining a union...."

²⁵⁴

"Regulating Unions" 272.

²⁵⁵

Bamber and Sheldon *op cit* 5.

²⁵⁶

Bamber and Sheldon *op cit* 5-6 state: "In western Europe including Britain, and Australasia, multi-employer bargaining emerged as the predominant pattern largely because employers in the metal working industries were confronted with the challenge of national unions organized along occupational or industrial lines. In contrast, single employer bargaining emerged in the USA and Japan because the relatively large employers that had emerged at quite an early stage in both countries were able to exert pressure on unions to bargain at enterprise level."

the case in USA, Japan and Canada. Consequently these countries have never had centralised systems of collective bargaining.²⁵⁷

Collective bargaining can also be conducted at different levels in the same country. It has been suggested that the level at which collective bargaining occurs is determined by the stage of industrial development within which the particular industry emerged.²⁵⁸ At the earlier stages of industrial development organisations tended to be smaller and consequently older industries such as printing and engineering developed centralized collective bargaining systems. This was done in order to remove competition within product markets. As the industrial era progressed larger industries such as the chemical and oil refining emerged.²⁵⁹ These huge firms were sufficiently powerful to counter union power at plant level without having to embark in multi employer collective bargaining. Secondly, it was not necessary for these huge firms to co-operate with other firms in order to reduce competition within product markets.²⁶⁰

Finally, the newer industries such as the service industries typically make use of individually bargained employment contracts.²⁶¹ Collective bargaining systems do not only differ with reference to the levels at which bargaining takes place, but also differ with regard to whether the bargaining is co-operative or adversarial in nature.²⁶² As seen above in England and the United States, bargaining tends to be adversarial, while in Japan and Sweden it is more co-operative with unions sharing responsibility for the prosperity of the enterprise. Germany has a dual system with adversarial bargaining taking place at central level, and co-operative style bargaining taking place at plant level. In Belgium bargaining takes place at national level, sectoral, regional and industrial level, as well as at plant level.

²⁵⁷

Idem.

²⁵⁸

Huiskamp "Collective Bargaining in Transition" in Ruysseveldt *et al Comparative Industrial and Employment Relations* (1995) 137-138

²⁵⁹

Bamber and Sheldon *op cit* 6.

²⁶⁰

Idem.

²⁶¹

This phenomenon is discussed in the next chapter.

²⁶²

See Du Toit *op cit* 1544, 1553.

CHAPTER 5

DECENTRALIZATION OF COLLECTIVE BARGAINING

ABRIDGED CONTENTS

	Page
A Introduction -----	134
B Reasons for Trade Union Decline	
1 Introduction-----	134-135
2 Government Policy-----	136-140
3 Employer Animosity Towards Trade Unions-----	141-142
4 Departure of Oligarchic Industries-----	142-147
5 Unemployment-----	147-148
6 Conclusion-----	148
C Decline of Industry Level Collective Bargaining	
1 Introduction-----	149-150
2 Advantages of Industry Level Collective Bargaining-----	150-156
3 Advantages of Enterprise Level Collective Bargaining-----	156-157
4 Present Situation-----	157-158
5 High Wages and Low Levels of Productivity-----	158-160
6 Segmentation and Flexibility of Labour Markets-----	160-162
7 Conclusion-----	162
D South African Legislature's Response to Union Decline and Decentralisation of Collective Bargaining	
1 Introduction-----	162-163
2 Legislative Support for Union Security Arrangements-----	163-165
3 Legislative Support for Secondary Strikes-----	165-166
4 Employees' Rights Extended to Atypical Employees-----	166-168
5 Protection of Unions with the Transfers of Undertakings-----	168-170
6 Corporatism-----	171
7 Co-determination-----	171-176
8 Organisational Rights-----	176
9 Right to Strike over Refusal to Bargain and Retrenchments--	176-177
10 A Legal Duty to Bargain?-----	177-194
E Conclusion -----	195-196

A Introduction

The recent worldwide trend in union decline has had two consequences in employment relations:

- (i) Decentralisation of collective bargaining, i.e. a movement from centralised collective bargaining to plant or local level collective bargaining;¹
- (ii) individualisation of employment relations at the expense of collective bargaining, i.e. a system where conditions of employment are determined by the employer and individual employees.²

The reasons for the decline of trade unions in the last two or three decades will be examined in this chapter. Thereafter the reasons for the worldwide decline of industry level bargaining as well as South Africa's situation will be discussed. Finally South African labour legislation and how it has reacted to recent developments in the labour market in order to encourage trade unions and centralised collective bargaining will be examined. Individualisation of employment relations will be discussed in the next chapter.

B Reasons for Trade Union Decline

1 Introduction

The decline of trade unions in general is evident throughout the industrialised world³. Various reasons including government and management animosity towards trade unions, poor public images of unions, the impact of global competition and

¹ Gladstone "Reflections on Globalisation, Decentralization and Industrial Relations" in Blanpain *Labour Law and Industrial Relations at the Turn of the Century* (1998) 163. See also Supiot *Beyond Employment Changes in Work and the Future of Labour Law in Europe* (2000) 94, 96. where the author said: "...there is a fragmentation of collective bargaining. On the one hand there is a general move towards decentralization, to agreements reached at the individual firm level."

² Deery and Mitchell *Employment Relations Individualisation and Union Exclusion: An International Study* (1999) 1.

³ Tallent and Vagt "A Look to the Future: The Union Movement and Employment Law" (2000) *Institute on Labor Law* Washington par 3. 04.

so on have been cited for the general worldwide decline of trade unions.⁴ The standard explanations for the general decline of unions are the following:⁵

- (i) Changes in the industrial structure resulting in a decline of "big, mass production, predominantly blue collar factories", and an increase in the number of much smaller and less capital intensive enterprises;
- (ii) an increase in the number of atypical employees ("peripheral, non-permanent workforce, including women");
- (iii) a move toward individualism as a result of improved education and higher living standards amongst workers, "combined with strong tendencies towards the individualization of work leading to increased emphasis on employees as individuals and employee mobility as well as lower levels of employee identification with the enterprise";
- (iv) the belief that unions have "fulfilled their mission";
- (v) difficulties in unionising employees at small and medium sized enterprises *inter alia* because of employer resistance and lack of union interest; and
- (vi) the general rise in living standards and "secured full and stable" employment in industrialised economies in the post-war period.⁶ In short, trade unions have generally declined as a result of the changing world of work.

⁴ *Ibid* par 3.02.

⁵ Gladstone "Reflections on the Evolving Environment of Industrial Relations" in Blanpain and Weiss *Changing Industrial Relations and Modernisation of Labour Law* (2003) 151 states: "The changing patterns of world production, the decline in the industrialized economies of basic manufacturing and extractive industries and the changed employment patterns between major economic sectors, as well as continuing and even more revolutionary technological developments, and a change in the nature, composition and aspirations of the labour force are all exercising and will continue to exercise pressures and constraints on industrial relations systems. These pressures are considerable in respect of the industrial relations actors - in particular the trade unions."

⁶ Fahlbeck "Unionism in Japan: Declining or Not" in Blanpain *Labour Law and Industrial Relations at the Turn of the Century* (1998) 711.

2 Government Policy

It has been suggested that government policy is a determining factor of union membership and collective bargaining⁷. Adams suggests this possible conclusion on the basis of the data set out in the table below which contains international and historical data with reference the growth or retreat of trade unions during times of encouragement or discouragement of trade unions by the various governments.⁸

NOTABLE PERIODS OF GOVERNMENT ENCOURAGEMENT AND DISCOURAGEMENT

<i>Where/When</i>	<i>Union Membership</i>	<i>Practice of Collective Bargaining/Consultation</i>
<i>Encouragement</i>		
US 1917-1920	grew	grew
US 1932-47	grew	grew
France 1936-38	grew	grew
Germany 1915-21	grew	grew
Japan 1945-48	grew	grew
Sweden from 1936	grew	grew
France 1980s	decreased	grew
France 1968-73	grew	grew
UK 1940-45	grew	grew
UK 1973-79	grew	grew
France 1915-1920	grew	grew
New Zealand from 1894	grew	grew
Australia from 1899	grew	grew
<i>Discouragement</i>		
UK 1799-1824	erratic	sporadic
US 1806-1842	erratic	sporadic
Japan 1901-1925	flat	little
Germany 1878-1890	submerged	little
Germany 1933-1945	none	none
France 1791-1860	nascent	little
France 1940-1945	submerged	little
US 1980s	decreased	decreased
UK 1980s	decreased	probably decreased
Japan 1938-1945	none	none

⁷ Adams "Regulatory Unions and Collective Bargaining: A Global, Historical Analysis of Determinants and Consequences" 1993 *CLLJ* 272-292.

⁸ *Idem.*

It is interesting to note that nowhere in the industrialised market economies did trade union membership grow in the 1980's.⁹ This includes France where government adopted a policy of union encouragement.¹⁰ The main reason for the general decline in trade unions from the 1980's onwards has been the fact that the golden era of "Fordism" with its Taylorist modes of production had come to an end. Globalisation and new technology ushered in a new era where organisations no longer ran along Fordist lines. Government policy towards trade unions therefore played a comparatively insignificant role as determining factor for trade union strength. Furthermore, in support of this view is the fact that it has not been an uncommon phenomenon for trade unions to prosper where governments have supported a policy of suppression towards trade unions. In South Africa black trade unions experienced phenomenal growth in the 1960's and the 1970's despite the fact that the government's policy towards them was one of suppression.¹¹

Despite the fact that black trade unions were given the right to register as a result of the Wiehahn recommendations of 1979 and could therefore participate in the statutory collective bargaining structures (namely industrial councils), "trade unions were hesitant to join their white counterparts in the centralized structures."¹² Collective bargaining at plant level was preferred by many trade unions representing black employees because although they enjoyed tremendous support at plant level they were not necessarily sufficiently representative at industrial level.¹³ Tallent and Vagt have the following to say with reference to trade unions in the United States: "The notion that inadequate legal protection is a major cause of union decline is suspect at best. Some of the most dynamic periods in union expansion have occurred during periods of weak legal protections and even

⁹ This decade is of particular relevance because this is when the golden era of "Fordism" had reached its end. As discussed in ch 2 subsections E 4 and 5, the 1980's brought on a new socio-economic era, which resulted in union decline. This is so, despite government policies of union encouragement.

¹⁰ See Table *supra*.

¹¹ See ch 4 subsection B 3 *infra*.

¹² Steenkamp, Stelzner and Badenhorst *op cit* 950.

¹³ *Idem*.

outright legal hostility.”¹⁴ “Unions in various countries and at different times have continued to operate and sometimes prosper during periods of government suppression”.¹⁵ Conversely unions have also declined during periods of government encouragement as was the case in France in the 1980’s.¹⁶

This does not signify that government policy has no effect on union growth and prosperity.¹⁷ However, it is submitted that government policy is usually a consequence of socio-economic circumstances. In democratic countries governments need to adopt policies that will generate the most prosperity for its citizens. If unions are perceived as having a negative influence on the economy, and/or if unions have a negative public image government policy towards trade unions is more likely to be suppressive. However, if unions are perceived as playing a necessary and important role in creating overall prosperity, governments are more likely to adopt a policy of encouragement.

Where legislation provides trade unions with a monopoly once such legislation is repealed, trade unions will suffer a decline, especially where the major motivation for joining the trade union was legal compulsion. This is what happened in Israel. Israel’s union membership declined by 77% from 1995 to 1997. ¹⁸ As explained by Raday¹⁹, one of the reasons for such decline was legislation. Until 1995 membership of the General Sick Fund was dependent on union membership. In other words in order to have access to national health benefits, one had to be a trade union member. This is a form of compulsion which resulted in the union (Histadrat General Federation of Employees) acquiring monopoly power. A similar

¹⁴ *Op cit* par 3.02.

¹⁵ See Adams *op cit* 293.

¹⁶ *Idem*.

¹⁷ See Raday "The Decline of Union Power" in Conaghan *et al Labour Law in an Era of Globalization* (2002) 361. The author discusses the recent Israeli experience of union decline to support his argument that government policy is a major determinant of union strength. He attributes the recent 77% decline in union membership to legislation.

¹⁸ International Labour Office *1997-1998 World Labour Report* (General ILO, K98) 239-240.

¹⁹ Raday *op cit* 356.

situation occurred in New Zealand where up until 1991 union membership was compulsory.²⁰ The repeal of these laws contributed extensively to major union decline in New Zealand and between 1991 and 1994 the overall coverage of collective agreements declined by 40 – 50% and between 1991 and 1993 trade union membership decreased by some 50%.²¹

Trade union monopolies created by socio-economic compulsion²² or legal compulsion²³ result in extremely high union membership. Where a major motivating factor for such membership is compulsion, it follows that the removal of the compulsion will result in drastic decline of union membership. In such cases legislation and government policy create an artificial *raison d'être* for trade unions. Once such *raison d'être* is removed, unless the unions have a relevant socio-economic contribution to make, decline and even demise will inevitably be the result. Where trade union membership is not a result of any form of compulsion, legislative policy and laws will have a diminished effect on union membership.

Since democratic governments strive to remain in power, policies and legislation will often be influenced and moulded by socio-economic circumstances. Adams²⁴ focuses his research on identifying the factors and conditions which influence governments in adopting policies towards trade unions which range from suppression, to tolerance, to encouragement. In doing this he comes to the conclusion that the linear progression of government policy towards trade unions from repression to tolerance to encouragement is an oversimplification. He contends that there is instead a 'zigzag pattern' that can be observed over the last

²⁰ Wood "Deregulating Industrial Relations: The New Zealand Experience" 1996 SAJLR 41, 48.

²¹ *Ibid* 49.

²² As was the case in Israel prior to the National Health Insurance Law of 1995.

²³ As was the case in New Zealand until the mid 1980's when New Zealand departed from its traditional industrial relations system based on compulsory arbitration and conciliation. See Forsyth "Deregulatory Tendencies in Australian and New Zealand Labour Law" Paper delivered at the Japan International Labour Law Forum Faculty of Law, University of Tokyo, 27 February 2001 19.

²⁴ *Idem*.

century.²⁵ Adams, however, does agree, by providing extensive support and historical analysis that “states everywhere, no matter the era in which they begin to industrialize, tend to suppress unions and collective bargaining early in the course of industrialization”.²⁶ The main reason for maintaining this view that countries have followed a zigzag pattern is the fact that in the last two decades or so many industrialised countries, most notably England and the United States of America have demonstrated a tendency to discourage unions. Also, as Adams points out,²⁷ government policy can consist of a combination of suppression, tolerance and encouragement all at the same time. Examples of this trend include Germany and Japan, where unions are generally encouraged, but civil servants are forbidden from bargaining collectively. He reaches the conclusion that policy is dictated by political and economic developments.²⁸

Socio-economic circumstances are also influenced by politico- legal choices.²⁹ This will more often be the case in one-party state systems. In democracies and free market economies it is more likely that socio-economic circumstances will determine political legal policy choices. This is because legislation which is contrary to the existent socio-economic forces cannot be effective. This is not to suggest that legislation and government policy have no part to play with reference to union membership. However it is submitted that in democratic states the effect of legislation on trade union strength is minor in comparison to economic and political factors. Evidence of such assertion is to be found in the fact that no industrialised economy experienced a growth in union membership in the 1980’s when the era of Fordism came to an end and the new age of technology began.³⁰ Even industrialised countries that adopted policies and legislation that encouraged unions such as France experienced union decline³¹.

²⁵ *Op cit* 275.

²⁶ *Op cit* 276.

²⁷ *Op cit* 296.

²⁸ *Op cit* 296-297.

²⁹ See ch 2 *supra* where the function of labour law is discussed.

³⁰ See Table *supra*.

³¹ *Idem*.

3 *Employer Animosity Towards Trade Unions*

Employer opposition toward trade unions has often been cited as one of the factors contributing to union decline.³² As is generally known, the period of greatest union growth in South Africa was experienced during the most vehement employer opposition.³³ The same can be said for the United States of America.³⁴ Whatever effect employer opposition has on trade unions is dependent to a large extent on the relative strength of employers versus trade unions. Such strength is in turn very much dependent on the state of the economy.³⁵ For example during times of high rates of unemployment employer strength vis-à-vis unions will be increased and vice versa. In the same way as legislation and state policy are usually determined by socio-economic reality, so too is the effect of management opposition to trade unions. Employer opposition to trade unions is also dependent on the system of collective bargaining which exists in a particular country. As discussed by Penceval³⁶ and Summers,³⁷ antagonistic systems of collective bargaining such as those prevalent in the USA are more likely to engender employer opposition to unions than a co-operative system such as in Japan.

³² Gladstone "Reflections on the Evolving Environment of Industrial Relations" in Blanpain and Weiss *Changing Industrial Relations and Modernisation of Labour Law* (2003) 154 states: "The difficulties encountered by trade unions in some countries in their efforts to maintain their influence and bargaining power have been compounded by a resurgence of management strategies aimed at emphasizing the individual rather than the collective labour relationship. These strategies lay stress on greater and more intense direct contacts with employees, and greater participation by them, sometimes bypassing the trade union (or statutory workers' representatives) with regard to matters relating to the operation and life of the enterprise; but matters which are also frequently of concern to the collective and to the trade union (or workers' representation bodies). Some of these strategies and policies are at times squarely aimed at removing the trade union from the employer-employee relationship in the enterprise and at other levels of the industrial relations interface."

³³ This occurred during the 1970's and 1980's. See Brassey *Employment and Labour Law* (1998) A1:41-A1:51.

³⁴ See Tallent and Vagt "A Look to the Future: The Union Movement and Employment Law" *Institute on Labor Law Washington* (2000) par 3.02.

³⁵ See ch 2 *supra* for discussion of this topic.

³⁶ "The Appropriate Design of Collective Bargaining Systems: Learning from the Experience of Britain, Australia and New Zealand" 1999 *Comparative Labor Law and Policy Journal* 447, 469.

³⁷ "Comparison of Collective Bargaining Systems: The Shaping of Plant Relationships and National Economic Policy" 1995 *Comparative Labour Law Journal* 467.

Where a structure of collective bargaining which is seen as bringing advantages to the employer is in place, employer opposition to unions is more likely to be very much more diluted.³⁸

4 Departure of Oligarchic Industries

Approximately during the period from 1950 to 1980 the developed industrialised countries were characterised by oligarchic industries.³⁹ These industries were typically very large, with high entry costs and consequently very few competitors. Such circumstances created fertile ground for the growth of trade unions that could easily control labour within these industries.⁴⁰ The lack of competition experienced by these large firms made it possible for them to offer lucrative wages to their employees in order to avoid the huge costs that they could incur as a result of strikes and other work stoppages.⁴¹ The heavy and mass production industries were "significant sources of union membership and strength".⁴²

These huge industries have in the past two decades or so lost their *quasi* monopoly status to foreign and local competition in the form of small and medium sized firms.⁴³ These smaller firms are a result of a move "from a production-based economy towards an economy where the services sector rules, by technological progress, and by market globalization."⁴⁴ These same changes have a crucial impact on the collective organization of labour relations and on the legal mechanisms governing worker representation, action, and collective bargaining."⁴⁵

³⁸ Bendix *Industrial Relations in the New South Africa* (1996) 188.

³⁹ Davidson and Rees-Mogg *The Sovereign Individual* (1997) 154.

⁴⁰ *Idem.*

⁴¹ See ch 2 *infra*.

⁴² Gladstone "Reflections on the Evolving Environment of Industrial Relations" in Blanpain and Weiss *Changing Industrial Relations and Modernisation of Labour Law* (2003) 152.

⁴³ See Mhone "Atypical Forms of Work and Employment and Their Policy Implications" 1998 *ILJ* 197, 201.

⁴⁴ See Baskin "South Africa's Quest for Jobs, Growth and Equity in a Global Context" 1998 *ILJ* 986, 989.

⁴⁵ Supiot *Beyond Employment Changes in Work and the Future of Labour Law in Europe* (2000) 94.

This decline in power of domestic oligarchies has, in other words, resulted in a decline in trade union power.⁴⁶

The reasons why these industries lost their status are:⁴⁷

- (i) Industries in the age of information and technology have negligible natural resource content. Consequently these industries are not tied to any location.⁴⁸ Information technology has resulted in a mobility of ideas, capital and persons.⁴⁹ Companies can now move location much more easily and

⁴⁶ Brown "Bargaining at Industry Level and the Pressure to Decentralize" 1995 *ILJ* 979, 980; Davidson and Rees-Mogg *The Sovereign Individual* (1997) 154; and Gladstone *op cit* 152 who states: "There are other reasons contributing to the inroads witnessed on trade union strength and influence. The shift to a service economy - i.e. the burgeoning of the tertiary sector - and technological change continue to contribute to an increase in job categories which traditionally present difficulties for trade union organizing efforts. The relative growth of employment in the service sector is hardly a new phenomenon, but is one now that has reached a point where in most industrialized countries employment in the production of goods is less than half (often far less) than half of total employment. Employment in services in the United States, Sweden, England, for example, is well over 60 per cent of total employment. This trend is continuing and intensifying."

⁴⁷ Davidson and Rees-Mogg *op cit* 154-158.

⁴⁸ Blanpain "Work in the 21st Century" 1997 *ILJ* 192 states: "Gone are the days of enterprises that controlled raw materials, having their own coal and ore mines, their own railway system and so on up to the final product, including its distribution." Mhone *op cit* 201 explains: "...the development of new technologies and production practices has brought about a convergence in methods of production so that location-specific forms of comparative advantage have begun to play a decreasing role in determining comparative efficiency or comparative advantage in international trade. More correctly, perhaps, is the fact that what in the past appeared to be location-specific advantages have been overrun or replicated through technological changes elsewhere giving rise to very mutable, fleeting forms of competitive advantage."

⁴⁹ Blanpain *op cit* 194 states: "Governments of national states unquestionably remain 'sovereign' over a piece of land. Yesterday, however, they could control the steady economic flows along the roads, rivers, in the air and over the sea. Today, and even more so tomorrow, they have no impact on the multitude of information 'networks' 'overspanning' their own land and the territories of other nations. Relevant economic and technological decisions are taken over their heads. Governments are reluctantly bowing to what is happening, do not really govern anymore, but are forced to endure and can only marginally react, within the boundaries of a blind market, driven by economic and technological forces which, certainly in the short run, are socially devastating, especially as regards the world of work."

- so escape burdensome tax and labour laws, which is not the case with an industrial giant of the industrial era such as General Motors;⁵⁰
- (ii) information technology has lowered the scale of enterprise.⁵¹ The consequence of this is that entry costs have diminished and the number of competitors has increased. Where there is more competition tempting clients with lower prices and better products, organisations cannot afford to pay politicians and employees more than they are actually worth.⁵² This leaves unions and governments with less leverage to coerce employers to pay higher wages and taxes.⁵³ Furthermore, smaller firms have less capital at stake that is at the mercy of employees. Not only have barriers to entry been reduced, but so too have 'barriers to exit' been reduced. The sharp fall in the average size of firms has reduced the number of persons employed in

⁵⁰ Baskin "South Africa's Quest for Jobs, Growth and Equity" 1998 *ILJ* 989 states: "...globalization places very real limits on the options available to national governments. The inability effectively to regulate capital flows has recently contributed to massive economic turbulence in many developing countries including South Africa. To attract foreign investment, the investment that matters most, a country must not only create and maintain sound economic fundamentals. It must also put in place incentives and a framework of governance which make it attractive to the potential investor seeking to maximize his returns. To trade, a country must be prepared to play by the WTO's global rules, and reduce protections given to domestic producers."

⁵¹ According to Ntsika Enterprise Promotion Agency (a government agency set up in 1995 to promote the development of the small business sector) the small business sector, which comprises survivalist, micro, small and medium enterprises, accounted for 99.3% of all private sector enterprises in the country. Only 0.7% is made up of large enterprises. In 1998 the Department of Trade and Industry estimated that the small business sector absorbed some 45% of people who left the formal sector, and contributed some 30% to the gross domestic product, Institute for South African Race Relations *2000 South Africa Survey Millennium Edition* (1999) 492.

⁵² Mhone *op cit* 201 explains; "...investment has become increasingly footloose, while the stages of production distribution and marketing are becoming unbundled and dispersed so that, for a specific firm these activities do not have to be undertaken in one place. They can be dispersed internationally to exploit efficiency opportunities where they arise. Such dispersal has been facilitated by the ease and speed with which data can be communicated, finances transferred between countries, things can be transported, and industries can be relocated internationally." See also in this regard Baskin *op cit* 989.

⁵³ See Baskin *loc cit*.

subordinate positions.⁵⁴ Aside from the fact that owners of small businesses are unlikely to embark on a strike against themselves, strikes in small firms that employ only a few people obviously cannot be as effective as strikes in huge firms. The formidable power that is a consequence of overwhelming numbers of employees is simply absent in smaller firms,⁵⁵

- (iii) the smaller scale of enterprise and the increasing number of firms results in greater social support for property rights even where the need or desire for redistribution remains constant. The consequence of this is decreased public support for efforts to acquire wages above market value. Such attempts will have a negative effect on the public image of unions;⁵⁶

⁵⁴ Davidson and Rees-Mogg *op cit* 154 estimate that in the United States in 1996 reported that as many as 30 million people worked alone in their own firms. Gladstone *op cit* 153 states: "The growth of atypical, and often precarious, employment and work relationships -whether induced by lack of 'normal' employment possibilities, by individual preferences based on workers' needs, attitudes and expectations, or by a desire for increased flexibility on the part of the enterprises - has presented trade unions with substantial organizing problems. The workers involved often represent a non-stable element of the workforce, changing employers, and frequently, industries, and sometimes, as in the case of certain temporary, home-based and 'independent' contractees, not even being a party to an employment relationship. In the words of Blanpain "Work in the 21st Century 1997 *ILJ* 194: "The hierarchical enterprise, the pyramid with the MD and the board atop the descending ranks of the managers, the middle managers, the foremen and the white- and blue- collar workers at the bottom of the pile, organized like an army or a governmental organization, belongs to the glorious years of Fordism, i.e. to the past. Labour relations in those enterprises were subordinate, tended to be more uniform, collective, controllable and controlled, including by way of collective bargaining."

⁵⁵ See Mills "The Situation of the Elusive Independent Contractor and Other Forms of Atypical Employment in South Africa: Balancing Equity and Flexibility?" 2004 *ILJ* 1203 where the trend "towards business having a small core group of full-time long-term employees and a periphery of workers engaged in atypical work arrangements" is acknowledged.

⁵⁶ Gladstone "Reflections on the Evolving Environment of Industrial Relations" in Blanpain and Weiss *Changing Industrial Relations and Modernisation of Labour Law* (2003) 152 states: "...in industrial relations systems where trade union action is centred - or significant - at the enterprise or workplace level, workers, especially newer workers, where they have the choice, not infrequently will opt not to join the union. This may result from fear, perhaps misplaced, that union membership will not be well viewed by the employer, thereby putting their job in jeopardy. The worker may also feel out of sympathy with a trade union that s/he considers rightly or wrongly, to be making irresponsible demands in a period of economic difficulty and recession combined with widespread unemployment."

- (iv) the lowering of capital costs for entry into an industry has facilitated competition and entrepreneurship thus increasing the number of persons working independently as 'atypical employees'.⁵⁷ Activities and networks have become dispersed. In an increasing number of activities the possibility of people working together as a team without ever having come into physical contact with one another is not remote.⁵⁸ This fact also acts to reduce and even extinguish trade union power of coercion by means of strikes. Atypical workers have a lower propensity to unionise and most industrialised market economies have experienced union decline coincidental with increased workplace flexibility;⁵⁹
- (v) with Fordist style assembly lines everyone using the same machine and tools would produce the same output. Work was standardized. Micro technology has individualised work. Output varies from individual to individual. A natural consequence of this is that income will vary

⁵⁷ South Africa is experiencing a trend towards outsourcing and decentralisation. A survey conducted by Andrew Levy and Associate in September 1998, found that 68.3% of companies had outsourced in the previous five years and that more than three quarters of them had done so on more than one occasion. The survey also found that 91% of employees affected by the outsourcing were blue collar workers. They also conclude that it is anticipated that outsourcing would continue in the foreseeable future, Institute for South African Race Relations *2000 South Africa Survey Millennium Edition* (1999) 28. See also Theron "Employment is not what it used to be" 2003 *ILJ* 1247, 1252-1256, 1268-1271; Kenny and Bezuidenhout "Fighting Subcontracting in the South African Mining Industry" 1999 *Journal of the South African Institute of Mining and Metallurgy* 11; Kelly "Outsourcing Statistics" 1999 *SALB* vol 23 no 3; Bernstein "The Sub-contracting of Cleaning Work: A Case Study of the Casualization of Labour" 1986 *Sociological Review* 396-442. See also Mills "The Situation of the Elusive Independent Contractor and Other Forms of Atypical Employment in South Africa: Balancing Equity and Flexibility?" 2004 *ILJ* 1203.

⁵⁸ Blanpain *op cit* 195 states: "The worker of today and tomorrow will thus perform in one or more networks, on his own, but mostly as part of a team, in the framework of shorter or longer projects, for which he will be contracted. The worker will have to assemble and monitor his own portfolio at work, most often as an independent worker and in a sense becoming his own employer. Labour relations will at the same time be less collective, less uniform, more free, less controllable and controlled. Collective arrangements will be mere frameworks or simply fade away."

⁵⁹ Horwitz and Franklin "Labour Market Flexibility in South Africa: Researching Recent Developments" 1996 *SAJLR* 31; Horwitz and Erskine "Labour Market Flexibility in South Africa: A Preliminary Investigation" 1996 *SAJLR* 24-47.

accordingly.⁶⁰ Individualisation of work is a concomitant of individualisation of clients and products. Standardised products capable of mass production have lost ground to carefully customized and tailored goods to the buyers' wishes,⁶¹

- (vi) increasingly, unskilled work can be done by automated machines, robots and computational systems. This creates the potential for individuals to perform a multiple of functions and has resulted in the necessity for employees to become multi-skilled in order for them to be more productive.⁶² The market value of unskilled work has diminished and consequently so has the ability of unskilled workers to demand high wages.⁶³

5 **Unemployment**

Even before the advent of globalisation it was obvious that trade union power was dependent *inter alia* on the rate of unemployment.⁶⁴ This has not changed.

⁶⁰ Individualisation of employment relations is the topic under discussion in the next chapter.

⁶¹ See Allan *et al* "From Standard to Non-Standard Employment: Labour Force Change in Australia, New Zealand and South Africa" 2001 *International Journal of Manpower* 748-63; Borat "The Impact of Trade and Structural Changes on Sectoral Employment in South Africa" 2000 *Development Southern Africa* 67; Crankshaw "Shifting Sands: Labour Market Trends and Unionization" 1997 *SALB* 28-35.

⁶² Mhone *op cit* 200 explains: "Indeed there was a time when Taylorism, with its refinement of the technical division of labour entailing uni-dimensional specialisation, job fragmentation and an element of de-skilling for some categories of labour, was seen as the emerging trend within countries and globally. But this trend merely represented a refinement of normal forms of work. Similarly, current trends towards vertical and lateral multi-skilling do not do much violence to normal forms of work. The former trend was aimed at cheapening labour while immensely enhancing its efficiency, but it had attendant negative effects that alienated workers and reduced efficiency. The latter trend attempts to enhance job satisfaction and efficiency but can also result in increased costs."

⁶³ Hayter, Reinecke and Torres "South Africa" *Studies on Social Dimensions of Globalization* (2004).

⁶⁴ Davies and Freedland *Kahn-Freund's Labour and the Law* (1983) 21 where it is stated: "The effectiveness of the unions, however, depends to some extent on the forces which neither they nor the law can control. If one looks at unemployment statistics and at the statistics of union membership, one can, at least at certain times, see a correlation. Very often, as employment falls, so does union membership. Nothing contributed to the strength of the trade union movement as

Gladstone states: "The persistent unemployment plaguing many countries particularly in Europe, is certainly a factor in decreased union membership. And although there is some room for limited optimism for a mild improvement, it is likely that nothing approaching full employment (however defined) is on the horizon. Whether caused by low growth rates, industrial restructuring or technological change, unemployment reduces the pool of workers from which trade union membership is drawn."⁶⁵ Unemployment rates in South Africa are much higher than those in Europe.⁶⁶ Consequently South African trade Unions might possibly face an even greater threat to their survival than their European counterparts.

6 Conclusion

Although government policy, employer attitudes towards unions, public image of unions, international trends in human resource management, and the respective political strength of unions and employers all have an influence on union strength, every one of these factors is determined by the existing socio-economic circumstances. In short therefore, union strength is determined by the socio-economic *milieu*.⁶⁷ As Ben-Israel states: "There is a close correlation between, on the one hand the way labour law is shaped, and the prevailing economic, social, technological, ideological or demographic factors on the other hand. This correlation also signifies that whenever changes occur, in one or several of the aforementioned factors, it becomes essential to examine whether the new reality does not require labour law modernisation as well."⁶⁸

much as the maintenance over a number of years of a fairly high level of employment, contributed, that is, to its strength in relation to management. A high level of employment strengthens the unions externally..."

⁶⁵ Gladstone "Reflections on the Evolving Environment of Industrial Relations" in Blanpain and Weiss *Changing Industrial Relations and Modernisation of Labour Law* (2003) 152.

⁶⁶ See Baskin "South Africa's Quest for Jobs, Growth and Equity in a Global Context" 1998 *ILJ* 987-988.

⁶⁷ Horwitz and Smith "Flexible Work Practices and Human Resource Management: A Comparison of South African and Foreign Owned Companies" 1998 *IJHRM* 14.

⁶⁸ "Modernisation of Labour Law and Industrial Relations: The Age Factor" in Blanpain and Weiss *Changing Industrial Relations and Modernisation of Labour Law* (2003) 43.

C Decline of Industry Level Collective Bargaining

1 Introduction

This phenomenon has been referred to as "decentralization". In the words of Gladstone: "Decentralization involves the devolution of rule-making and governance, both private and public, to levels of political or hierarchical authorities lower than those where such rule-making and governance were previously exercised...But what we are primarily concerned with in this essay is the decentralization of the crucial interaction between employers and workers, with or without representation of the latter, in the fixing of terms and conditions of employment and the regulation of the relations between the parties to industrial relations."⁶⁹

The worldwide decline of industry level collective bargaining is well documented.⁷⁰ Industry level collective bargaining enjoyed its heyday in industrial states in the 1960's. The only exceptions were Japan and, to a lesser extent, the United States, where enterprise level collective bargaining was the preferred forum. In England during the 1970's enterprise level bargaining became more prominent and by 1990 only one out of five British private-sector employees was covered by industry level collective bargaining. Most other European countries followed this trend in the 1980's.⁷¹ Canada, New Zealand and Australia also experienced a similar decline in industry level collective bargaining in the 1980's.⁷²

⁶⁹ "Reflections on Globalization, Decentralization and Industrial Relations" in Blanpain *Labour Law and Industrial Relations at the Turn of the Century* (1998) 164.

⁷⁰ See for example Brown "Bargaining at Industry Level and the Pressure to Decentralize" 1995 *ILJ* 979, 982.

⁷¹ Supiot *Beyond Employment Changes in Work and the Future of Labour Law in Europe* (2000) 103-104 states: "Until the 1980s, most collective bargaining systems had a centre of gravity, which in continental Europe was, more often than not, national industry-wide bargaining (such as in Germany, France, the Netherlands, Sweden, or Italy), or company-wide bargaining under the British model...Decentralization of bargaining...shifts the centre towards the company level...The bargaining centre is shifting from the general/national industry level ...towards individual firms."

⁷² Brown *op cit* 980.

These developments are not a result of labour legislation but as Brown says:

“It is to developments in the world economy as a whole that we must look for an explanation. The benefits of industry-wide agreements to their participants depend very much upon those agreements covering all the employers in a given product market. But industry-wide agreements are unavoidably confined to individual countries. Transnational collective bargaining is doomed both by the volatility of currencies and by the insurmountable organizational problems it poses for trade unions. Clearly, then, the advantages of an agreement constrained by national frontiers diminish rapidly when international trade obliges firms to compete in international product markets.”⁷³

The irreversible advent of globalisation has heightened international trade and competition.⁷⁴ Now even less than ever can any state wishing to survive economically afford to adopt a strategy of autarky.⁷⁵

2 Advantages of Industry Level Collective Bargaining

According to Brown⁷⁶ the following are important advantages of industry level collective bargaining:

⁷³ *Ibid* 983.

⁷⁴ Supiot *op cit* 94 explains: "The far-reaching changes witnessed in the way companies organize work right across the European Union have been prompted by the move away from a production-based economy towards an economy where the services sector rules, by technological progress, and by market globalization. These same changes have a crucial impact on the collective organization of labour relations and on the legal mechanisms governing worker representation, action, and collective bargaining. New groups of workers have joined the labour market and there is now a need to examine employment and labour problems as a whole and not just from the traditional stand-point of the subordinated worker."

⁷⁵ Gladstone "Reflections on Globalization, Decentralization and Industrial Relations" in Blanpain *Labour Law and Industrial Relations at the Turn of the Century* (1998) 164 explains: "It is commonplace to say that the world has become smaller. A commonplace, but nonetheless true. Instant world-wide communications technology, and transfer of knowledge and information, has of course contributed to making global business practicable. But, perhaps more so, there is the need to survive in an environment of rabid competition. With national barriers to transnational trade abolished or lessening - and with many previously protected markets no longer available - it may very well be a question of 'go global or die.'"

⁷⁶ *Idem*.

- (i) The cost of wages can be passed on to the consumer by increasing prices. Since every competitor is subject to the same labour costs, all competitors will be obliged to increase prices. This is referred to as taking 'wages out of competition'. This argument is not really acceptable because taking wages out of competition is not an option in the light of globalisation. In fact this has been described as "one of the historical functions of European Trade unions".⁷⁷ It is essential to remain competitive and a policy of autarky is unthinkable.
- (ii) Brown finds the idea of 'rate for the job' attractive. This may have been so when jobs were standardised and industries comprised large economies of scale. Standardised 'rates for the job' are inappropriate in small and medium sized enterprises where jobs are not standardised and one individual may perform a number of different jobs.⁷⁸

⁷⁷ Supiot *op cit* 132-133 states: "One of the historical functions of European trade unions has been to prevent competition among companies in a given industry from leading to lower pay...But the industry wide framework for that unifying function entrusted to unions has been weakened by new kinds of company organization and particularly by sub-contracting, which is not subject to industry-wide agreement discipline. Companies can therefore, play one industry against another to reduce labour costs."

⁷⁸ As Supiot *op cit* 94-95 explains: "The collective dimension of labour relations has always been closely related to the ways companies organize work. They in fact determine the structural framework of worker organizations on which the legal machinery for action, representation, and collective bargaining are built. In the pre-industrial organization of work, which was based on a diversity of trades, action and representation were corporatist; in such a model the price of products rather than wages were at the core of collective bargaining. In the industrial model, the craft or trade is no longer at the hub of the organization of work. Industry coordinates crafts that become increasingly specialized to meet the needs of mass production. In this new architecture, collective identities no longer turn on the practice of a trade but rather on affiliation with a company or industry (the respective importance of these two levels of collective organization varies depending on the country). This model has not disappeared but now co-exists with new kinds of organization of work which change the framework of action, representation and collective bargaining." Also at 112: "Moreover, the trade unions' homogenous human and social base-wage-earning, industrial male workers with a typical open ended, full-time employment contract - has become fragmented and diversified, as the community of interests represented has splintered. The growing diversification of employees...the discontinuity of careers and the expansion of sub-contracting practices", have not only contributed to trade union decline, but also to the fact that in many instances plant level collective bargaining becomes a

- (iii) According to Brown small firms are protected from unions demanding better conditions and higher wages at enterprise level where there are industry level collective agreements in place. Experience in South Africa does not bear this out. Despite the LRA strongly encouraging industry level collective bargaining, many employers are still engaging in collective bargaining at enterprise level. Bezuidenhout⁷⁹ states: "In terms of industry relations at a meso-level, it seems that the trend towards centralization has come to an end. Only 32 per cent of the non-agricultural private sector workforce is covered by bargaining council agreements, and firm level bargaining, according to recognition agreements, still forms the foundation of collective bargaining."⁸⁰
- (iv) Brown further argues that industry level collective agreements reduce the influence of trade unions at the workplace, which in turn results in increased productivity. This sentiment seems contrary to the perception of the legislature. The LRA provides for workplace forums in order to increase productivity. In order to create a workplace forum we need a representative trade union at the workplace. The object of democratisation of the workplace by means of workplace forums cannot be achieved without trade union influence at the workplace. In stark contrast to Brown it seems that the South African legislature perceived the influence of trade unions at the workplace as a positive thing.⁸¹
- (v) Brown also argues that standardisation of job descriptions facilitates industry wide management of training. The advantage of spreading the costs of training across an industry, so the argument goes, will prevent

more suitable method of setting conditions and standards of work than industrial level collective bargaining.

⁷⁹ Information available on the web site with address <http://www.ilo.org/public/english/bureau/inst/papers/2000/dp115/index.htm> Information accessed 13 July 2001.

⁸⁰ See also *Besaans Du Plessis (Pty) Ltd v NUSAW* 1990 ILJ 690 (LAC) 694 where the trade union demanded that the employer bargain collectively at plant level even though the employer engaged in collective bargaining at industry level

⁸¹ This view is shared by many; see for example *Supiot op cit* 128; *Gladstone in Blanpain op cit* 117 and; Rood "Labour Law in the 21st Century" in *Wedderburn et al Labour Law in the Post-Industrial Era* (1994) 89.

'free riders' benefiting from employees trained at the expense of other employers.⁸² This argument loses much of its strength in the light of the fact that standardized jobs are becoming less and less frequent.⁸³

- (vi) Furthermore, the Skills Development Act⁸⁴ makes provision for training across industries thus removing the need for industry level collective bargaining to fulfil this function.

There is much to be gained from on-the-job training especially in situations where multi-skilling in smaller enterprises is becoming the norm. Work is becoming individualistic in nature. Industry wide training cannot always cater for the specific needs of small and medium sized enterprises.⁸⁵ Industry-wide training is formalistic and theoretical, whereas enterprise level on-the-job training equips workers with the ability to deal with the specific problems and challenges, as well as the advantages peculiar to that particular enterprise. Industry-wide training is limited in that it trains individuals to perform only specific tasks or to fulfil only one particular job description. In reality individuals will be required to perform a number of different tasks or jobs. What these different tasks will be can only be determined once a person is employed within a particular enterprise. It sometimes makes more sense to train people specifically at organisational level rather than generally, at industry level.⁸⁶

Other perceived advantages of industry level collective bargaining include the following:⁸⁷

- (i) *Protection for non-unionised or weakly-organised employees:*

⁸² Bendix *Industrial Relations in the New South Africa* (1998) 3rd ed 305.

⁸³ Allan *et al* "From Standard to Non-Standard Employment: Labour Force Change in Australia, New Zealand and South Africa" 2001 *International Journal of Manpower* 748-763.

⁸⁴ Act 97 of 1998.

⁸⁵ Supiot *Beyond Employment Changes in Work and the Future of Labour Law in Europe* (2000) 94-95.

⁸⁶ *Idem*.

⁸⁷ Bamber and Sheldon "Collective Bargaining" in Blanpain and Engels *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* (2001) 36.

Although industry level collective bargaining may provide some protection for some non-unionised or weakly organised employees, as seen above,⁸⁸ many employees are not covered by industry level collective agreements. Secondly legislation such as the Basic Conditions of Employment Act⁸⁹ was enacted to protect these employees and create minimum standards and conditions of work.⁹⁰ Larger coverage however might be at the expense of the economy and might be beyond the capacity of smaller enterprises thus hindering job creation.

(ii) *Efficient use of union negotiators:*

There seems to be no reason why enterprise level collective bargaining cannot result in efficient use of union negotiators. Trade unions can train more officials in the art of negotiation and their top negotiators can negotiate at various enterprises on behalf of the members.⁹¹

(iii) *Levelling the playing fields:*

Industry level collective bargaining does indeed have the potential of levelling the playing fields. However, legislation providing minimum standards has the same effect. The danger, however, arises when collective agreements at industry level provide for something more than minimum standards and wages. As Bendix observes: “The original purpose of extending agreements was to prevent the exploitation of non-unionised employees. This presupposed that councils established only minimum-level wages and conditions of service...It is to be doubted that wage levels set by councils (particularly those dominated by large employers) are minimum-level wages.”⁹²

(iv) *Large employers favour extension of agreements:*

The fact that large employers may favour extension of agreements does not necessarily mean that this is advantageous. Interestingly, it is mainly the larger employers that have been applying for exemptions. The South

⁸⁸ See Bezuidenhout at web address
<http://www.ilo.org/public/english/bureau/inst/papers/2000/dp115/index.htm>.

⁸⁹ Act 75 of 1997.

⁹⁰ Thompson and Benjamin *South African Labour Law* (1997) vol 1 B1-2.

⁹¹ See Supiot *op cit* 125-128.

⁹² *Industrial Relations in the New South Africa* (1998) 287.

African Enterprise Labour Flexibility Survey found that larger companies – between 150 and 400 workers – generally apply for exemptions.⁹³

(v) *Formulation of industry-wide responses to increased competition:*

Due to the global trends of enterprises downsizing, the emergence of small and medium enterprises, and the existence of a multi-tier wage systems,⁹⁴ this industry-wide response will be very difficult if not impossible to orchestrate in practice.

There are however important policy arguments in favour of industry-level collective bargaining as stated by Cheadle:⁹⁵

- (i) “industry-level bargaining is low on transactional costs for employers and trade unions. The negotiations are conducted by representative organisations in respect of the industry or parts of an industry;
- (ii) industry-level bargaining shifts collective bargaining on the major issues out of the workplace with the effect that workplace relations are generally less strained;
- (iii) bargaining outcomes at industry level tend to be general in nature allowing variation at the level of the workplace. Most agreements at industry level set minimum standard and the best agreements are in the nature of framework agreements combining both basic protections and flexibility;
- (iv) industry-level bargaining sets a social floor for competition. By setting reasonable standards applicable to all employers in a local market, competition between those employers is based on productivity rather than the socially undesirable reduction of wages or an extension of hours;
- (v) strikes and lock-outs occur less often in an industry-level bargaining system and are generally less damaging to individual employers because the latter’s competitors in the local market are also subject to the strike or lock-out;

⁹³ Information available on website with address

<http://www.ilo.org/public/english/bureau/inst/papers/2000/dp115/indexhtm>

⁹⁴ See Baskin “South Africa’s Quest for Jobs, Growth and Equity in a Global Context” 1998 *ILJ* 994-995 for a discussion on our multi-tier wage system.

⁹⁵ Cheadle, Davis and Haysom *South African Constitutional Law: The Bill of Rights* (2002) 395.

- (vi) industry-level benefit schemes permit a greater degree of labour mobility within the industry; and
- (vii) precisely because industry-level bargaining is a voluntary system of collective bargaining, it is more legitimate in a context where legitimacy is paramount.”

3 Advantages of Enterprise Level Collective Bargaining

Wages can be linked to productivity. One of the best ways to encourage productivity is monetary reward. South Africa has amongst the lowest productivity levels in the world.⁹⁶ Enterprise level collective bargaining allows for a more individualistic treatment of employees and the acquisition of skills, productivity, promotion and wages can all be linked. Enterprise level collective bargaining enables enterprises to react more appropriately and more speedily to the pressures and competition resulting from the global economy.⁹⁷

Team building and the democratisation of the workplace are facilitated by enterprise level collective bargaining.⁹⁸ It allows for a more co-operative as opposed to antagonistic relationship between the employer and its employees. A more hands on approach is clearly more suitable with the increase in the number of small enterprises and the downsizing and shrinking of economies of scale. Employees can exert a more direct influence at enterprise level. The lower the levels of negotiations the greater the opportunity for direct employee participation.

In short, enterprise level collective bargaining is at times better equipped than industry level collective bargaining to synchronise wages and productivity thus

⁹⁶ The individualisation of contracts of employment is the topic of discussion in the next chapter. The low rates of productivity are discussed infra at paragraph heading 4.

⁹⁷ Supiot *Beyond Employment Changes in Work and the Future of Labour Law in Europe* (2000) 133-135.

⁹⁸ Hence the machinery for the creation of workplace forums in terms of s 80 of the LRA.

enabling the enterprise to remain globally competitive and consequently to maintain employment.⁹⁹

4 *The Present Situation*

The Department of Labour has identified a trend in establishing trade unions more for the purpose of being represented during dispute hearings than for collective bargaining.¹⁰⁰

At the end of 1998 there were 76 bargaining councils.¹⁰¹ The total number of bargaining councils in the private sector at the end of October 1999 was 73.¹⁰² Only 32% of non-agricultural employees were covered by bargaining council agreements in 1997, and a number of bargaining councils have deregistered since 1995.¹⁰³

The Department of Labour has reported that despite a continued rise in the number of trade unions, trade union membership has decreased from 3.8 million in 1998 to 3.35 million in 1999.¹⁰⁴ This amounts to a decrease of approximately 11.84%. Registered union membership comprises approximately 30.8% of the estimated economically active population.¹⁰⁵

Wage settlements and the inflation rate 1985-98 excluding the agricultural and domestic sectors:

	Year	Average level of wage settlements	Inflation rate
Nominal surveyed wage increases	1985	13.7%	16.6%

⁹⁹ Supiot *op cit* 95-96.

¹⁰⁰ Republic of South Africa Department of Labour *Annual Report* (1999) 53.

¹⁰¹ Institute for South African Race Relations *2000 South Africa Survey Millennium Edition* (1999) 33.

¹⁰² *Ibid* 54.

¹⁰³ Information available at internet site with address <http://www.ilo.org/public/english/bureau/inst/papers/2000/dp115/indexhtm> accessed 29 April 2002.

¹⁰⁴ *Op cit* 54-55.

¹⁰⁵ *Idem*.

reached at	1986	15.5%	18.4%
centralised	1987	17.2%	16.1%
bargaining level	1988	17.4%	12.9%
averaged 8.6% in	1989	17.4%	14.8%
1998.	1990	17.4%	14.2%
	1991	16.1%	15.4%
	1992	12.0%	13.9%
	1993	10.0%	9.7%
	1994	10.0%	8.9%
	1995	11.5%	8.7%
	1996	9.9%	7.4%
	1997	9.7%	8.6%
	1998	8.6%	6.9%

Source: Andrew Levy and Associates Statistics South Africa (2000)

5 High Wages and Low Levels of Productivity

Not only are labour costs increasing at a more rapid rate than the rate of inflation, but labour costs are also increasing much faster than the rate of productivity.¹⁰⁶

Despite a recent increase in labour productivity this can be ascribed more to the replacement of labour with machines than to the better utilisation of labour.¹⁰⁷ This was re-iterated in the *Government Gazette*:

“Over the past decade there have been periods when overall wage growth (including salaries) outstripped productivity growth, and periods when the opposite has been true. Where real wage rate growth outstrips productivity growth there would be cause for concern since higher unit labour costs could affect international competitiveness, contribute to inflationary pressures and cause job losses. The most recent figures suggest that on an economy wide level, excluding agriculture, the growth in labour productivity has exceeded annual growth in real earnings per worker and has been associated with a decline in the growth of unit labour costs, at least in recent years. Unfortunately there are also indications that some productivity improvements may be artificial and may have arisen simply through the shedding of labour. Productivity gains are important and must be associated both with improved wages and with increases in employment levels.”¹⁰⁸

¹⁰⁶ *Idem.*

¹⁰⁷ 2002 GG No 19040 9.

¹⁰⁸ *Idem.*

There are studies that indicate that a 10% increase in wages could lead to a 7.1% decline in black employment.¹⁰⁹ This demonstrates that unrealistically high wages could result in an increase in unemployment.

Despite this the Labour Relations Amendment Act¹¹⁰ further extends the powers of bargaining councils by the addition of the following functions:

- (i) to provide industrial support services within the sector,¹¹¹ and
- (ii) to extend the service and functions of the bargaining council to workers in the informal sector and home workers.¹¹²

The Amendments make provision for the monitoring, promotion and enforcement of bargaining council agreements¹¹³ by the appointment of agents who can:

- (i) publicize contents of agreements;
- (ii) conduct inspections; and
- (iii) investigate complaints.
- (iv) Furthermore, agents are now empowered to adopt any other means to enforce their collective agreements and may perform any other function conferred or imposed by the council.¹¹⁴

Bargaining Councils are also in terms of these amendments able to enforce bargaining council agreements by means of agents ordering compliance orders.¹¹⁵

6 Segmentation and Flexibility of Labour Markets

The fact that our labour market is segmented and multi-tiered has been acknowledged.¹¹⁶ The result is a huge gap between the formal and the informal sectors. The gap in the building industry, (which is regulated by a bargaining

¹⁰⁹ See Baskin “South Africa’s Quest for Jobs, Growth and Equity in a Global Context” 1998 *ILJ* 986, 999; Grawitzky (1997) “High wages not only Cause of Unemployment - Bank Study” *Business Day* 18 November 1997 6.

¹¹⁰ Act 12 of 2002.

¹¹¹ S 28 (1) (K).

¹¹² S 28 (1) (L).

¹¹³ S 33 (1A) (a).

¹¹⁴ S 33 (1A) (b).

¹¹⁵ S 33A.

¹¹⁶ 2002 GG No 19040 at 21.

council), is between 50-60%.¹¹⁷ It appears that while formal employment in the building industry has declined, the number of persons informally employed by the industry has increased through outsourcing and the use of unregistered workers and independent contractors. Other sectors or industries seem to have resorted to similar tactics in order to avoid paying wages that are above the market rate. Large numbers of employees have been retrenched in the forestry industry in Bethlehem and the work subsequently outsourced to them at between 50-70% of the rate.¹¹⁸ According to Sachs,¹¹⁹ Director of the Harvard Institute for International Development, the wages of South African formal sector employees is approximately three times that of the wages of those who are informally employed. It seems that the result of industry level collective agreements which have been imposed on non parties by sector, may be a loss of formal jobs. The unfortunate thing is that workers in the informal sector as well as the unemployed are not represented by anyone.

Sachs has the following to say with reference to our industry level collective bargaining system:¹²⁰

“Let me turn finally to one of the main issues of this house – labour market flexibility – which evidence suggests is very important. All of the fast-growing economies of the world have flexible labour markets. By fast growing economies I mean those eight developing countries which achieved 5 per cent or more per capita growth per year between 1986 and 1994: namely Hong Kong, Singapore, Korea, Taiwan, Malaysia, Chile, Mauritius and Thailand. In all these middle-income countries wage setting is at the enterprise level. This, I believe is of tremendous significance. None of these countries have industry-wide, region-wide or national-level negotiation. Many of them have active trade union negotiations but they are enterprise-by-enterprise negotiations rather than industry-wide negotiations. I

¹¹⁷ Baskin *op cit* 992-993.

¹¹⁸ *Ibid* 994.

¹¹⁹ Sachs “Globalization and Employment: A Public Lecture,” 24 October 2001, available on web address <http://www.ilo.org/public/english/bureau/inst/papers/publects/sachs/ch2.htm> accessed 12 October 2001.

¹²⁰ *Ibid*.

believe that the evidence shows that this is very important for the start-up of new businesses and for creating the conditions, not so much for existing enterprises, but for the growth of new enterprises. While I know that this is a controversial statement and I hope that we may discuss it, I do believe that the evidence shows that problems arise when collective agreements are extended across the board to a sector or a region thereby preventing market forces from operating to facilitate the start-up of new enterprises. This is probably the key to the real flexibility of these economies which are characterised by enterprise-level negotiation and low labour market taxation – that is low rates of payroll taxation, value-added taxation and personal income taxation which together represent a gap between the cost of labour to the firm and the real take-home pay of employees.”¹²¹

However where rates of unemployment are high the risk of exploitation of workers by the unilateral determination of wage rates by employers is real.¹²² Since a state-imposed minimum wage would result in inflexibility,¹²³ collective bargaining seems to be the better option. Collective bargaining has “of necessity evolved into a wage-setting instrument of greater sensitivity to market realities.”¹²⁴ Although it may not be impossible to achieve this sensitivity at central level, it certainly is a formidable task. After having researched the bargaining council agreements in the South African clothing industry Anstey concludes: “The carefully crafted character of its early agreements reflects a joint, if uncomfortable, search for wage coherence in an industry under siege in a global economy. SACTWU has managed to strengthen union influence over wages and conditions for employees across the clothing manufacturing industry in South Africa, but market realities will dictate the negotiation of detailed agreements with a range of flexibilities reflecting the fragmented nature of the industry in the modern era if jobs are to be created and decent work preserved. Where multi-employer collective bargaining in the old century was centred in a concept of market control based in ‘levelling’ labour costs

¹²¹ *Ibid* 6.

¹²² Anstey “National Bargaining in South Africa’s Clothing Manufacturing Industry” 2004 *ILJ* 1829, 1862.

¹²³ *Idem*.

¹²⁴ *Idem*.

across industries, in the new century its test will be the extent to which it can become a market sensitive mechanism for wage setting in industries reflecting increasingly diverse conditions as a consequence of variable levels of enterprise integration into the global economy.”¹²⁵

7 Conclusion

In the light of globalisation and international competition, the argument for labour flexibility and against autarky becomes stronger. A refusal to accept the changes caused by globalisation and information technology and to react appropriately can only mean disaster for any state. This is not an argument in favour of complete deregulation, particularly given our history. However, such regulation must be sensitive to any negative impact on employment. The Comprehensive Labour Market Commission recommended the following with regard to the extension of collective agreements: “Not only should the representative position of the parties be considered prior to extension, but also the sensitivity of such agreements to both non-parties and to job creation. In practise we wish to see agreements which accommodate the difference circumstances faced by smaller business, various regions and different sub-sectors.”¹²⁶ I doubt, however, given the nature of industry level collective agreements, that such flexibility is easily achieved in practice.

D South African Legislature’s Response to Union Decline and Decentralisation of Collective Bargaining

1 Introduction

South Africa is no exception to worldwide trends which result in decentralisation and individualisation of employment relations.¹²⁷ The drift from industrial and

¹²⁵ *Ibid* 1862-1863.

¹²⁶ 2002 GG No 19040 21.

¹²⁷ Macin & Webster “Recent Developments in South African Relations and Collective Bargaining: Continuity and Change” 1998 *SAJLR* 35 ff.

manufacturing jobs to services,¹²⁸ the emergence of small and medium-sized enterprises,¹²⁹ the increase in the number of atypical employees¹³⁰ and so on are all evident in the South African labour market.

The South African legislature has adopted several strategies to maintain union strength: there appears to be an underlying, unspoken premise that any action or attitude that results in union decline is contrary to the public interest. It is presumed without question that unions perform an important welfare function. Clearly this is not necessarily true, especially in times of high unemployment.

2 Legislative Support for Union Security Arrangements

The LRA provides for both agency shop¹³¹ and closed shop agreements¹³². This is despite the decision of the European Court of Human Rights in *Young, James and Webster United Kingdom*¹³³ where it was held that the freedom of association encompasses the freedom not to associate and that closed shop arrangements requiring union membership as a condition of employment constituted a violation of the freedom of association enshrined in Article 11 of the European Convention on Human Rights.

The provision of closed shop agreements is also contrary to national legislation in most countries. The right to freedom not to associate is protected in many states including Austria, France, Italy, England, Germany, Belgium, the USA, Australia and many more,¹³⁴ and closed shop agreements have been specifically outlawed

¹²⁸ Baskin "South Africa's Quest for Jobs, Growth and Equity in a Global Context" 1998 *ILJ* 986-989 and Mhone "Atypical Forms of Work and Employment and Their Policy Implications" 1998 *ILJ* 197 198-206.

¹²⁹ Du Toit "Small Enterprises, Industrial Relations and the RDP" 1995 *ILJ* 544.

¹³⁰ Christianson "Atypical Employment – The Law and Changes in the Organisation of Work" 1999 *Contemp LL* 65, 66; Theron "Employment is Not What it Used to be" 2003 *ILJ* 1247-1271.

¹³¹ S 25.

¹³² S 26.

¹³³ 1981 *IRLR* 408.

¹³⁴ Olivier and Potgieter "The Right to Associate Freely and the Closed Shop" 1994 *TSAR* 443 444.

in most countries of the world.¹³⁵ In Germany closed shops and other forms of union security have been interpreted as being contrary to the freedom of association. This is because the freedom of association has been interpreted to include the freedom not to associate.¹³⁶ Union security agreements are also foreign to Belgian industrial relations because the freedom not to associate is considered part of the freedom of association. In England closed shops are specifically outlawed.¹³⁷ The position in the United States can be summarised as follows: “the right to be free not to associate enjoys extensive protection in the United States and generally equals the protection afforded to be right to be free to associate. The exception in this regard is the recognition of the agency shop which is, if not outlawed in a particular state, subject to severe limitations and qualifications, of which many relate directly to the exercise by the individual of his or her inalienable rights. In terms of statutory regulation and judicial interpretation these rights can only be infringed to the extent that collective bargaining and the position of the union as sole bargaining representative necessitate curtailment.”¹³⁸

Closed shops are also contrary to international protection afforded in terms of custom and law: Article 20(1) of the Universal Declaration of Human Rights provides that “Everyone has the right to freedom of peaceful assembly and association”, and subsection (2) renders such right subject to the proviso that “no one may be compelled to belong to an additional association”. The International Labour Organisation (ILO) also recognises a right not to associate.¹³⁹

To argue against the legitimacy of closed and agency shops solely by showing that it is contrary to International law and the law in most countries¹⁴⁰ is not entirely

¹³⁵ Davies and Freedland *Kahn-Freund's Labour and the Law* (1983) 237.

¹³⁶ Olivier and Potgieter *op cit* 443.

¹³⁷ *Ibid* 446-447.

¹³⁸ *Ibid* 454.

¹³⁹ Olivier & Potgieter *op cit* 302-303. For a comprehensive analysis of International Law, see Olivier & Potgieter 302-305.

¹⁴⁰ In Scandinavian countries, however, the constitutional freedom of association has not been interpreted to include the freedom not to associate, Raday "The Decline of Union Power" in Conaghan *et al Labour Law in an Era of Globalization* (2002) 360. For a discussion on the constitutionality of the closed shop, see also Du Toit

convincing. However, the case against the legitimacy of closed shops and agency has been convincingly put forward by Olivier and Potgieter.¹⁴¹ The simple fact that “an individual would not be able to associate freely should he/she not be able to choose not to associate with a particular union”¹⁴² leads one to the conclusion that the freedom to associate necessarily entails the freedom not to associate. From this it follows that closed shop agreements and probably agency shop agreements are in contravention of the freedom of association as protected in terms of our Constitution,¹⁴³ the LRA¹⁴⁴ and the ILO.¹⁴⁵

3 Legislative Support for Secondary Strikes

One of the arguments of union proponents is that the prohibition of secondary strikes is very damaging to union strength in the light of recent trends towards decentralisation of collective bargaining.¹⁴⁶ This is because decentralisation reduces the effectiveness of single employer strikes. Therefore the legitimisation of secondary industrial action is perceived as necessary for the survival of trade unions.¹⁴⁷

The LRA provides for the legitimisation of secondary strikes.¹⁴⁸ Secondary strikes on the other hand are prohibited in some other states such as New Zealand¹⁴⁹ and

et al Labour Relations Law (2000) 3rd ed 93-95; Landman “Statutory Inroads into a Trade Union’s Right of Disassociation” 1997 *ILJ* 13 and Olivier “The Right to Associate Freely and the Closed Shop” 1994 *TSAR* 289 and 1994 *TSAR* 443.

¹⁴² *Ibid* 300.

¹⁴³ S 18.

¹⁴⁴ S 54.

¹⁴⁵ ILO Convention 87 of 1948. For a discussion on the constitutionality of the closed shop, see also Du Toit *et al Labour Relations Law: A comprehensive Guide* 4th ed (2003) 93-95.

¹⁴⁶ Raday *op cit* 361: This view presupposes that unions are necessarily a benefit.

¹⁴⁷ *Ibid*.

¹⁴⁸ S 66. However certain restrictions are placed on secondary action: S 66(2) provides that 7 days written notice must be given, the primary strike must be protected; and; the nature and extent of the secondary strike is reasonable in relation to the possible direct or indirect effect that the secondary strike may have on the business of the primary employer.

¹⁴⁹ Forsyth: “Deregulatory Tendencies in Australian and New Zealand Labour Law” *Working Paper No. 21* Centre for Employment and Labour Relations Law, University of Melbourne (2001) 22.

legislation in England and other countries place severe restrictions on secondary labour action.¹⁵⁰

4 Employees' Rights Extended to Atypical Employees

Most forms of atypical employment such as part-time work, contract work, temporary work, home work, and leased work, do not easily lend themselves to unionisation. This is especially the case in small and medium enterprises.¹⁵¹ Employers may find it attractive to classify their workers as atypical employees in order to avoid the provisions of labour legislation and collective agreements, tax payments, social security payments and the provision of fringe benefits. It has been argued therefore that “legitimization of atypical employment is a form of indirect rather than direct deterrence of collective bargaining power”.¹⁵²

South African legislation once again comes to the rescue of unions in this regard: The LRA¹⁵³ and the BCEA¹⁵⁴ create a rebuttable presumption that a person is an employee if one or more listed conditions exist. Section 200A of the LRA reads as follows: “Until the contrary is proved, a person who works for, or renders services to, any other person is presumed, regardless of the form of the contract, to be an *employee*, if any one or more of the following factors are present:

- (i) the manner in which the person works is subject to the control or direction of another person;
- (ii) the person's hours of work are subject to the control or direction of another person;
- (iii) in the case of a person who works for an organisation, the person forms part of that organisation;

¹⁵⁰ Raday *op cit* 360.

¹⁵¹ Bamber and Sheldon “Collective Bargaining” in Blanpain and Engels (2002) *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* 20.

¹⁵² Raday *op cit* 363. See also Theron “Employment is not What it Used to Be” 2003 *ILJ* 1247.

¹⁵³ S 200A of the LRA inserted in terms of the Labour Relations Amendment Act 12 of 2002.

¹⁵⁴ S 83A of BCEA inserted in terms of the Basic Conditions of Employment Amendment Act 11 of 2002.

- (iv) the person has worked for that other person for an average of at least 40 hours per month over the last three months;
- (v) the person is economically dependent on the other person for whom he or she works or renders services;
- (vi) the person is provided with tools of trade or work equipment by the other person; or
- (vii) the person only works for or renders services to one person.”

This does not apply to any person who earns in excess of the amount determined by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act, any of the contracting parties may approach the Commission for an advisory award on whether the persons involved in the arrangement are employees.

This legislation shifts the onus of proof to the employer. The employer will have to prove that the person is not an employee.¹⁵⁵

The amendments to the LRA¹⁵⁶ extend the functions of bargaining councils so that informal and domestic workers also enjoy coverage.¹⁵⁷ It appears that the main purpose of this provision is to extend the applicability of bargaining council collective agreements to atypical employees.

The BCEA¹⁵⁸ makes provision for sectoral determinations by the Minister to:

“Prohibit or regulate task-based work, piecework, homework and contract work;”
and to

¹⁵⁵ For a discussion on the approach the courts have in determining whether a person is an employee or not, see Christianson “Atypical Employment - The Law and Changes in the Organisation of Work” (1999) *Contemp LL* 65; Benjamin “Beyond Labour Law’s Parochialism: A Re-envisioning of the Discourse of Redistribution” in Conaghan *et al Labour Law in an Era of Globalization* (2002) 75-92; and Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* (2004) pars 112-137.

¹⁵⁶ Act 12 of 2002.

¹⁵⁷ S 28(b) (l).

¹⁵⁸ S 55 (4) (g) and (k).

“specify minimum conditions of employment for persons other than employees”.

The BCEA¹⁵⁹ also gives the Minister authority to ‘deem’ certain vulnerable groups or workers to be ‘employees’ for the purposes of the basic minimum conditions of ‘employment’.

The purpose of all these provisions is not only to cast the safety net of protection wider but also to increase the recruitment base of trade unions since only employees can become union members.¹⁶⁰ The downside is the reduction or elimination of employers’ ability to create a flexible labour force in order to effectively compete on an international level and consequently and ultimately job losses and another hindrance in the creation of employment.¹⁶¹

5 Protection of Unions with the Transfers of Undertakings

In the 1980’s and 1990’s in most of the world there has been a significant increase in the number of employers seeking to reduce labour costs by the contracting out of business functions, the use leased labour via labour hire agencies, the engaging of contractors, privatisation and so on.¹⁶² Such workers normally do not fall within the ambit of union protection. This can result in a further decline of unions and undermining of collective bargaining. Where a business which had recognised a union is transferred to another employer, the union runs the risk that that employer (new employer) will not recognise it and that any collective agreements entered into with the old employer will not be observed by the new employer.

¹⁵⁹ S 83.

¹⁶⁰ S 213 of the LRA defines a trade union as “an association of employees whose principal purpose is to regulate relations between employees and employers, including any employers’ organisations.”

¹⁶¹ See ch 6 sub-heading F 2 entitled “The Changing Nature of Work in South Africa” where the importance of flexibility and the attempts by employers to achieve it are discussed.

¹⁶² Raday “The Decline of Union Power” in Conaghan *et al Labour Law in an Era of Globalization* (2002) 364.

The LRA remedies this and provides:¹⁶³

unless otherwise agreed between the union and employees, the terms and conditions of collective agreements and arbitration awards are transferred to the new employer. This includes not only terms and conditions of substantive collective agreements but organisational rights and collective agreements recognising a union are also transferred to the new employer.

In addressing individual rights the LRA guarantees that unless otherwise agreed with either the union or the employees:¹⁶⁴

“If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6) -

- (a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;
- (b) all the rights and obligations between the old employer and the employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee;
- (c) anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer; and
- (d) the transfer does not interrupt an employee’s continuity of employment, and an employee’s contract of employment continues with the new employer as if with the old employer.”

Furthermore, unless otherwise agreed, the new employer is bound by:

- (i) “any arbitration award made in terms of this Act, the common law or any other law;
- (ii) any collective agreement binding in terms of section 23; and
- (iii) any collective agreement binding in terms of section 32 unless a commissioner acting in terms of section 62 decides otherwise.”¹⁶⁵

¹⁶³ S 197(2).

¹⁶⁴ S 197 (2) (b).

¹⁶⁵ S 197 (5) (b).

The new employer will comply with the above if the new terms and conditions are “on the whole not less favourable”.¹⁶⁶ However this is not applicable where terms and conditions are covered by a collective agreement.¹⁶⁷ In other words where there is a collective agreement in place the new employer takes over that collective agreement as it stands and cannot alter it in any way. Provision is also made for the union’s rights to information in order to enable them to “engage effectively in the negotiations”.¹⁶⁸

A transfer of the business is defined as a “transfer as a going concern”¹⁶⁹ and a business includes a part of a business. It is therefore submitted that outsourcing,¹⁷⁰ contracting out and privatisation would be included in this definition.¹⁷¹

¹⁶⁶ S 197 (3) (a).

¹⁶⁷ S 197 (3) (b).

¹⁶⁸ S 197 (6) (b).

¹⁶⁹ S 197 (1) (b).

¹⁷⁰ See *National Education Health and Allied Workers Union v University of Cape town & Others* [2002] 4 *BLLR* 311 (LAC), 2003 *ILJ* 95 (CC); Le Roux “Consequences Arising Out of the Sale or Transfer of a Business: Implications of the Labour Relations Amendment Act” 2002 *Contemp LL* 61; *SA Municipal Workers & Others v Rand Airport Management Co (Pty) Ltd & Others* 2002 *ILJ* 2034 (LC) par 18-19, *Schutte v Powerplus Performance (Pty) Ltd & Another* [1999] 2 *BLLR* 169 (LC); Bosch “Operational Requirements and Section 197 of the Labour Relations Act: Problems and Possibilities” 2002 *ILJ* 641.

¹⁷¹ For a discussion of the “transmission of business provisions” in Australia, see Forsyth “Deregulatory Tendencies in Australian and New Zealand Labour Law” (2001) *Working Paper No. 21* Centre for Employment and Labour Relations Law – University of Melbourne 13-17. It appears that the Australian Federal Court has adopted a broad approach and focuses on whether there is a substantial identity of activities in order to ascertain whether there has been a transfer as a going concern. This approach therefore includes various forms of outsourcing, contracting out and privatisation under the legislative provisions. For further discussions on some problems surrounding the application of s 197 of the LRA in the context of outsourcing in South Africa, see *National Education Health and Allied Workers Union v University of Cape Town & otherst*; Bosch “Transfers of Contracts of Employment in the Outsourcing Context” 2003 *ILJ* 840; Borraine & Van Eck “The New Insolvency and Labour Legislative Package: How Successful was the Integration?” 2003 *ILJ* 1840.

6 Corporatism

South African labour legislation is also supportive of unions in that it supports a tripartite system of labour relations. The most important role-players in the South African labour market are the state, employers associations and trade unions or trade union federations. In the words of Olivier:¹⁷² “Government has been instrumental in developing a labour relations model based on tripartite structures and societal corporation which have become hallmarks of the new dispensation. The most important indication of this is the establishment of the National Economic, Development Labour Council (NEDLAC)”.

The functions of NEDLAC include reaching consensus and concluding agreements concerning social and economic policy, labour legislation, and labour market policy. Such consensus is necessary before any social or economic policy or legislation is implemented by parliament.¹⁷³

Such enabling legislation lends support to the legitimacy of trade unions and power to the trade union movement.¹⁷⁴ This is despite the fact that non-union members, the atypically employed and the unemployed are not represented at NEDLAC.

7 Co-determination

One of the stated purposes of the LRA is to “promote employee participation in decision-making in the workplace”.¹⁷⁵ The legislature’s hope was to achieve such participation via workplace forums. Many perceive mechanisms such as workplace

¹⁷² Olivier “The Regulation of Labour Flexibility and the Employment Relationship” 1998 *TSAR* 536, 540.

¹⁷³ S 5 of the National Economic, Development and Labour Council Act 35 of 1994.

¹⁷⁴ The degree of union involvement in the administration of public labour market policies has been listed as an important factor in the determination of union density in a book by Fahlbeck on Swedish unions, see Raday “The Decline of Union Power” in Conaghan *et al Labour Law in an Era of Globalization* (2002) 370.

¹⁷⁵ S 1(d) (iii).

forums or works councils¹⁷⁶ which allow for employee participation in decision making at the workplace to be supportive of union growth.¹⁷⁷ However, the point has been made that since it is argued that a strong union is a prerequisite for a works council to be effective, it might be more accurate to argue that works councils are dependent on unions and not vice versa.¹⁷⁸

It is a well known fact that workplace forums have not been a success in South Africa.¹⁷⁹ The main reason for this is trade union opposition to them especially COSATU. The major fear of unions is that workplace forums will serve to usurp union power.¹⁸⁰

The idea behind works councils that exist in countries like Germany, Sweden and Belgium and the South African version in the form of workplace forums is to create a dual system of negotiation between employer and employees. Bargaining over distributive issues (wages and benefits) should be left to collective bargaining with unions, while matters concerning strategic business decisions, technology, health and safety and other production issues should be dealt with in a less adversarial manner by means of consultation and joint-decision making between management and labour.¹⁸¹

In order to allay union fears the legislature enacted provisions in the LRA which render workplace forums entirely dependent on majority unions for their existence. Additionally, if they are allowed to exist at all they are in essence under union control. These provisions provide as follows:

¹⁷⁶ As they are referred to in Germany and other European countries.

¹⁷⁷ See Summers" Workplace Forums from a Comparative Perspective" 1995 *ILJ* 807, 811.

¹⁷⁸ Raday *op cit* 371.

¹⁷⁹ Du Toit *et al Labour Relations Law* (2003) 4th ed 42. According to the *Explanatory Memorandum to the Labour Relations Amendment Bill* of 2000 there were only 17 workplace forums in existence at the time.

¹⁸⁰ *Ibid.*

¹⁸¹ See *Explanatory Memorandum to the Draft Bill* 135-136.

- (i) Only a trade union or trade unions with majority membership in a workplace may apply to the CCMA for the establishment of a workplace forum.¹⁸²
- (ii) Upon receiving such application a CCMA commissioner must seek to facilitate a collective agreement between the parties that will govern the operation of the workplace forum in its entirety and replace the provisions of chapter V.¹⁸³ The primary option, in other words, is a workplace forum created by collective agreement.
- (iii) If the parties cannot arrive at a collective agreement, the commissioner must seek to facilitate agreement on the constitution of the workplace forum.¹⁸⁴
- (iv) If the applicant union or unions are recognized in terms of a collective agreement as collective bargaining agent(s) in respect of all employees in a workplace, such trade unions may choose the members of the workplace forum from among their elected representatives in the workplace in terms of their own constitutions.¹⁸⁵
- (v) If the applicant union or unions cease to be representative and another union or unions achieve majority status, the latter will be entitled to demand a new election of the workplace forum.¹⁸⁶
- (vi) Any registered trade union with members at the workplace may nominate candidates for election to the workplace forum.¹⁸⁷ The likely effect is that the applicant union or unions, given their majority membership among the workforce, will determine the composition of the workplace forum by putting forward their own nominees for election.
- (vii) An applicant union or unions that nominated a member for election to a workplace forum may remove that member at any time.¹⁸⁸

182 S 80(2).
183 S 80(7-8).
184 S 80(9).
185 S 81.
186 S 82(1) (f).
187 S 82(1) (h).
188 S 82 (1) (i).

- (viii) Office-bearers or officials of the applicant trade union or unions may attend any meeting of the workplace forum, including meetings with the employer or with employees.¹⁸⁹
- (ix) The applicant union or unions and the employer may, by agreement, change any of the provisions of the constitution of workplace forum set out in para (v) to (viii) above.¹⁹⁰
- (x) If any of the statutory topics of consultation or joint decision-making are regulated by a collective agreement, they are automatically excluded from the agenda of the workplace forum and will continue to be regulated by collective agreement.¹⁹¹
- (xi) The applicant union or unions and the employer may by collective agreement add topics to the statutory agendas of consultation and joint decision-making (ss 84(3), 86(3) (a)) and may also remove all or any of the topics from the agenda of joint decision-making.¹⁹² Similarly, a bargaining council may add topics to the consultative agenda of workplace forums falling within its jurisdiction.¹⁹³
- (xii) The applicant union or unions may request a ballot to dissolve a workplace forum. If more than 50% of employees taking part in the ballot vote for dissolution, the workplace forum will be dissolved.¹⁹⁴

As can be seen from the above workplace forums are totally dominated and in control of unions. Their existence is dependent on the volition of majority unions, their jurisdiction is confined to matters not covered by collective agreements, and trade unions can prescribe and regulate all their activities, and can terminate their existence.¹⁹⁵

¹⁸⁹ S 82(1) (u).

¹⁹⁰ S 82(1) (v).

¹⁹¹ Ss 84(1), 86(1).

¹⁹² S 84(3) and 86(3) (a) and (b).

¹⁹³ S 84(2).

¹⁹⁴ S 93.

¹⁹⁵ See Du Toit "Collective Bargaining and Worker Participation" 2000 *ILJ* 1544.

These provisions have been criticised for going too far in allaying union fears at the expense of meaningful worker participation that could result in increased productivity.¹⁹⁶ Union domination of workplace forums does not allow for co-operative consensus seeking and further entrenches adversarialism at the workplace. This is because the distinction between the collective bargaining role of trade unions and the consensus seeking role of workplace forums becomes blurred.¹⁹⁷ Furthermore, it appears that contrary to the position in other countries, unions may embark on strike action where agreement cannot be reached on a matter for consultation.¹⁹⁸ This runs contrary to the co-operative spirit intended for workplace forums. With regard to workplace forums the legislatures' over-zealous concern for the protection of trade unions has resulted in the inability of workplace forums to perform the functions that they were designed to achieve, either because they never came into existence and when they rarely did, they were deprived of any form of independence from trade unions.¹⁹⁹

Union opposition to workplace forums is summarised by Du Toit *et al*: "Put simply, an ineffectual trade union presence at plant level may create a vacuum that workplace forums could fill, either by force of circumstances or with a little help from employers. The fear is that workers may transfer their loyalties from an inadequate trade union to a workplace forum that is better able to represent their interests and thus turn curable union weakness into terminal decline."²⁰⁰ It appears therefore that according to union protagonists unions must continue to prosper even at the expense of employee interests.

¹⁹⁶ Baskin & Satgar "South Africa's New LRA – A Critical Assessment and Challenges for Labour" 1995 *Labour Bulletin* 50.

¹⁹⁷ *Idem*.

¹⁹⁸ Olivier "Workplace Forums: Critical Questions from a Labour Law Perspective" 1996 *ILJ* 803, 812-815; Summers "Workplace Forums from a Comparative Perspective" 1995 *ILJ* 806; Van Niekerk "Workplace Forums" 1995 *Contemp LL* 31, 32; Du Toit "Collective Bargaining and Worker Participation" 1995 *ILJ* 1544.

¹⁹⁹ See Olivier *op cit* 803.

²⁰⁰ *Labour Relations Law* (2003) 4th ed 1554.

Despite initial intentions to amend the provisions relating to workplace forums²⁰¹ so as to encourage their development the 2002 amendments to the LRA have not altered these provisions at all. It is concluded that the legislature remains committed to allaying union fears, addressing union concerns and perhaps even encouraging unions at all costs.

8 Organisational Rights

As was observed *supra*,²⁰² South African labour legislation provides unions with extensive organisational rights in order that they might expand and gain influence. The legality of the organisational right of stop order facilities for the collection of union dues as well as agency shops have been questioned the world over.²⁰³ Nevertheless they are provided for in terms of our legislation. These systems provide unions with huge administrative and financial benefits.

9 Right to Strike over Refusal to Bargain and Retrenchments

The right to strike is available to unions where the employer refused to bargain collectively with the union or refuses to recognise the union provided the strike is preceded by the normal procedures in addition to an advisory award having been made.²⁰⁴ Despite the lack of a direct duty to bargain being placed on the employer by the LRA, it has been submitted by Du Toit *et al*²⁰⁵ that section 23(5) of the Constitution which provides for the right of every trade union and every employer

²⁰¹ There were proposed amendments contained in the Labour Relations Amendment Bill of 2000, to the effect that a registered trade union would be able to apply for the establishment of a workplace forum in a workplace in which the majority of the employees were not trade union members, provided that the application was supported by non-union members and a majority of the employees in the workplace as a whole supported the application. Furthermore, the proposed amendments provided that where there was no registered trade union, the majority of employees in a workplace could apply for the establishment of a workplace forum. Finally, the proposed amendments made it possible to establish a workplace forum in workplaces where there were less than 100 employees. These proposals however were ultimately not drafted.

²⁰² Ch 3 *supra*.

²⁰³ Raday "The Decline of Union Power" in Conaghan *et al Labour Law in an Era of Globalization* (2002) 374.

²⁰⁴ S 64 (2).

²⁰⁵ *Labour Relations Law* (2003) 4th ed 167.

and employer's organisation to engage in collective bargaining, could be interpreted as introducing a duty to bargain collectively.²⁰⁶

In the case of all but small employers or very small retrenchments, the 2002 Amendments to the LRA provide unions with a choice of either striking or going to the Labour Court over the substantive fairness of dismissals based on operational requirements.²⁰⁷ Sympathy strikes are also provided for in such instances.²⁰⁸

This can result in forum shopping, it causes uncertainty for both employees and employers, and may cause disputes amongst employees. It is another instance of the prevalent emphasis on job retention as opposed to job creation in our labour legislation.²⁰⁹

10 A Legal Duty to Bargain?

10.1 Introduction

Whether there is a legal duty to bargain collectively is far from settled. Academic opinion on this issue differs.²¹⁰ In order to consider the merits of the opposing views it is necessary to consider the policies of the Labour Relations Act 66 of 1995 (hereinafter the "LRA"). As pointed out by Smit J: "The Constitutional Court in the *NEHAWU v University of Cape Town & others* case at 19 par 34, indicated that in interpreting constitutional rights guidance should be obtained from the provisions of the Labour Relations Act 66 of 1995."²¹¹ In turn, in order to gain insight into these policies it is necessary to consider the background of the duty to

²⁰⁶ This is discussed in detail under the sub-heading 10 *infra*.

²⁰⁷ S 189A (7)(b) and 8(b).

²⁰⁸ S 189A (11)(c).

²⁰⁹ See Baskin "South Africa's Quest for Jobs, Growth and Equity in a Global Context" 1998 *ILJ* 986; Mhone "Atypical Forms of Work and Employment and Their Policy Implications" 1998 *ILJ* 197.

²¹⁰ For example compare Cheadle's view in Cheadle, Davis and Haysom *South African Constitutional Law: The Bill of Rights* (2002) 388-398 with the view of Van Jaarsveld in "Reg op Kollektiewe Bedinging – Nog Enkele Kollektiewe Gedagtes" *De Jure* 2004 349.

²¹¹ *SA National Defence Force Union & Another v Minister of Defence & Others* 2003 *ILJ* 2101 (T) 2112 A.

bargain in South Africa and the background against which the policies of the LRA were formulated.

10.2 *Development of a Duty to Bargain in South Africa*

Collective bargaining became prevalent in most modern economies as a result of the advent of industrialisation. Steenkamp, Stelzner and Badenhorst explain: “Collective bargaining in South Africa was of little significance until industrialization commenced with the discovery of diamonds in 1870 and gold in 1872. Prior to these events South Africa was mainly a rural society. Employment relationships were governed by the Master and Servants Act 1841, which was primarily aimed at setting down rules for black employees. There were no collective labour relations and no concerted attempt by workers to organize themselves against their employers. The advent of mining, however, witnessed a large-scale migration of unskilled blacks and whites to the Witwatersrand. The mining industry, in turn, quickly gave rise to the establishment of supporting industries such as the railways, engineering and building industries. As industrialization expanded the need for skilled workers increased. A large number of highly skilled European immigrants were employed at much higher rate than the rest of the workforce. With increased mechanization, however, mine owners realized that many jobs previously performed by European immigrants and skilled white workers could in fact be performed by black unskilled or semi-skilled labour at a lower rate. The threat of losing their jobs to black workers quickly gave rise to a number of strikes by white mineworkers. It was only after the violent Rand Revolt of January 1922 (when 25000 white miners went on strike to express their dissatisfaction with the contemplated retrenchment of about ten per cent of the white workforce, which they viewed as yet another attempt by mine owners to replace them with cheaper black labour), that the government decided to implement statutory machinery for collective bargaining and the resolution of disputes between employers and employees.”²¹²

²¹² “The Right to Bargain Collectively” 2004 *ILJ* 946-947.

Thus in 1924 the Industrial Conciliation Act²¹³ was passed. This Act was testimony to the recognition of the fact that industrial conflict had to be institutionalised through a system of collective bargaining in order to contain conflict and strive towards industrial peace. A statutory system of centralised collective bargaining was introduced. Unfortunately blacks were excluded from participation in this statutory system of collective bargaining. Consequently, a dualistic system of labour relations developed, with trade unions representing white employees taking part in a statutory, centralised system of collective bargaining and trade unions representing black employees negotiating with individual employers at plant or organisational level.²¹⁴ In 1979 the Wiehahn Commission of Enquiry recommended that the statutory system of collective bargaining should be made available to trade unions representing black employees and that an industrial court with a broad and flexible unfair labour practice jurisdiction should be created.²¹⁵ The industrial court looked to its unfair labour practice jurisdiction to impose a duty to bargain.²¹⁶

A judicially imposed duty to bargain was first introduced in the United States, and this system was adopted in Canada and Japan.²¹⁷ Cheadle makes the point that the duty to bargain “is not just a right: it is a policy regime that involves fundamental choices as to the form and level of collective bargaining and the nature of its regulation. It commits a society to a collective bargaining regime centred on the workplace rather than on the industry. It requires a regulatory regime that provides for state or third- party determination of:

- Who must bargain with whom-threshold issues of representativeness;

²¹³ 11 of 1924.

²¹⁴ See Cameron, Cheadle and Thompson *The New Labour Relations Act* (1989) 21-29.

²¹⁵ See Steenkamp, Stelzner and Badenhorst *op cit* 949-951.

²¹⁶ *UAMAWU v Fodens (SA) (Pty) Ltd* 1983 ILJ 212 (IC); *East Rand Gold and Uranium Co Ltd v NUM* 1989 ILJ 683 (LAC); *NUM v East Rand Gold and Uranium Co Ltd* 1991 ILJ 1221 (A); *MAWU v Hart* 1985 ILJ 478 (IC); *FAWU v Spekenham Supreme* 1988 ILJ 627 (IC):

²¹⁷ Cheadle, Davis and Haysom *op cit* 390.

- Who is represented by the trade union in the negotiations (the ‘bargaining unit’);
- What may be placed on the bargaining agenda (the ‘subject matter of bargaining’); and
- The manner in which bargaining takes place (the ‘duty to bargain in good faith’).

In a nutshell, the positive duty to bargain carries with it a policy choice as to the form and level of collective bargaining and the regulatory regime that is necessary to govern and maintain it.”²¹⁸This would therefore in Cheadle’s view impinge on the philosophy of voluntarism which underpinned the LRA’s predecessors.²¹⁹Thompson and Benjamin are of the view that the LRA has an even stronger underlying philosophy of voluntarism when it comes to collective bargaining.²²⁰

In the light of this and the fact that Canada, the United States and Japan all have plant level collective bargaining systems as opposed to the centralised systems of some European countries, it is not surprising that in these countries there exists a positive duty to bargain in the sense that it can be judicially imposed.²²¹ When the industrial court in South Africa was imposing a duty to bargain plant level collective bargaining was prevalent. This is despite the fact that a statutory system of

²¹⁸ *Idem.*

²¹⁹ See Davis “Voluntarism and South African Labour Law-are the Queensbury Rules an Anachronism?” 1990 *AJ* 45, 52-55.

²²⁰ See *South African Labour Law* (1997) vol 1 AA1-5 where the authors state:” The approach of the 1995 Act is quite different from that of its predecessor. Under the unfair labour practice provisions of the repealed Act, employers were saddled with a legal duty to bargain with trade unions. Most presiding officers held that only sufficiently representative unions held rights in this regard, but some went so far as to extend entitlements to unions with insignificant strength. The collective dimension of the unfair labour practice jurisdiction has now been effectively abolished, and with it the duty to bargain. However, the institution of collective bargaining is unequivocally fostered, albeit down a different path. The objective has been to create a statutory framework conducive to bargaining, whilst preventing the judicial appropriation of politically sensitive terrain. A sub-text has been to deny legal leverage to unrepresentative unions.”

²²¹ *Ibid* 390.

collective bargaining at central level was in place. The reason for this state of affairs is historical: As mentioned above unions representing black employees were excluded from the statutory system of centralised collective bargaining until the Wiehahn recommendations were put in place in 1979.²²² During the 1980s, despite being able to participate in the statutory system of central collective bargaining (industrial councils), most trade unions representing black employees continued to bargain with employers at plant level. Cameron, Cheadle and Thompson explain: “The introduction of the industrial court in 1979 represented a major philosophical break with the past. It coincided with the deracialisation of the statute, a step which meant that henceforth the aspirations and frustrations of the entire industrial workforce would require accommodation within a single, uniform code. It would have been quite beyond the capacity of the existing system of industrial councils and conciliation boards to deal successfully with the sudden arrival of a phalanx of unions representing predominantly black workers. The legacy of past exclusion from this statute entailed that the emerging unions were not registered and in fact had never sought to organize along lines consistent with the registration process. They were, in the main, incipient industrial unions which had learnt the art of survival through factory-based recruitment programs. Their major quests were for recognition for themselves and job security for their largely unskilled and semi-skilled members. To the extent that they relied upon legal forms at all, they sought to fix their right in contract (in the shape of recognition agreements), not through legislation. A statutory formula was called for which could reconcile the old traditions with the new. The unfair labour practice jurisdiction was the legislative response to that demand.”²²³

Not surprisingly, black trade unions were less than enthusiastic about the fact that they could partake in the officially sanctioned system of collective bargaining. Initially most of the unions representing black employees were distrustful of their inclusion in the system and perceived it as another form of government control. Another reason for their failure to partake in the system was simply as a matter of

²²² See Bendix *Industrial Relations in the New South Africa* (1988) 81-82.

²²³ *The New Labour Relations Act* (1988) 21.

principle in protest of their previous exclusion. Smaller unions felt that their power base would be diluted if they were to partake in a system of centralised collective bargaining and preferred to bargain at plant level.²²⁴ The result was an entrenched system of plant level collective bargaining in South Africa.

Towards the mid 1980s resistance to registration by unions representing black employees began to wane and according to the Department of Manpower's report for 1990 "total union membership discounting the unregistered unions, had increased by one and a half million since 1980."²²⁵ Steenkamp, Stelzner and Badenhorst observe: "The initial divergence between statutory and non-statutory bargaining changed during the 1980s. When the rapidly expanding Metal & Allied Workers Union (MAWU) decided to join the industrial council for the metal industry in 1984, many trade unions followed suit."²²⁶ Black trade unions began to see the advantages of central level collective bargaining. As these unions gained strength they became the representatives of the black working class and since blacks were disenfranchised these trade unions "found themselves in a politically prominent position."²²⁷ Labour and political rights of black employees became the major issues for central level collective bargaining. Despite the acceptance of the statutory system of central collective bargaining by many trade unions representing black employees from the mid 1980s, there "was also a proliferation of recognition agreements between individual employers and unions representing black employee."²²⁸ In other words, plant level collective bargaining continued to flourish and the industrial court made use of its unfair labour practice jurisdiction to impose a duty on employers to bargain.²²⁹ This duty necessitates that the court prescribes:

- (i) what constitutes bargaining in bad faith i.e. a duty to bargain in good faith;²³⁰

²²⁴ Bendix *op cit* 97.

²²⁵ *Ibid* 98.

²²⁶ "The Right to Bargain Collectively" 2004 *ILJ* 950.

²²⁷ Bendix *op cit* 99.

²²⁸ *Ibid* 100.

²²⁹ See *inter alia* *FAWU v Spekenham Supreme* (1988) *ILJ* 627 (IC).

²³⁰ See Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* (2004) par 546.

- (ii) what may and may not be put on the bargaining table;²³¹
- (iii) at what level the parties should bargain,²³² and
- (iv) with whom the employer should bargain.²³³

In short, although trade unions representing black employees increasingly took part in central level collective bargaining from the mid 1980s to the early 1990s, plant level collective bargaining continued and the industrial court therefore made use of its broad unfair labour practice jurisdiction to impose a duty to bargain.²³⁴

Du Toit *et al* criticize the industrial court's jurisprudence concerning the duty to bargain: "Inevitably, the resulting rules and principles were formulated on an *ad hoc* basis which gave rise to a number of problematical features. These included-

- Uneven often subjective, rulings which left litigants uncertain as to when, with whom and in respect of which topics the duty to bargain would arise;
- a proliferation of eligible agents with rights to bargain at plant level;
- a duality between centralized and plant-level bargaining;
- a vague and often subjective concept of good faith bargaining; and
- an overall lack of consistency, undermining bargaining relationships and impacting unfavourably on the legitimacy of the system.

As a consequence, collective bargaining developed in a context of legalism at the expense of voluntarism, innovation and industry level organization. The result, according to the drafters of the current Act, was 'a confused jurisprudence in which neither party is certain of its rights and in which economic outcomes are imposed on parties which often bear little, if any, relation to the needs of the parties or the power they are capable of exercising'." ²³⁵

²³¹ *Ibid* par 546 A.

²³² *MAWU v Hart* 1985 ILJ 478 (IC); *PPAWU v SA Printing & Industries Federation* 1990 ILJ 345 (IC); *UAMAWU v Thomsons (Pty) Ltd* 1988 ILJ 266 (IC).

²³³ See Van Jaarsveld, Fourie and Olivier *op cit* par 156.

²³⁴ See *SASBO v Standard Bank* 1998 BLLR 208 (A).

²³⁵ *Labour Relations Law* (2003) 4th ed 228-229.

These problems coupled with a preference for central level collective bargaining by COSATU²³⁶ set the scene for the drafting of the Labour Relations Act 66 of 1995.

10.3 The Labour Relations Act 66 of 1995 (hereinafter LRA)

The LRA abolished the broadly formulated unfair labour practice which accorded the industrial court the ability to create a judicially enforceable duty to bargain.²³⁷ Nevertheless the LRA encourages collective bargaining especially at central or sectoral level.²³⁸ The objects clause of the LRA specifically provides for this.²³⁹ The LRA provides a number of motivations for the encouragement of central or sectoral level collective bargaining:

- (i) by collective agreement parties to a bargaining council may establish the thresholds of representativity necessary for the acquisition of organisational rights;²⁴⁰
- (ii) trade unions that are party to a bargaining council are automatically entitled to the organizational rights of access to the workplace and stop order facilities in all workplaces within the council's registered scope;²⁴¹
- (iii) councils can by means of collective agreement determine which matters may not be an issue in dispute for the purpose of a strike or lock-out at the workplace;²⁴²
- (iv) a bargaining council may add to the list of issues over which it is compulsory to consult with a workplace forum.²⁴³

The LRA has a strong theme of majoritarianism running through it and the creation of large majority representative unions is encouraged. Various motivations have

²³⁶ Bendix *op cit* 103.

²³⁷ Benjamin and Thompson *South African Labour Law* (1997) vol 1 AA1-5.

²³⁸ Steenkamp, Stelzner and Badenhorst "The Right to Bargain Collectively" 2004 *ILJ* 954.

²³⁹ S 1(d) (ii).

²⁴⁰ S 18(1).

²⁴¹ S 19.

²⁴² S 28(1) (i).

²⁴³ S 84(2) and s 28 (1) (j).

been put in place to encourage unions that represent a majority of the workforce either alone or by joining forces with other unions. Only these unions enjoy the following rights:

- (i) The organisational rights of the election of trade union representatives²⁴⁴ and the organisational right of access to information²⁴⁵ are only available to union(s) that represent a majority of the employees at the workplace;
- (ii) the right to enter into closed²⁴⁶ and agency shop²⁴⁷ agreements with the employer;
- (iii) the right to apply for the establishment of a workplace forum;²⁴⁸
- (iv) the right to enter into collective agreements that are binding on non members;²⁴⁹ and
- (v) the right to enter into a collective agreement that establishes the threshold of representativity applicable for the acquisition of organizational rights of access to the workplace, stop – order facilities and trade union leave rights.²⁵⁰ In considering whether or not a trade union is sufficiently representative, the commissioner ‘must seek to minimise the proliferation of trade union representation in a single workplace and, where possible, to encourage a system of a representative trade union in the workplace’.²⁵¹

The LRA encourages collective bargaining by providing machinery for the creation of bargaining forums such as workplace forums,²⁵² bargaining councils²⁵³ and statutory councils,²⁵⁴ and by providing for the acquisition of organisational rights.²⁵⁵

The *Explanatory Memorandum* that accompanied the Draft Bill states: “The fundamental danger in the imposition of a legally enforced duty to bargain and the

²⁴⁴ S 14.
²⁴⁵ S 16.
²⁴⁶ S 26.
²⁴⁷ S 25.
²⁴⁸ S 80.
²⁴⁹ S 23(1) (d) (iii).
²⁵⁰ S 18.
²⁵¹ S 21(8); s 27.
²⁵² S 80.
²⁵³ S 27.
²⁵⁴ S 39.
²⁵⁵ Ch III part A of the LRA.

consequent determination by the judiciary of levels of bargaining, bargaining partners and bargaining topics, is the rigidity which is introduced into a labour market that needs to respond to a changing economic environment. The ability of the South African economy to adapt to the changing requirements of a competitive international market is ensured only where the bargaining parties are able to determine the nature and the structure of bargaining institutions and the economic outcomes that should bind them, and, where necessary, to renegotiate both the structures within which agreements are reached and the terms of these agreements...While giving legislative expression to a system in which bargaining is not compelled by law, the draft Bill does not adopt a neutral stance. It unashamedly promotes collective bargaining. It does so by providing a series of organisational rights for unions and by fully protecting the right to strike.”²⁵⁶

This preference for majority representative trade unions and an abhorrence of a proliferation of unions is further testimony to the LRA's preference for and encouragement of central or sectoral level collective bargaining instead of plant level collective bargaining.²⁵⁷ The previous dispensation displayed no such bias in favour of central level collective bargaining. A legally enforceable duty to bargain “commits a society to a collective-bargaining regime centred on the workplace rather than on the industry.”²⁵⁸ Clearly, such a plant level collective bargaining system was not what the legislature intended in drafting the LRA 66 of 1995. This *inter alia* is why the legally imposed duty to bargain was abolished.²⁵⁹ However, the preference for collective bargaining for the ultimate purpose of attaining labour peace remained.²⁶⁰ What has changed in this respect is the means used to encourage, perhaps even enforce, collective bargaining. Instead of a broadly formulated unfair labour practice jurisdiction, organisational rights for

²⁵⁶ GN 97 “Draft Negotiating Document in the Form of a Labour Relations Bill” 10 Feb 1995 GG 16259 22.

²⁵⁷ Basson, Christianson & Garbers *Essential Labour Law* (2000) vol 2 74.

²⁵⁸ Cheadle, Davis and Haysom *South African Constitutional Law: The Bill of Rights* (2002) 391.

²⁵⁹ See Thompson and Benjamin *South African Labour Law* (1997) vol 1 AA1-5.

²⁶⁰ S 1 (c) (i); s 1 (d) (i) (ii).

representative trade unions coupled with the right to strike²⁶¹ provide the key for the encouragement or even enforcement (given certain circumstances) of participation in collective bargaining. Brassey explains: “In seeking to promote a framework within which employees and employers can collectively bargain, the Act adopts an unashamedly voluntarist approach: it does not prescribe to the parties whom they should bargain with, what they should bargain about, or whether they should at all. In this regime the courts have no right to intervene and influence collectively bargained outcomes. These actions must depend on the relative power of each party to the bargaining process.”²⁶²

Aside from the provision for the establishment of closed shops and agency shops and statutory provision for organisational rights, the introduction of the right to strike without fear of dismissal under certain prescribed circumstances is one of the most significant changes brought about by the LRA.²⁶³ In short, statutory provision of organisational rights, a marked bias towards majority representative trade unions and central or sectoral collective bargaining, combined with a right to strike all point to a system where collective bargaining is left to be determined by the power-play between the parties. Judicial interference in the sphere of collective bargaining is inappropriate and unwarranted in these kinds of systems.²⁶⁴ Cheadle cites the following²⁶⁵ in support of this view: “I believe our current system of collective bargaining regulating relations between workers and employers is too complicated and sophisticated a field to be put under the scrutiny of a judge in a contest between two litigants arguing vague notions such as ‘reasonable’ and ‘justifiable in a free democratic society’. I have no confidence that our adversary court system is capable of arriving at a proper balance between the competing political, democratic and economic interests that are the stuff of labour legislation.

²⁶¹ *In re Certification of the Constitution of the Republic of South Africa* 1996 ILJ 821 (CC) par 64; *NUMSA v Bader Bop (Pty) Ltd* 2003 ILJ 305 (CC).

²⁶² *Employment and Labour Law* (2000) vol 3 A 1: 8.

²⁶³ Bendix *Industrial Relations in the New South Africa* (1998) 102.

²⁶⁴ See Brassey and Cooper in Chaskalson and others *Constitutional Law of South Africa* (1998) 30.

²⁶⁵ Cheadle, Davis and Haysom *South African Constitutional Law: The Bill of Rights* (2002) 395.

When we consider that labour law is poly-centric in nature, adjustments to the delicate industrial relations balance in one part of the system might have unanticipated and unfortunate effects in another. The lessons of the evolution of our labour law regime in the past 50 years display very clearly that the legislatures are far better equipped than the courts to strike the appropriate balance between the interests of the individual employee, the union, the employer and the public.”

266

Although the LRA does not provide for a duty to bargain, it renders the imposition of such duty possible by the use of economic or industrial muscle: In terms of the LRA, a trade union is entitled to strike where an employer refuses to bargain, provided an advisory (not binding) arbitration award on whether bargaining should take place is first obtained.²⁶⁷ This provision re-iterates the LRA’s unwillingness to allow courts or other tribunals to impose a duty to bargain. Clearly the legislature perceived the use of industrial muscle in the form of a strike as the most suitable or appropriate means of forcing the employer to bargain collectively.

The fact that the LRA does not explicitly provide for a duty to bargain collectively has led many to describe the Act as ‘voluntaristic’.²⁶⁸ From the perspective that there is no judicially enforceable duty to bargain this description might be accurate. Van Jaarsveld²⁶⁹ on the other hand, argues that what is ‘voluntaristic’ about the Act is not the fact that the LRA does not impose a duty to bargain, but rather the mechanisms that the LRA provides for collective bargaining. The parties are free to determine the outcomes, parties and subjects for collective bargaining. For

²⁶⁶ *Op cit* 388. See too Weiler “The Regulation of Strikes and Picketing under the Charter” in Weiler and Elliot (eds) *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedom* (1986) 235.

²⁶⁷ S 64(2).

²⁶⁸ See for example Steenkamp, Stelzner and Badenhorst “The Duty to Bargain Collectively” 2004 *ILJ* 953; *NPSU v National Negotiating Forum* 1999 *ILJ* 170 (LC); Brasseley *Employment Law and Labour Law* 2nd ed (1999) vol 3 A 1:8.

²⁶⁹ “Reg op Kollektiewe Bedinging - Nog Enkele Kollektiewe Gedagtes” 2004 *De Jure* 353.

example, there is no compulsion to establish a bargaining council,²⁷⁰ or a workplace forum,²⁷¹ nor does the LRA prevent the parties from entering into a recognition agreement and bargaining at plant level despite the LRA's preference for central or sectoral level bargaining. However there are some instances where the LRA is not voluntaristic at all: The Minister can force parties to become members of a statutory council²⁷² and in this manner force the parties to bargain with each other. Another instance of where the LRA is not voluntaristic is where an employer is obliged to grant a 'representative' trade union certain organisational rights.²⁷³ In the words of Du Toit *et al.*: "The end product is a hybrid of voluntarism, inducement and compulsion."²⁷⁴

10.4 *The Constitutional Duty to Bargain*

The interim Constitution²⁷⁵ provided for the "right to bargain collectively",²⁷⁶ while the final Constitution (hereinafter "the Constitution"²⁷⁷) provides for "the right to engage in collective bargaining".²⁷⁸ Some are of the opinion that this difference in wording between the interim Constitution and the final Constitution is insignificant.²⁷⁹ In other words, in terms of this view, the right to collective bargaining is the same as the right to engage in collective bargaining. This entails a direct or positive right in the sense that the other party has a "correlative duty" to bargain collectively.²⁸⁰

²⁷⁰ S 27.

²⁷¹ S 80.

²⁷² S 41.

²⁷³ Ss 12-16.

²⁷⁴ *Labour Relations Law* (2003)^{4th} ed 227.

²⁷⁵ Act 200 of 1993.

²⁷⁶ S 27(3).

²⁷⁷ Act 108 of 1996.

²⁷⁸ S 23(5).

²⁷⁹ Smit J in *SA National Defence Force Union & Another v Minister of Defence & Others* 2003 ILJ 2101 (T) at 2112; Van Jaarsveld *op cit.*

²⁸⁰ *SA National Defence Force Union & Another v Minister of Defence & Others loc cit.*

Others believe that the difference in wording between the interim and the final constitution was deliberate and that the meaning differs.²⁸¹ According to this view section 23(5) of the Constitution does not provide for a right in the sense that it imposes a correlative, positive duty to bargain, but it merely provides for a freedom to bargain collectively. A 'freedom' as opposed to a 'right' does not entail a positive duty to act, but only an absence of interference with that protected freedom, hence a negative duty. In short, a right to bargain would entail a correlative duty to bargain, whereas a freedom to bargain merely prohibits an interference or hindrance with the exercise of that freedom.

Van Jaarsveld²⁸² discusses some of the reasons for the view that the difference is insignificant. Firstly the argument that collective bargaining is of such integral importance to the very fibre of our industrial relations system that the absence of a direct duty to bargain would negate the importance of collective bargaining is put forward. According to this interpretation, organisational rights, which form the foundation of effective collective bargaining, would make no sense unless an enforceable, fundamental right to collective bargaining exists.²⁸³ It appears that the author is referring to a judicially enforceable right. I agree with this sentiment with the reservation that the right to collective bargaining need not necessarily be enforced by the courts. This right can also be compelled by the use of economic forces or industrial muscle in the form of a strike as provided for in terms of the LRA. I concede that in order to exert such industrial muscle, the employee party will have to be sufficiently representative. But this is in accordance with the policies of majoritarianism and the preference for sectoral or central level collective bargaining provided for in the LRA.²⁸⁴ As pointed out by Cheadle: "The establishment of a compulsory system of collective bargaining is almost

²⁸¹ See the views of Van der Westhuizen J in *SA National Defence Union & Another v Minister of Defence & Others op cit* at 1507-1510; Brassey and Cooper in Chaskalson *et al Constitutional Law of South Africa* (1998) 30; and Cheadle in Cheadle, Davis and Haysom *South African Constitutional Law: The Bill of Rights* (2002) 390-394.

²⁸² *Op cit* 349.

²⁸³ *Ibid* 355.

²⁸⁴ As discussed under heading 2 *supra*.

impossible at industry level. On the other hand, a duty to bargain is readily enforceable at the level of the employer. The combination of both a voluntarist industry – level system and a compulsory system of workplace bargaining will lead ultimately to the dismantling of industry-level structures of bargaining. Once the constitutional text is held to include a duty to bargain, it commits itself and the society to a workplace-level system of collective bargaining. The fact that there is no judicial enforcement of a duty to bargain does not mean that the Labour Relations Act does not provide a remedy. Firstly, much of the critical content of a recognition agreement – namely the entrenchment of the trade union at the workplace - is enforceable. Secondly, there is a procedure for an advisory award on disputes concerning a duty to bargain. Such an award is not legally enforceable but can be enforced by a trade union through the union's exercising its right to strike.”²⁸⁵

Smit J²⁸⁶ decided that if there is no positive, judicially enforceable right to bargain collectively, the State would not be fulfilling its constitutional mandate to “respect, protect, promote and fulfil the rights of the Bill of Rights.”²⁸⁷ My view is that in promulgating the LRA which unashamedly encourages collective bargaining and provides the framework for its practical achievement, the State has indeed fulfilled its mandate to “respect, protect, promote and fulfil” the right to bargain collectively.

Another argument in favour of a duty to bargain is that if the drafters of the Constitution wanted to create only a freedom as opposed to a positive, judicially enforceable right, they would have used the word ‘freedom’ instead of the word ‘right’ as they have done for example in s 15 - the freedom of religion, belief and opinion, s16 - the freedom of expression and s 21 - the freedom of movement and residence.²⁸⁸ But the difference between these ‘freedoms’ and the ‘right’ to

²⁸⁵ Cheadle, Davis and Haysom *op cit* 395-396.

²⁸⁶ *SA National Defence Force Union & Another v Minister of Defence & Others* 2003 ILJ 2101 at 2113.

²⁸⁷ S 7(2).

²⁸⁸ Smit J's judgement in *SA National Defence Force Union & Another v Minister of Defence & Others op cit* 2113; and *Van Jaarsveld op cit* 356.

collective bargaining is that these freedoms can be exercised without the participation of another party. All that is required of other parties is that they refrain from interfering with the exercise of that freedom. On the other hand, in order to bargain collectively, the active participation and even cooperation of another party is required. This is not the same as refraining from doing something. It follows that to speak of a 'freedom' to bargain collectively would make no sense. Since the participation of another party is required the use of the word 'right' is more appropriate. As alluded to earlier this does not necessarily mean a legally enforceable right. In the light of the fact that the LRA has created other mechanisms for its enforcement, judicial enforcement is not necessary. Secondly, the use of the word 'right' in the Constitution does not necessarily entail a right that is enforceable by the courts.²⁸⁹

Finally the argument that South Africa is obliged to enforce collective bargaining in terms of its international law obligations²⁹⁰ is countered by Cheadle's view : "...the duty to bargain is not an aspect of the right to bargain collectively in the manner articulated in international instruments. The ILO Convention on the Right to Organise and to Bargain Collectively records the ratifying member's obligations as follows:

Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote full development and utilisation of machinery for voluntary negotiation between employers and employers' organizations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

This obligation has been glossed by the Committee on Freedom of Association. The committee states, in its digest of decisions, that 'Collective bargaining if it is to

²⁸⁹ See Beatty "Constitutional Labour Rights: Pro's and Cons" 1993 *ILJ* 1; De Vos "Pious Wishes or Directly Enforceable Human Rights? 1997 *SAJHR* 67; *Sabroomoney v Minister of Health Kwa Zulu Natal* 1997 12 *BLLR* (CC), 1998 1 SA 765 (CC); *Treatment Action Campaign & Others v Minister of Health & Another* [2002] 4 *BLLR* 356 (T); and *Grootboom v Oostenberg Municipality* [2000] 3 *BLLR* 277 (C).

²⁹⁰ Van Jaarsveld *op cit* 349.

be effective, must assume a voluntary character and not entail recourse to measures of compulsion which would alter the voluntary nature of such bargaining'. It is evident from the text of the Convention and the commentary on it that it is the negative form of the right that is internationally entrenched and not its positive form."²⁹¹

The European Charter, and other international instruments, as Cheadle²⁹² demonstrates, take the same approach in that governments are required to take steps to "encourage and promote the full development and utilisation of machinery for voluntary negotiation." (Text of the International Labour Organisation Convention on the Right to Organise and Bargain Collectively).

These international instruments impose a freedom and not a right to bargain collectively and emphasize that the bargaining should take on a voluntary nature, for example, the International Labour Organisation's Committee on Freedom of Association 1996 in discussing the various Articles of Convention 98 (which deals with the right to organize and bargain collectively) says:

"Nothing in Article 4 places a duty on the government to enforce collective bargaining by compulsory means with a given organization; such intervention would clearly alter the nature of bargaining."^{293 294}

²⁹¹ Cheadle, Davis and Haysom *South African Constitutional Law: The Bill of Rights* (2002) 389-390.

²⁹² *Idem.*

²⁹³ Par 846.

²⁹⁴ See also Brassey and Cooper in Chaskalson *et al Constitutional Law of South Africa* (1998) 30, footnote 1 in this regard.

10.5 Conclusion

Precisely what the constitutional right to “engage in collective bargaining” entails is still unclear. In addition to this there appears to be confusion with regard to whether the LRA provides for a duty to bargain. In a recent arbitration award,²⁹⁵ the commissioner identified the following issues for decision: whether the employer was obliged to enter into a recognition agreement; and whether the employer was obliged to negotiate with TAWUSA over certain issues. The commissioner found that since the union represented only 23.5% of the workforce, the employer was not obliged to bargain collectively with the union. Since the LRA does not provide for a judicially enforceable duty to bargain, the commissioner was not in a position to decide these issues.

For the reasons set out above, I hold the view that the constitutional duty to “engage in collective bargaining” does not entail a correlative duty to bargain. However, in circumstances where a specific group of employees is not entitled to take part in a strike,²⁹⁶ it may be possible to construe such failure to bargain collectively as an unfair labour practice in terms of section 23(1) of the Constitution. As Smit J observed: “The obligation to engage in collective bargaining is of particular importance in the present context since members of the SANDF are unable to secure their right to bargain collectively by strike action. If the minister is not burdened with an obligation to negotiate in good faith, SANDU will be deprived of any method of enforcing their ‘right to engage in collective bargaining’. A right without a remedy is meaningless.”²⁹⁷

The old Industrial Court decisions dealing with the duty to bargain under its unfair labour practice jurisdiction (in terms of the 1956 Labour Relations Act), could be useful in interpreting the constitutional right to fair labour practices in this context.

²⁹⁵ *Structural Applications (Pty) Ltd v TAWUSA* [2003] 10 BALR 1203 (CCMA).

²⁹⁶ S 65(d) of the LRA.

²⁹⁷ *SA National Defence Force Union & Another v Minister of Defence & Others op cit* 2113 G-H.

E Conclusion

Given that there are so many arguments in favour of and against any particular form, level and approach to collective bargaining it is not surprising that there have been “moves towards the diversification of bargaining levels”.²⁹⁸ Social security benefits and national incomes policy are topics that might be better suited for national negotiations. Work schedules, productivity and payments by results on the other hand are topics which might be better resolved by enterprise level negotiations or consultations. Consequently new forms of enterprise level collective bargaining have been devised not only in South Africa in the form of workplace forums, but also in France, Ireland, Italy, the Netherlands, Sweden, Australia, New Zealand and England.²⁹⁹

Works Councils or the European equivalent of our workplace forums have been very successful in *inter alia* Germany, Belgium, Sweden and the Netherlands.³⁰⁰ A tendency in the last few years, of works councils concerning themselves with wages and working conditions has been identified.³⁰¹ Even though this is usually a task for trade unions where there is no collective agreement in place, enterprise consensus-seeking prevents the unilateral imposition of terms by employers. Also, centrally agreed conditions cannot be too specific so enterprise consultations have served to fill in the gaps.

²⁹⁸ Bamber and Sheldon “Collective Bargaining” in Blanpain and Engels *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* (2002) 34.

²⁹⁹ *Idem* 33.

³⁰⁰ Summers “Comparison of Collective Bargaining Systems: The Shaping of Plant Relationships and National Economic Policy” 1995 *Comparative Labour Law Journal* 808; Du Toit “Collective Bargaining and Worker Participation” 1995 *ILJ* 1544; Basson and Strydom “Draft Negotiating Document on Labour Relations in Bill Form: Some Thoughts” 1995 *THRHR* 265; Delpont “Korporatiewe Reg en Werkplekforums” 1995 *De Jure* 409; Benjamin and Cooper “Innovation and Continuity: Responding to the Labour Relations Bill” 1995 *ILJ* 265; Olivier “Workplace Forums; Critical Questions From a Labour Law Perspective” 1996 *ILJ* 803.

³⁰¹ Du Toit *op cit* 1574.

The move away from Taylorist modes of production to 'Gatesism' has altered socio-economic conditions within world labour markets. The increasing growth in the number of atypical employees, higher rates of unemployment, the greatly diminished costs of entry into industries, the increase in the number of small enterprises and so on have all contributed to a worldwide trend of union decline. All this has resulted in collective bargaining becoming less centralised. South Africa's response to these global developments as far as labour legislation is concerned is to continue to encourage trade unions (especially large trade unions) and central level collective bargaining. This insistence on a system which is more suitable to conditions prevalent during the golden era of Fordism is out of kilter with reality and not necessarily effective. Legislation cannot alter reality. It should rather be moulded and dictated by such reality.

CHAPTER 6

THE INDIVIDUALISATION OF EMPLOYMENT CONTRACTS

ABRIDGED CONTENTS

	Page
A Introduction	198-201
B Australia	
1 Law and Individualisation of Employment Contracts.....	201-207
2 Human Resource Management and Individualisation.....	207-211
C New Zealand	
1 Law and Individualisation of Employment Contracts.....	212-215
2 Human Resource Management and Individualisation.....	215-220
D England	
1 Law and Individualisation of Employment Contracts.....	220-222
2 Human Resource Management and Individualisation.....	222-226
E Japan	
1 Law and Individualisation of Employment Contracts.....	226
2 Traditional System of Japanese Industrial Relations.....	226-233
F South Africa	
1 Introduction.....	234
2 The Changing Nature of Work in South Africa.....	235-240
3 Legislation.....	240-244
4 Conclusion.....	244-245

A Introduction

It is inevitable that loss of union power and decentralisation of collective bargaining¹ coupled with the increasing number of small enterprises² could all contribute to a move towards the individualisation of the contract of employment. South Africa is no exception to the general trend towards an increase in the use of temporary and casual labour, externalisation or outsourcing³, and an increase in the use of atypical employees generally.⁴ “The ILO-sponsored South African Labour Flexibility Survey (SALFS) in 1996 was the first prominent survey that showed that firms in the manufacturing sector were increasing their use of temporary or casual labour. More recently, other surveys and studies have also shown that these are trends affecting thousands of workers not only in manufacturing but also in retail, agriculture, mining, construction and other sectors of the economy. Most analysts generally agree that increases in atypical forms of

¹ See Horwitz and Franklin “Labour Market Flexibility in South Africa: Researching Recent Developments” 1996 *SAJLR* 3-31; Horwitz and Erskine “Labour Market Flexibility in South Africa: A Preliminary Investigation” 1996 *SAJLR* 24-47.

² According to Ntsika Enterprise Promotion Agency (a government agency set up in 1995 to promote the development of the small business sector), the small business sector which comprises survivalist, micro, small and medium enterprises, accounted for 99.3% of all private sector enterprises in the country. Only 0.7% is made up of large enterprises. In 1998 the Department of Trade and Industry estimated that the small business sector absorbed some 455 of people who left the formal sector, and contributed some 30% to the gross domestic product (Institute for South African Race Relations *2000 South Africa Survey Millennium Edition* (1999) 492.)

³ A survey conducted by Andrew Levy and Associates in September 1998, found that 68.3% of companies had outsourced in the previous five years and that more than three quarters of them had done so on more than one occasion. They concluded that the outsourcing would continue in the foreseeable future, Institute for South African Race Relations *op cit* 28. See also in this regard Theron “Employment is not what it Used to Be” 2003 *ILJ* 1252-1256, 1268-1271; Kenny and Bezuidenhout “Fighting Sub-Contracting in the South African Mining Industry” 1999 *Journal of the South African Institute of Mining and Metallurgy*; Kelly “Outsourcing Statistics” 1999 *SALB* 16; Bernstein “The Sub-Contracting of Cleaning Work: A Case Study of the Casualization of Labour” 1986 *Sociological Review* 396-442.

⁴ See Research Project on “The Changing Nature of Work and Atypical Forms of Employment” *SOCPOL Circular* No 73A/04. The findings of this report are discussed below under the heading “South Africa”.

employment are a global phenomenon. They are often attributed to different factors such as those linked to “globalization, technological change and transformation in the organization and functioning of enterprises, often combined with restructuring in a highly competitive environment”.⁵

Deery and Mitchell attribute this “widespread growth of individual employment arrangements across much of the industrialised world”⁶ to the following interrelated factors:

- (i) An aggressive assertion of managerial rights in industrialised states in response to the global economic restructuring that occurred in the 1980’s and the 1990’s;
- (ii) A global political climate which facilitated a deregulation of labour relations. The authors state: “There has been a clear political objective in many Western countries to introduce greater flexibility into their systems of labour market regulation and to remove alleged rigidities which have been seen as inhibiting efficiency and productivity. This has invariably involved greater decentralised bargaining and extended opportunities for individualised employment arrangements.”
- (iii) A culture of individual responsibility as a result of human resource management ideologies. These ideologies have been referred to as “unitarist fantasies”.⁷ According to the unitarist approach trade unions are perceived as restricting the individual’s freedom to pursue his or her self interest as well as eroding the relationship of trust between employer and employee. This in turn will hamper employee loyalty and work commitment. Trade unions undermine the promotion of a sense of common purpose

⁵ Cheadle *et al Current Labour Law* (2004) 135; see also in this regard International Labour Office *The Scope of the Employment Relationship* Report V for International Labour Conference (2003); Jordaan “Non Standard Forms of Employment” 1995 *Labour Law News and Court Reports* 1; Olivier “Extending Labour Law and Social Security Protection: The Predicament of the Atypically Employed” 1998 *ILJ* 669; Thompson “The Changing Nature of Employment” 2003 *ILJ* 1793; Theron *op cit* 1247.

⁶ *Employment Relations: Individualisation and Union Exclusion - An International Study* (1999) 1.

⁷ Ronfeldt and McCallum “Our Changing Labour Law” in *Enterprise Bargaining, Trade Unions and the Law* (1995) 2.

between employer and employee.⁸ A stable and productive workforce is perceived as a major factor in ensuring global competitiveness. The change in work processes has resulted in the demand for a multi-skilled core workplace that is able to respond to changing demands and circumstances in the market.⁹

Various strategies may be utilised by management in order to elicit loyalty and high levels of productivity from the workforce. These include:

- (i) Various forms of employee participation such as profit sharing schemes or ownership of shares;
- (ii) investment in training and career development;
- (iii) systems of communication and information sharing;
- (iv) non-union grievance procedures;
- (v) in-house bulletins;
- (vi) social functions; and
- (vii) the development of a core workforce consisting of permanent employees with considerable benefits coupled with a peripheral group of non-skilled, part-time, casual and other forms of atypical employees.¹⁰

⁸ Bendix *Industrial Relations in the New South Africa* 3rd edition (1998) 20-21; Deery and Mitchell *op cit* 7 state: "Policies built around open communication systems, extensive training, incentive compensation, team work and the dissolution of status barriers have been seen as easier to introduce in the absence of trade unions".

⁹ Deery and Mitchell *op cit* 2 state: "more competitive product markets combined with less buoyant labour conditions have provided both the incentive and the opportunity for employers to press for wide discretion to manage and direct the performance of work. The pursuit of labour flexibility has invariably provided a rationale for greater unilateralism. Management has often cited collective procedures and standards as constraints on their organisational efficiency. This has served as an argument to strengthen claims for greater managerial prerogatives in relation to structure and performance of work.

¹⁰ Deery and Walsh "The Character of Individualised Employment Arrangements in Australia: A Model of 'Hard' HRM" in Deery and Mitchell *Employment Relations Individualisation and Union Exclusion – An International Study* (1999)117-118.

Various studies have demonstrated that effort levels were increased where individual pay schemes based on performance and upward communication channels existed between labour and management.¹¹

What follows is a comparative overview of laws and human resource management policies adopted in Australia, New Zealand, England and Japan that have facilitated the move toward individualisation of employment agreements in those countries. Finally, the available statistics regarding the use of “atypical” employment in South Africa and the effect of these on the efficacy of the current legislative system are discussed. The reason for not discussing the South African statistics in terms of “individualisation” is that the only statistics available deal with the use of “atypical” employment. The difference between “individualisation” and “atypical” employment is that with “individualisation” the basis of the relationship is usually a contract of employment, whereas with “atypical” employment the basis of the relationship is often a commercial contract. However, as is discussed below, the result is similar: The employer or provider of work can dictate the terms and conditions of the contract.

B Australia

1 Law and Individualisation of Employment Contracts¹²

In 1996 the Liberal National Party Coalition Government replaced the Federal Labour Government. The new government enacted the Workplace Relations Act 1996 (hereafter “the WRA”). Prior to the passing of this legislation, the employers’ generally supreme power was curbed by collective power embodied in trade unions as well as by the administrative supervision of industrial tribunals. Since the turn of the 20th century individually negotiated wages and conditions of employment were rare in Australia. A system that established compulsory arbitration, the entrenchment of trade union power and a wage board system

¹¹ *Ibid.*

¹² This contribution limits itself to Australian Federal Law. For details concerning Australian State law, see Deery and Mitchell *Employment Relations: Individualisation and Union Exclusion – An International Study* (1999) ch 1 – 6.

dominated for almost a century. For the majority of Australian employees the source of their rights and entitlements was not the individual contract of employment but rather industrial awards, collective agreements and federal or state legislation.

The main object of the WRA is to place the responsibility of determining employment conditions in the hands of employers and employees at workplace level.¹³ The WRA also enables “employers and employees to choose the most appropriate form of agreement for their particular circumstances, whether or not that form is provided for by this Act.”¹⁴ Clearly then, the WRA encourages individual contracts of employment between employer and employee. Even in the absence of a facilitative legal framework at federal level by the mid 1990’s there already was a trend in Australia to implement individual contracts of employment.¹⁵

The WRA severely limits the scope of industrial awards. Australian federal awards may now deal with only twenty matters which have been listed in the Act together with any incidental matters which may be considered necessary for the operation of the award.¹⁶ The WRA requires the Australian Industrial Relations Commission to review awards, not only to see to it that they do not cover non-allowable matters, but also to ensure that the awards do not preserve inefficient work practices, hinder productivity, or deal with matters more appropriately left to workplace level agreements. Clearly this opens the door for de-centralised collective bargaining as well as individual agreements. The WRA encourages individually negotiated agreements which can change the standards set down in awards or certified collective agreements. These variations can now operate to diminish as well as to increase employee entitlements. This can now be done without official scrutiny and on an individual basis as opposed to by collective agreement only.

¹³ S 3(b) of WRA.

¹⁴ S 3(c) of WRA.

¹⁵ Forsyth “Deregulatory Tendencies in Australian and New Zealand Labour Law” Centre for Employment and Labour Relations Law Working Paper No. 21 (1999) University of Melbourne, at 4.

¹⁶ S 89A (6).

A system of individual agreement making outside of the award system is provided for. These agreements are called Australian Workplace Agreements¹⁷ and they operate to the exclusion of any federal or state award. An AWA is defined as a written agreement between an employer and an employee, made either before or after employment has commenced that “deals with matters pertaining to the relationship between an employer and employee”.¹⁸ AWA’s can deal with any matter the parties wish to include in the agreements. However certain core provisions must be included.¹⁹ These include anti-discrimination provisions. A model dispute resolution procedure is automatically applicable unless the parties formulate their own. Not every employer can enter into AWA’s. Partnerships and sole traders which are not registered corporations are excluded from the eligibility criteria. Thus many small businesses cannot enter into AWA’s.²⁰

In practice, AWA’s are usually drawn up by management and presented to the employees for approval. This has been criticised on the basis that this cannot constitute bargaining but usually amounts to the imposition of terms and conditions by the employer.²¹ Each party may appoint a person or persons to act as bargaining agent on their behalf whom the other party must not refuse to recognise.²² However, in 1997 only in 6.5% of the cases did employees use agents and mostly these agents were neither unions nor lawyers.²³

AWA’s must be approved by the employment advocate²⁴ who must be satisfied that they pass the “no disadvantage test”.²⁵ This means that workers entering into

¹⁷ Hereafter referred to as AWA’s.

¹⁸ S 170VF of the WRA 1996.

¹⁸ S 170VF of the WRA 1996.

¹⁹ S1700G.

²⁰ S170VC.

²¹ Deery and Mitchell *Employment Relations: Individualisation and Union Exclusion - An International Study* (1999) 33.

²² S170VK.

²³ Deery and Mitchell *op cit* 34.

²⁴ The “employment advocate” is a body with various functions. In relation to AWA’s the employment advocate must advise both employers and employees,

AWA's must on balance be no worse off than they would have been under applicable awards.

It should be noted however, that AWA's that leave employees worse-off can at times still be approved. Since rights or entitlements arising from sources other than an award, such as an enterprise collective agreement will not be considered in the application of the no disadvantage test, the employee would be worse off if that enterprise collective agreement provided him/her with more extensive rights and entitlements. Another situation where an AWA that leaves an employee worse off would be approved is where approval would in the opinion of the employment advocate, not be contrary to the public interest. In these circumstances, even where the AWA did not meet the no-disadvantage test, approval is required. An example of such a circumstance is where the AWA is "part of a reasonable strategy to deal with a short-term crisis in and to assist in the revival of, a business or part of business".²⁶

Since employees must *on balance* be no worse off, losses can be balanced against gains. Therefore the only requirement is that the employee should not be worse off on the whole with reference to the applicable award. It follows then, that certain rights or entitlements can be compromised and the AWA still approved on the basis that the employee is on the whole not worse off. The fact that the employment advocate has the conflicting duties of advising both employers and employees is perceived by some as an obstacle to genuine protection for employees from entering into AWA's which render them worse off.²⁷

scrutinising proposed agreements for approval, investigating alleged breaches of AWA's and offences concerning AWA's, and where appropriate providing free legal representation to a party relating to an AWA.

²⁵ This test is also applicable to enterprise agreements brought to the Commission for certification, WRA section 170 LT (2) – (4) of WRA.

²⁶ S 170VPG (4).

²⁷ Stewart "The Legal Framework for Individual Employment Agreements in Australia" in Deery and Mitchell *Employment Relations: Individualisation and Union Exclusion - An International Study* (1999) 29.

Furthermore, there is a lack of transparency with reference to the decisions of the employment advocate. The confidentiality provisions in the Act see to it that such decisions are shrouded in secrecy. Therefore there is no real measure of accountability. The WRA provides no mechanism to challenge the merits of a decision of the employment advocate. It has been argued that this too, results in a weakening of protection offered by the no-disadvantage test.²⁸

Lastly, an AWA can only be approved if the employee genuinely consented to making it.²⁹ The employer has a duty to provide certain information and explanations to the employee in order that the employee may be in a position to ascertain the effect of the AWA. How far the employer is expected to go in this regard is unclear. It has been suggested that there should be a comparison of the employee's position under the applicable AWA with his/her existing rights in terms of the award.³⁰ With reference to non-union collective agreements the commission has taken the view that employees must "understand the impact of the agreement" in order for there to be genuine consent.³¹

The employer is also required not to act unfairly and unreasonably in failing to offer AWA's with similar terms to comparable employees, that is, employees who do the same kind of work.³² An acceptable reason for differential treatment offered by the employment advocate was differences in levels of skill and performance. Nevertheless, it is largely unclear what would constitute reasonableness and fairness in this regard.

The up-take of AWA's has been somewhat slow. By January 2001, 150,079 AWA's had been approved, covering 2 798 employers. Most of these employers

²⁸ Forsyth "Deregulatory Tendencies in Australian and New Zealand Labour Law" Centre for Employment and Labour Relations Law Working Paper No 21 (2001) University of Melbourne, at 5.

²⁹ Section 170VPA (i) (d).

³⁰ Deery and Mitchell *Employment Relations: Individualisation and Union Exclusion – An International Study* (1999) 34.

³¹ *Ibid* 35.

³² Sections 170VPA (1) (e) and 170VA.

were small businesses. It seems that the up-take rate has been increasing over time. By mid 2000 only 1.4% of all Australian employees were protected by AWA's. However 2.6% of the Australian workplace was protected by formal individual agreements if state systems were also taken into account.³³

Nevertheless it seems that there is a much stronger trend toward individualisation than these figures indicate – according to Wooden up to 15% of the workforce may be covered by individual contracts of employment.³⁴ In June 1998 alone 4 574 AWA's were approved, compared with only 4 493 in the first nine months of the system and in 2000 there were 41% more AWA's approved than in 1999.³⁵ Perhaps the reason for the initial slow up-take is a lack of awareness of the AWA system. Nevertheless, there are other valid reasons that might encourage employers to make use of the other means of formalising their relationship with employees such as a certified agreement. A certified agreement is a registered enterprise agreement. The following reasons also contributed to this situation:³⁶

- (i) Separate documentation concerning every individual employee and all new employees must be lodged with the employment advocate. Certified agreements are automatically binding on new employees. The financial and administrative burden on the employer as well as the time consuming delays while applications are processed all act as disincentives for employers.
- (ii) The no-disadvantage test must be applied separately for each individual covered by the AWA, taking each individual's unique circumstances into account. With a certified agreement, on the other hand, the no-disadvantage test can be applied to the group as a whole.

If an award is altered to confer superior entitlements to employees, existing AWA's which were tested with reference to the previous entitlements might

³³ Wooden Inaugural lecture, Melbourne Institute of Applied Economic and Social Research, University of Melbourne, 14 August 2000 3-4.

³⁴ Wooden, *The Transformation of Australian Industrial Relations* (2000) 75-76.

³⁵ Information available at website www.oea.gov.au 16 September 2001.

³⁶ Wooden *The Transformation of Australian Industrial Relations* (2000) 78-79.

have to be altered in order to satisfy the no-disadvantage test with reference to the new entitlements.

- (iii) In a situation where not all employees accept the terms of the AWA, the employer will be faced with the administration of different conditions for different workers. This might also be the cause of conflict at the workplace.
- (iv) Since certified agreements only override awards to the extent of any inconsistency, it is not necessary to include all the provisions of an award in a certified agreement. With an AWA, on the other hand, all applicable award provisions must be included so as not to render the employees worse off.
- (v) An employer who breaches an AWA can be sued for damages. This remedy is not available to employees when a certified agreement is breached.

Where there is no union presence or a weak union presence certified agreements seem to be a viable option for employers. The employer can enter into such agreement directly with a group of employees, and still exclude the applicable award coverage.

2 Human Resource Management and Individualisation

2.1 Introduction

Deery and Walsh³⁷ undertook a study which identified the characteristics of firms in Australia which employ staff on individual contracts rather than collective arrangements. The study used official Australian data to identify workplaces with 60% or more of their non-managerial staff on individual contracts of employment. Their study compares these “individualised workplaces” with what they term “collectivised workplaces” which had no non-managerial employees on individual contracts. What follows is a brief summary of their findings.

2.2 Organisational characteristics

It was found that 90% of individualised workplaces were in the private sector. Many of these firms were foreign owned (23%) as opposed to 10% in the

³⁷ “The Character of Individualised Employment Arrangements in Australia: A Model of ‘Hard’ HRM” in Deery and Mitchell *Employment Relations: Individualisation and Union Exclusion – An International Study* (1999) chapter 6.

collectivised workplaces. A great number of them faced foreign competition 41% as opposed to only 29% in the collectivised workplaces and were more likely to have made a profit in the previous financial year (65%) as opposed to 44% in the collectivised workplaces. 80% of the individualised workplaces used contractors as opposed to 64% in collectivised workplaces.³⁸ It is interesting to note that the average number of employees in collectivised and individualised workplaces was very similar: 94 in individualised workplaces and 93 in collectivised workplaces. Surprisingly collectivised workplaces made more use of casuals (18%) than did the individualised workplaces (only 10%). Also surprising was the fact that 85% of the employees of individualised workplaces were full time,³⁹ and full time employees comprised only 70% of the workforce of collectivised workplaces.⁴⁰

2.3 *Human Resource Management characteristics*

66% of individualised workplaces had no union presence with only 21% of collectivised workplaces having no union presence. The majority of both managements of collectivised workplaces (87%) and individualised workplaces (97%) preferred to deal directly with the employees. Individualised workplaces were more likely to have an in house human resource manager, 25% as opposed to 17% at collectivised workplaces. Individualised workplaces also made significantly more use of outside advice of law firms and management consultants on industrial relations issues: 48% of individualised workplaces made use of law firms for advice, only 25% of collectivised workplaces did so.⁴¹ As for management consultants the ratio was 36% at individualised workplaces to 19% at collective workplaces. Negotiations of industrial relations matters such as staffing levels, wages, occupational health and safety, technology and charges in work practices were very rare at individualised workplaces. However, these negotiations also took place at a minority of collectivised workplaces.⁴²

³⁸ Deery and Walsh *op cit* 121.

³⁹ *Ibid* 122.

⁴⁰ *Idem*.

⁴¹ Deery and Walsh *op cit* 120-123.

⁴² *Idem*.

2.4 Performance Related Pay

The use of individualised pay schemes based on performance share ownership, bonus schemes and staff appraisal schemes were far more prevalent in individualised workplaces. The figures are as follows:⁴³

Human Resource Management Characteristics (% workplaces)

	Individualised Workplaces	Collectivised Workplaces
Employees receive Performance Related Pay	65	27
Share ownership	29	14
Bonus scheme	66	31
Staff appraisal scheme	77	59

The contrast with reference to the provision of training for employees, team building, improvement methods and so on are not so stark:

⁴³ Deery and Walsh *op cit* 122.

Human Resource Management Characteristics (% workplaces)

	Individualised Workplaces	Collectivised Workplaces
Training scheme	62	60
Team building	51	48
Semi autonomous groups	31	28
Quality circles	16	12
Continuous improvement methods	20	17

2.4 Communication and Information Sharing

The forms of communication were similar in all workplaces. The difference in the use of these systems between individualised and collectivised workplaces was negligible as seen from the figures:⁴⁴

Forms of Communication Used (% of workplaces)

	Individualised Workplaces	Collectivised Workplaces
Daily-walk-around by senior managers	86	87
Suggestion schemes	30	30
Staff newsletters/bulletins	51	56
Surveys of employees views	20	23
Regular meetings between managers and employees	79	82
Regular social functions	60	43
Joint consultative committees	22	34

⁴⁴ Deery and Walsh *op cit* 123.

Notable differences however with reference to the use of regular social functions and joint consultative committees were observed. It seems that individualised workplaces made use of social functions in order to create an atmosphere of solidarity and loyalty amongst its workforce.⁴⁵ With regard to the use of consultative work committees it comes as no surprise that collectivised workplaces made significantly more use thereof since as seen above, 97% of individualised workplaces preferred to deal with employees on an individual basis.

Individualised workplaces were more likely to share information concerning customer/client satisfaction and workplace performance. Collectivised workplaces were more likely to provide information to employees concerning affirmative action policies and occupational health and safety policies.⁴⁶ Only 62% of individualised workplaces had written grievance procedures in place compared with 72% of collectivised workplaces.⁴⁷

2.6 Human Resource Management Outcomes

The difference in the rate of absenteeism between individualised and collectivised workplaces was negligible. Individualised workplaces experienced very little industrial action compared to collectivised workplaces. Employee turnover however was quite a bit more substantial at individualised workplaces. The figures are as follows:⁴⁸

	Individualised Workplaces	Collectivised Workplaces
Employee turnover (%)	20	12
Absenteeism (%)	2.7	2.6
Strikes in last year	1	10
Stopwork meetings in last year	2	17

⁴⁵ *Ibid.*

⁴⁶ Deery and Walsh *op cit* 124.

⁴⁷ *Idem.*

⁴⁸ *Ibid* 124.

C New Zealand

1 Law and Individualisation

Between 1894 and 1991 unions enjoyed legislative support and were able to operate in a system that embraced collectivism. Trade unions were encouraged and protected by legislation to the extent that they enjoyed monopoly bargaining power and union membership was compulsory in the private sector.⁴⁹ By the early 1970's many began to criticize the New Zealand labour relations system for failing to take into account its effect on the economy and the individual circumstances of employers. Some trade unions also attacked the system on the basis that they could extract more concessions from employers by bargaining at enterprise level.⁵⁰

In 1990 the Labour party was voted out of office and replaced by the Conservative National Party. This new government, in contrast to the gradual approach to deregulation taken in Australia, took a 'big bang' approach. The result was the Employment Contracts Act of 1991 (hereafter referred to as the ECA). New Zealand deregulated its labour law system as part of a broader program of economic reform.

The ECA abolished the centralised system of wage fixing which had been in place for almost a century. The ECA forced a shift from collective to individual bargaining, with the common law and legislation being the primary sources of regulation. The ECA provides for a contractual regime to govern the employment relationship. An employer can enter into a contract of employment with each individual employee, or alternatively a collective contract binding on "one or more employers and two or more employees".⁵¹ The "collective" agreements need not involve the participation or input of a trade union. The word 'collective' therefore

⁴⁹ Oxenbridge "The Individualisation of Employment Relations in New Zealand" in Deery and Mitchell *Employment Relations: Individualisation and Union Exclusion: - An International Study* (1999) 227.

⁵⁰ Wood "Deregulating Industrial Relations: The New Zealand Experience" 1996 SAJLR 40.

⁵¹ S 2.

means nothing more than the involvement of more than one employee as a party to the contract.

The only significant difference between the collective and individual forms of contract is that the 'collective' contracts must be in writing and for a fixed term. Since strikes and lock-outs are unlawful while a collective contract is in force⁵², the expiry date in collective agreements is necessary for determining the lawfulness of a strike or lock-out. When a collective agreement expires, the employment relationship does not cease, but the parties become bound by individual contracts of employment "based on the expired collective employment contract".⁵³ Since these contracts of employment bind only the individual employees and not trade unions or collective bodies, any enforcement action would have to be brought by the individual employee.

There are very few restrictions as to content of the contract of employment. The content of collective contracts are "a matter of negotiation"⁵⁴, while the parties to individual contracts can determine the content "as they think fit".⁵⁵ Thus, the only limitations are the common law and minimum standards legislation. The only substantive control to be found in the ECA is a provision which allows the court to intervene where a contract was procured by harsh and oppressive means, or its contents are harsh and oppressive.⁵⁶ It is difficult to prove that terms and conditions are harsh and oppressive. The courts are inclined to test the contents of the contract against statutory minimums. If they fall within these minimums the courts will find it difficult to establish harshness or oppressiveness. Where the terms however regulate a matter for which there are no statutory minimums this provision will be applicable. In considering the harshness or oppressiveness of terms and conditions the courts are sympathetic to the operational requirements of

52 S 64(1).

53 S 19 (4).

54 S 9(b).

55 S 19(1).

56 S 57.

the employer.⁵⁷ With regards to the means which were employed to procure the contract, the manner of negotiation is put to the test. Where employees have succeeded in claims based on the provision employers have used unlawful means to procure the contract, such as unlawful lock-outs or misrepresentation.⁵⁸

The main purpose of the ECA was to reduce the employment relationship to a purely economic one and to achieve labour market flexibility in this manner. It seems that the New Zealand Court of Appeal also approached the employment relationship from a conservative viewpoint in line with the objectives of the ECA.⁵⁹ Anderson has described the court's approach as 'pro-employer' and 'anti-collectivist'.⁶⁰ There have been a number of cases where it is evident that the New Zealand Court of Appeal perceives the employment relationship as purely contractual and has adopted traditional general principles of contract with an emphasis on the preservation of the subordinate role of the employee in the relationship as well as an emphasis on individualism and freedom to contract.⁶¹ For example, in *TNT Worldwide Express (NZ) Ltd v Cunningham*,⁶² the court held that irrespective of the common law indicia of a contract of employment, the express words of the contract were held to be the determinative of whether the contract qualified as a contract of employment or not. In *Principal Auckland College of Education v Hagg*⁶³ the court held that termination of a fixed term contract did not amount to dismissal unless it entailed a variation to the contract. In *Aoraki Corporation Ltd v McGavin*⁶⁴ The court was of the view that the ECA left very little room for court intervention in the employment relationship.

⁵⁷ See *March v Transportation Auckland Corporation Ltd* 1996 2 ERNZ 266.

⁵⁸ Anderson "Individualising the Employment Relationship in New Zealand: An Analysis of Legal Developments" in Deery and Mitchell *Employment Relations: Individualisation and Union Exclusion – An International Study* (1999) 210.

⁵⁹ Anderson *op cit* 210-213

⁶⁰ *Ibid*

⁶¹ For a more complete discussion of the cases illustrating this point, see Anderson *op cit* 210-213.

⁶² [1993] 3 NZLR 681

⁶³ [1997] 2 NZLR 537.

⁶⁴ [1998] 1 ERNZ 601.

In late 1999 the Labour/Alliance Coalition Government took over. The new government enacted the Employment Relations Act 2000 (the ERA), which came into effect on 02 October 2000. The purpose of the ERA was to achieve a more balanced approach to economic and social policy, and to create a climate of co-operation between employers and employees.⁶⁵ The ERA also has a strong corporatist flavour in its attempt to create ‘partnerships’ between government, business and unions.⁶⁶ In order to achieve this, the ER Act promotes collective bargaining. It does so by promoting the principles of ‘good faith’ and the freedom of association. Collective bargaining has now taken centre stage with unions once again being given recognition which had been withdrawn by the 1991 Act.

The ERA does not preclude or prevent parties from entering into individual agreements, despite its emphasis on collective agreement making. Despite the ERA, a return to the era of a centralised arbitration system with compulsory union membership in certain industries has been ruled out.⁶⁷ However the real significance and effects of the ERA in practice still remains to be seen.

2 Human Resource Management and Individualisation

An extensive study of the process of individualisation in New Zealand in the period following the enactment of the Employment Contracts Act 1991⁶⁸ has rendered some interesting results. One conclusion is that the legislature’s focus on individual and enterprise bargaining arrangements as opposed to centralised collective bargaining has resulted in a significant decline of trade unions. The following table illustrates the point.⁶⁹

⁶⁵ Wilson (Attorney General and Minister of Labour) “New Zealand’s Path Forward: A Plan for Working Together for Productivity and Fairness” Whitlam Lecture, Melbourne, 8 December 2000, 5-6 as referred to by Forsyth “ Re-Regulatory Tendencies in Australian and New Zealand Labour” Centre for Employment and Labour Relations Law (2001) Working Paper No. 21, University of Melbourne, 21.

⁶⁶ *Idem.*

⁶⁷ Forsyth *op cit* 22

⁶⁸ Oxenbridge “The Individualisation of Employment Relations in New Zealand “in Deery & Mitchell *Employment Relations: Individualisation and Union Exclusion – An International Study* (1999) 228.

⁶⁹ *Ibid.*

New Zealand Unions and Union Density, 1985-1996

<i>Year Density</i>	<i>Unions</i>	<i>Membership</i>
December 1985 43.5%	259	683,006
September 1989 44.7%	112	648,825
May 1991 41.5%	80	603,118
December 1991 35.4%	66	514,325
December 1992 28.8%	58	428,160
December 1993 26.8%	67	409,112
December 1994 23.4%	82	375,906
December 1995 21.7%	82	362,200
December 1996 19.9%	83	338,967

Source: Crawford, A, Harbridge, R and Hince, K 1997

Consequently, since 1991, union representation of employees in the negotiation of individual employment contracts has become very rare.⁷⁰

⁷⁰ *Idem.*

Oxenbridge categorises the different kinds of individual employment contracts as follows:

- (i) traditional iec's negotiated individually between employers and employees, covering single employees;
- (ii) iec's that are not formally negotiated, or written, but exist in law all the same (informal or verbal contracts);
- (iii) In accordance with ECA provisions, iec's based on expired cec's, or awards and agreements ("rollover" iec's);
- (iv) "standard form" iec's (or, "de facto cec's", whereby conditions of employment are the same for all employees. A variation involves organisations implementing collective-style contracts, with changes in remuneration and job descriptions made to customise the contract to the individual;
- (v) "two-tier" contract structures, whereby an employee is party to a cec which sets out basic conditions, and an iec or letter of appointment which sets out salary details and other individualised conditions.⁷¹

The extent and trends towards these different forms of individualisation gleaned from different research findings (albeit disparate samples of surveys) are summarised thus.⁷²

⁷¹ *Op cit* 232.

⁷² *Ibid* 233.

Structure of Contracts under the ECA

	IEC	Multi-Employer(and awards)	Single Enterprise CEC	Combined IEC/CEC	Total CEC
Department of Labour May 1991 % employees	28%	59%	13%	-	72%
NZ Employers Federation 1992 % employers	71%	-	-	-	-
McAndrew 1992 % contracts	25%	25%	36%	24%	41%
Department of Labour Aug 1992 % employees	52%	8%	35%	5%	48%
Statistics New Zealand Feb 1992 % employees	46%	40%			54%
Statistics New Zealand Feb 1993 % employees	57%	9%			43%
Department of Labour Aug 1993 % employees	40%	9%	37%	8%	54%
NZIER 1995*	45%	10%	29%	15%	54%
Department of Labour Aug 1996 % employees	49%	11%	34%	4%	49%
Harbridge et al 1998 % contracts	3%	22%	75%	-	97%
Department of Labour 1998 % employees	-	7%	93%	-	100%

(Percentage of employees/employers/contracts in all enterprises surveyed)

In February 1992, 61% of enterprises had the majority of their employees covered by individual employment contracts and by 1993 the figure had already risen to 77%.⁷³ Furthermore there was a huge decline in the number of employees covered by multi-employer collective agreements (from 59% at the time of the promulgation of the ECA to less than 10% in 1998).⁷⁴

In summarising and collating with the research findings Oxenbridge comes to the following conclusions:⁷⁵

- (i) around two-thirds of workers represent themselves in the process of developing ice's; Unions represent most workers covered by cec's; and union representation is higher in the public sector than in the private sector. Trends towards groups of employees representing their fellow employees in negotiations were identified;
- (ii) small-scale surveys (<2000 responses) indicated that between 40% and 60% of employees were covered by iec's, and an equivalent proportion by cec's. However, the two large collective bargaining databases hold contracts covering between 20% and 30% of the labour force, and it is assumed that the remainder of the population are covered by iec's;
- (iii) there has been a massive decline in the number of workers covered by multi-employer agreements, and around one-third of the population currently work under enterprise cec's;
- (iv) ice's (particularly rollover contracts) predominate in all industry sectors outside of the public sector, metals manufacturing, communications and meat processing sectors, where the prevalence of cec's is greater. The incidence of cec's is higher on large sites with high levels of pre-Act membership;

⁷³ *Ibid* 234.

⁷⁴ *Idem*.

⁷⁵ *Ibid* 247-248.

- (v) large proportions of workers (around one-fifth to one-third) are covered by rollover and standard form iec's, denoting little worker input into the contract formation process;
- (vi) the small firm sector in New Zealand is characterised by a high level of iec's (particularly informal, standard form and rollover iec's), non-negotiation modes of contract formation, and minimal union presence or representation;
- (vii) young workers in low-paid occupations, and workers in the hospitality and retail sectors, are more likely to have: informal contracts; no knowledge of their contract type or legal minimum employment conditions; no input into the contract formation process; and no choice over the type of contract covering them;
- (viii) several studies suggest that iec's have facilitated the use of soft HRM strategies, particularly the implementation of performance-based pay structures. However, iec's are primarily used by employers as a strategy for cost-cutting, concession-bargaining and de-unionisation of the workforce;
- (ix) unions have responded to de-collectivising forces by focusing resources on organising larger sites and those which offer the greatest recruitment potential. They have largely withdrawn from the small firm sector.

In short only about 20% of the employed labour force is covered by collective agreements demonstrating the dramatic decrease of support for the collective bargaining system in New Zealand.⁷⁶

D England

1 Law and Individualisation

Until recently, the most important source of regulation of the employer and employee relationship for non-managerial employees in England has been collective bargaining.⁷⁷ However, a trend towards 'individualising' employment

⁷⁶ *Op cit* 234.

⁷⁷ Deakin "Organisational Change Labour Flexibility and the Contract of Employment" in Deery and Mitchell *Employment Relations: Individualisation and Union Exclusion – An International Study* (1999) 136.

relations has since occurred. The motivation for this trend was the belief that it would result in more flexible labour markets which are essential for international competitiveness and economic efficiency.⁷⁸

Brown has identified a number of factors that created pressures which forced government and employers to change their strategies.⁷⁹ Conservative governments in England, especially the Thatcher Government encouraged a policy in terms of which trade unions would play a much less prominent role in employment relations. The privatisation of certain industries such as telecommunications, gas, water and electricity has resulted in loss of union power and influence. Changes in product markets, capital markets, national and global competition have also exerted pressure on employers to individualise the employment contract. The rate of unemployment which has risen from below 4% for the 15 years preceding 1980 to over 9% for the subsequent 15 years⁸⁰ has also diminished the bargaining power of employees and trade unions even further.

In terms of British labour law which has traditionally taken a voluntaristic approach, collective agreements are not enforceable as between the parties to them.⁸¹ This means that where there has been a breach of a collective agreement neither the trade union nor the employer may enforce the rights embodied in the contract. However, the terms of such collective agreements are enforceable as between individual employee and employer. Collective agreements become incorporated into the individual contract of employment in terms of the doctrine of incorporation in workplaces where the relevant union or unions have been recognised by the employer for the purposes of collective bargaining, by the employer.⁸²

⁷⁸ Brown "Individualisation and Union Recognition in Britain" in Deery and Mitchell *Employment Relations: Individualisation and Union Exclusion - An International Study* (1999) 153.

⁷⁹ *Op cit* 153 – 155.

⁸⁰ *Idem*.

⁸¹ Deakin *op cit* 139.

⁸² *Ibid* 136.

Due to the traditionally voluntaristic nature of British labour law, unlike New Zealand and Australia, it was not necessary to change labour laws to any great degree in order to achieve the individualisation of the contract of employment. The major impetus for such change was the lack of government support for trade unions coupled with labour market pressures.

2 Human Resource Management and Individualisation

The research conducted by Deakin⁸³ suggests that the major reason for management to pursue a trend toward the individualisation of the contract of employment was the attainment of flexibility with reference to job and grading structures. This trend however is not particularly new. Brown quotes the following figures: “The proportion of employees covered by either bargained or statutory collective arrangements fell from 83% in 1980 to 36% in 1997”.⁸⁴

Brown also makes the important distinction between substantive and procedural individualisation.⁸⁵ Substantive individualisation refers to the content of terms and conditions imposed by the individual contracts of employment. Procedural individualisation refers to the manner of determining these terms and conditions, i.e. without collective mechanisms or parties representing the individual employee. He concludes that in practice individualising firms tended not to differentiate non-pay terms and conditions between employees but that these terms and conditions were in fact standardised.⁸⁶ One reason for this might be an attempt to reduce administrative costs in designing and implementing agreements that reflect differences in non-pay terms for each individual. Secondly, the implementation of different terms and conditions can result in such differentiation leading to animosity between the employees and between management and employees.⁸⁷ Where this

⁸³ *Ibid* 130.

⁸⁴ Brown *op cit* 154.

⁸⁵ *Ibid* 156.

⁸⁶ *Idem*.

⁸⁷ Oxenbridge *op cit* 242 found that with reference to New Zealand “in a small number of cases, some very small firms referred to an increase in the amount of conflict and animosity between employees resulting from individual contracts of employment”.

is perceived as discrimination it could be a demotivating factor resulting in a reduction of loyalty and co-operation from employees.

Deakin's findings also indicate a tendency to standardise certain terms and conditions since "the individualised agreements closely followed the model of the statutory written statement required by legislation".⁸⁸ This fact as well as empirical evidence suggests that the employees are presented with the agreement as a *fait accompli* on a take it or leave it basis without any individual bargaining having taken place.⁸⁹

Brown's research indicates that the individualisation has been procedural as opposed to substantive with the only substantive differentiation in individual contracts being differences in pay. The procedural differentiation comes in the form of employers retreating from collective bargaining.⁹⁰ Brown's research shows that management's main objective in individualising the contract of employment is to reassert management prerogative in the implementation of pay structures.⁹¹ Detailed job descriptions and numerous job grades forced upon management by trade unions in collective agreements were perceived by management as restrictive and inflexible. Management did not want to be bound by a pay structure determined by an inflexible job grading system. Such system necessitated very precise job descriptions which ran contrary to the achievement of flexibility through a multi-skilled workforce. Furthermore this system did not allow for the rewarding of high productivity and loyalty. Management therefore sought to reduce the precision of job descriptions. This allows for the exercise of management prerogative with reference to the employees' duties on an *ad hoc* basis as the need arises due to changing labour market trends.

⁸⁸ Deakin *op cit* 143.

⁸⁹ *Idem.*

⁹⁰ *Ibid* 156.

⁹¹ *Idem.*

Despite the practical difficulties that can be encountered in the implementation of pay determined with reference to individual performance the majority of firms in Brown's research saw such pay structures as an essential part of their strategy.⁹²

Deakin's findings were similar: the principal objective cited by management for individualisation was flexibility in pay and grading structures.⁹³ He also found that individual performance related pay was most prevalent in firms that had de-unionised completely.⁹⁴

Brown also identified the objectives of increasing rewards at higher levels whilst decreasing payment rates at lower levels and reducing the number of less skilled workers.⁹⁵ One of the reasons for this is that the overhead costs of less skilled employees are proportionately high due to the standardised non-pay terms. Another way of reducing overhead costs is to outsource the tasks requiring fewer skills. In comparing firms that had individualised their contracts of employment with firms in similar product market circumstances that had retained collective bargaining Brown came to the following conclusions concerning substantive terms and conditions:⁹⁶

- (i) Both firms that recognised trade unions and those that did not, implemented standardised non-pay terms and conditions for non-managerial staff.
- (ii) Not only firms that individualised their contracts of employment but also unionised firms wanted to exercise more control over the content of job descriptions, performance related pay and pay structures. All the firms, including unionised firms had decreased the number of job grades in order to achieve greater flexibility of job description. Deakin's research yielded

⁹² *Idem.*

⁹³ Deakin *op cit* 145.

⁹⁴ *Idem.*

⁹⁵ *Idem.*

⁹⁶ *Ibid* 160 – 162.

similar results in that he found most flexibility clauses relating to hours of work, contractual performance or job description and pay structures.⁹⁷

- (iii) The linking of pay to performance for middle and senior managerial staff was common to all the firms surveyed (unionised and those that had retreated from collective bargaining). For a non-managerial grade however, there was a greater tendency amongst firms that had derecognised their unions to link pay with individual performance.
- (iv) Strong unions had in the past negotiated wages for less skilled workers which were above competitive levels. Employers had to pay these rates irrespective of market conditions. Brown's research suggests that all firms surveyed, even those that had not derecognised the trade unions were able to readjust these wages so that they were in touch with market rates.
- (v) As far as the size of pay increases was concerned, once again unionised and de-collectivised firms showed very similar results. i.e. unions did not negotiate higher pay rises for their members.
- (vi) Both unionised and de-collectivised firms had achieved similar flexibility with reference to functional as well as temporal flexibility.
- (vii) Since the matched firms enjoyed similar commercial success it seems that unit labour costs were also comparable.

In summary therefore, the only difference seems to be in payment systems with firms that had derecognised unions making more extensive use of performance linked pay. Deakin's research also confirmed Brown's findings that firms that had retained collective bargaining also made use of flexible working arrangements. He states "Many of the firms retaining collective bargaining made use of contractual devices aimed at formalising flexible working arrangements. Agreements included clauses reserving to the employer the right to change working hours to fulfil operational needs, and to vary job duties. Hence the preservation of the collective bargaining did not prevent the achievement of a high degree of working time flexibility".⁹⁸

⁹⁷ Deakin *op cit* 146.

⁹⁸ Deakin *op cit* 148.

In conclusion these studies indicate that collective bargaining need not necessarily act as a bar to flexibility. Collective agreements can contain clauses which are sufficiently flexible to adapt to changing needs and circumstances as they arise. Most firms whether they had retreated from collective bargaining or not had attempted to achieve flexibility. Nevertheless it is doubtful that such flexibility is achievable where the collective bargaining is at industry level as opposed to plant level as is the case in England.⁹⁹

E Japan

1 Law and Individualisation

Like England flexibility and individualisation has easily been achieved without the necessity of altering legislation or introducing new legislation. Since the relationship between employers and trade unions in Japan has traditionally been co-operative and collective bargaining is mainly enterprise based, trade unions and collective agreements have not been a bar to flexibility required by the employers.

2 The Traditional System of Japanese Industrial Relations

2.1 Introduction

In terms of the traditional system of Japanese industrial relations job security is of paramount importance. In exchange for job security employees forfeit individual treatment. Everyone is treated alike and follow similar careers. Wages are not determined by reference to productivity or ability but rather by age and length of service. In other words employees are rewarded for length of service and loyalty as opposed to the type or quality of work they produce. The notion of job security is deeply entrenched in the system and the dismissal of employees is heavily

⁹⁹ Summers "Comparison of Collective Bargaining Systems: The Shaping of Plant Relationships and National Economic Policy" 1995 *Comparative Labour Law Journal* 481.

restricted.¹⁰⁰ It therefore seems to have been accepted that control over employment conditions by the employer is a necessarily quid pro quo for life-long employment.¹⁰¹

There are three sources of the terms and conditions of employment:¹⁰²

- (i) *The individual contract of employment:* The individual contract of employment forms the basis of the relationship between employer and employee. It need not be in writing and very often is not reduced to writing. Employment contracts however are subject to minimum standards established in terms of the Labour Standards Law and other protective pieces of legislation, collective agreements and work rules.
- (ii) *Collective Agreements:* Article 16 of the Trade Union Law¹⁰³ gives precedence to the provisions of collective agreements over the provisions of an individual contract of employment. Unlike South African law, where the so called 'principle of advantage'¹⁰⁴ is applicable, in Japan even where the individual contract provides more advantageous provisions for the employee, such provisions are null and void and the provisions of the collective agreement are applicable. Where the individual contract is silent on certain issues the collective agreement is applicable.

Most collective agreements cover only one specific employer. Unlike South Africa employers are not bound by standards set by collective agreements at industry level. Since collective agreements in Japan are enterprise level

¹⁰⁰ Nakakubo "Individualisation of Employment Relations in Japan" in Deery and Mitchell *Employment Relations: Individualisation and Union Exclusion - An International Study* (1999) 179.

¹⁰¹ *Idem.*

¹⁰² *Ibid* 172-179.

¹⁰³ *Ibid* 173.

¹⁰⁴ In terms of this principle if the individual contract of employment provides for terms and conditions that are more advantageous to the employee and the terms of the collective agreement, then those terms in the individual contract are applicable. Likewise, the terms in the collective agreements that offer more advantage to the employee are also applicable.

collective agreements they are very specific and do not set only minimum standards, although theoretically this would be possible. This possibility would allow individuals to negotiate better conditions. The general practice however is for the collective agreements to provide for the actual terms and conditions within that enterprise. Furthermore it has been generally accepted by the Japanese courts¹⁰⁵ that collective agreements which provide employees with less advantageous conditions nevertheless override the individual contract of employment and they are binding on the employees. The employee's consent is not necessary to render such collective agreements binding. However, in principle these collective agreements are only binding on union members. In practice however, the terms and conditions contained in collective agreements are normally incorporated in the work rules¹⁰⁶, which are binding on all employees. The result is that normally the terms contained in collective agreements become applicable to all employees within an enterprise irrespective of whether they are union members or not.

- (iii) *Work rules of the organisation:* With the decline of unions in Japan¹⁰⁷ work rules have gained in significance. Work rules are applicable to all employees. They are a set of written documents setting out the working conditions and other general rules of the establishment. Every employer who employs more than 10 employees is obliged in terms of the Labour Standards Law to compile such rules and to make them known to the employees. The work rules deal with matters such as working hours, rest periods, leave, health and safety, wages, bonuses and other conditions of employment. Work rules may not breach laws and ordinances and are inferior to collective agreements. Generally, in practice where there is a

¹⁰⁵ See Nakakubo *op cit* 174 for discussion.

¹⁰⁶ Discussed hereunder.

¹⁰⁷ Nakakubo in Deery and Mitchell *Employment Relations: Individualisation and Union Exclusion – An International Study* (1999)176 cites the following figures: More than 80% of private sector employees are not union members and the overall unionisation rate has declined to below 23%.

collective agreement in place the work rules will be altered so as to reflect the collective agreement. The practical implication of this custom is that the terms of collective agreements become applicable to all employees irrespective of whether they are union members or not.

In establishing or altering work rules the employer is obliged to seek the opinion of the majority representative union. If there is no such trade union then the employer must seek the opinion of the person representing the majority of the employees. Prerogative however rests with the employer and it is not bound by such opinion. The courts have held that as long as these new rules are 'reasonable' they are binding on employees without their consent.¹⁰⁸ Work rules take precedence over the terms of individual contracts of employment. In terms of the Labour Standards Law work rules provide minimum standards that are applicable to a particular enterprise. Each individual employee is free to negotiate more advantageous conditions with the employer. Without such explicit agreement the work rules form the contract of employment.

In summary it appears that in terms of traditional Japanese labour relations the individual contract of employment plays a truly minimal role. Even where there is no collective agreement in place the work rules will overshadow the individual contract of employment. Despite this fact, Japanese employers do enjoy considerable flexibility in determining the terms and conditions of employment contracts. This is possible for a number of reasons:

¹⁰⁸ See *Shihoku Bus Co v Nihon*, Supreme Court 25 December 1968, Minshu Vol 22 No. 13: p 3459. In ascertaining the reasonableness of the change of rules the courts will balance the necessity for change against the disadvantage inflicted on the employees. Where the majority of employees are in favour of the change the likelihood of the courts finding the changes to be reasonable are more likely. See also Yamakawa "The Role of the Employment Contract in Japan" in Betten *The Employment Contract in Transforming Labour Relations* (1995) 114-115 for a discussion on this concept.

- (i) 95% of Japanese unions are enterprise based.¹⁰⁹ Unlike South Africa and Germany, Japanese employers are not bound by minimum conditions set at industry level through collective bargaining.
- (ii) The relationship between employers and trade unions is characterised by co-operation with an emphasis on the pursuit of the common interest being the welfare of the organisation.¹¹⁰
- (iii) It is understood the employer has the right to various discretions, such as the right to transfer employees. It is accepted that employees accept this right of control by the employer in exchange for job security. Hence the employers' prerogative to alter work rules remains intact.¹¹¹

2.2 *Human Resource Management and Individualisation*

A movement away from the tradition of the seniority wage system towards an individualised system has been identified in Japan.¹¹² This is a natural result of the pressure of global competition moving the emphasis to efficiency and productivity rather than long term stability of the employees. Other factors resulting in a more individualised treatment of the employer employee relationship are:

- (i) The long term decline in the rate of unionisation in Japan;¹¹³
- (ii) decline in the coverage of Japanese collective agreements both quantitatively and qualitatively;¹¹⁴
- (iii) the rise in the number of atypical employees who are not legally protected to the extent of typical employees. Atypical employment is largely free from

¹⁰⁹ Nakakubo *op cit* 178.

¹¹⁰ Nakakubo *op cit* 179 states: "While 90% of Japanese Unions have collective agreements with the employer, they are more concerned about the relationship between the employer and the union than about actual working conditions for the employees. They indeed do not have to conclude comprehensive collective agreements because the standard working conditions are already prescribed in work rules".

¹¹¹ See Yamakawa *op cit* 109-110.

¹¹² See Nakakubo *op cit* 105; Nakata "Trends and Developments in Employment Relations in the 1980's and 1990's" in Deery and Mitchell *Employment Relations: Individualisation and Union Exclusion - An International Study (1999)* 189, and Yamakawa *op cit* 116.

¹¹³ Nakata *op cit* 189-191.

¹¹⁴ *Ibid* 191 –194.

regulation.¹¹⁵ A large degree of flexibility is therefore available to employers in the use of atypical workers;

- (iv) even where there is a collective agreement covering working conditions in force, such agreement may contain a provision to the allowing individual treatment of employees depending on employee's circumstances. The view has been put forward that as the changing world of work develops, the inclusion of this kind of provision is likely to increase;¹¹⁶
- (v) the Japanese economy declined in the 1990's and it was no longer able to carry the huge amount of 'baby boomers' that were hired in the 1960's and 1970's;¹¹⁷
- (vi) the younger generation is becoming increasingly critical of the seniority wage system.¹¹⁸ Consequently, different Human Resource Management tools and practices have become more popular in Japan. What follows is a brief description of some of the more prevalent means of achieving flexibility in the contract of employment.

2.3 *Individual Appraisal Systems*

The movement away from the traditional seniority wage system has resulted in the use of other criteria for the determination of wages:

2.3.1 *Satei*

Satei refers to individual worker appraisals. Such appraisals are normally undertaken by management either annually or bi-annually.¹¹⁹ Employees are appraised on work performances and attitudes. Promotions, level of wages and the assignment of tasks are influenced by these appraisals. Already in 1988 more than 80% of firms surveyed by the Ministry of Labour made use of Satei.¹²⁰ These systems are also common even in unionised organisations, and studies show that

¹¹⁵ See Yamakawa *op cit* 115 and Nakata *op cit* 194 who point out that the number of regular employees dropped by 6.8% from 1989 to 1996 while all other types of non-irregular employees increased in the same period with the sales and service sectors experiencing the largest increase in non-regular employment.

¹¹⁶ Yamakawa *op cit* 123.

¹¹⁷ Nakakubo *op cit* 180.

¹¹⁸ *Idem.*

¹¹⁹ Nakata *op cit* 194.

¹²⁰ *Ibid* 195.

the share of unionised firms with ability pay is not smaller than non-unionised firms.¹²¹

The 'annual salary' system is an example of pay - related performance and it allows for the employer and individual employee to negotiate the employee's annual salary for the next year. The employer or its representative, and the individual employee, together review the employee's achievements during the preceding year against the targets met. New targets are set for the following year and a salary consistent with the target performance is set.

Wage differentials based on ability and achievement as opposed to age had already been adopted in Japan by some companies as early as the 1960's, and by the 1970's such practices were quite common.¹²² However, most Japanese companies still employ large numbers of school leavers every year. They all acquire skills gradually through on the job training. Since they have the same amount of time on the job many of them develop at very similar rates. The result is very similar wages for people of the same age.¹²³ However, individual personnel appraisal systems that result in more dramatic wage differentials are on the increase. The trend is to place emphasis on results as opposed to potential ability of the employee.¹²⁴

2.3.2 *Flexibility in Working Hours*

A trend to individualising working hours through agreement between employer and individual employee has been identified in Japan. This "variable working time" system allows individuals to choose when to start and when to finish working. The percentage of firms using this system has increased from 7% in 1988 to over 40% by 1996.¹²⁵

¹²¹ *Ibid* 197.

¹²¹ *Ibid* 195.

¹²² Nakakubo *op cit* 181.

¹²³ *Ibid* 182.

¹²⁴ *Idem.*

¹²⁵ *Ibid* 199.

Another system which allows flexibility in working hours is called a 'Sairyo Rodo' arrangement. In terms of such agreements efficient workers work less hours and less efficient workers work more hours. This system is applicable to workers with special kinds of skills. Since it deviates from the eight hour day and 40 hours per week standard contained in legislation (Labour Standard Law), application of such system is dependent on agreement between management and the majority of workers in the organisation. The Ministry of Labour has recorded an increase across industries of this system from 1988 to 1996.¹²⁶

The increase in the type and number of atypical employees in Japan¹²⁷, the dwindling coverage of collective agreements¹²⁸ and the need to compete globally have all contributed to the individualisation of the contract of employment in Japan. Changes in legislation were not necessary to allow for this new trend because the Japanese labour law system already had the following characteristics:

- (i) a culture of cooperation between employer and trade union;
- (ii) no centralised system of collective bargaining where wages and other conditions of work are set at industry level; and
- (iii) a great degree of employer prerogative with regard to the content of contracts of employment.

F South Africa

1 Introduction

South Africa began lifting trade tariffs in the late 1980s.¹²⁹ In fact the ANC government "appears to be going further than its predecessors in stimulating competition, as proved by the intention to reduce import tariffs as far as

¹²⁶ Nakata *op cit* 200.

¹²⁷ Yamakawa *op cit* 115 and Nakata *op cit* 200.

¹²⁸ Nakata *op cit* 194 after having conducted various surveys concludes: "In summary, the evidence in this section indicates that the coverage of Japanese collective agreements is declining both quantitatively and qualitatively. Consequently, individual contracting is becoming more relevant to the Japanese workforce."

¹²⁹ Theron "Employment is not what it Used to be" 2003 *ILJ* 1248.

possible.”¹³⁰ In 1994 South Africa signed the Marrakech Agreement of GATT and in 1995 South Africa applied for membership to the World Trade Organisation.¹³¹ Around the same time the Labour Relations Act¹³² (hereafter the LRA), with its emphasis on industrial level collective bargaining,¹³³ was being drafted. This system, as espoused in the Labour Relations Act,¹³⁴ was a result of the “struggles in mining and manufacture.”¹³⁵ As Theron points out:¹³⁶ “The growth of casualization and externalisation has coincided with the decline of these sectors, both in terms of their relative importance to the economy, and in terms of the numbers employed. Accordingly the model on which our labour relations system is premised no longer prevails, or has changes substantially.” As will be demonstrated hereunder, the consequences of this are twofold: firstly, many are no longer protected by the legislation because they cannot be categorised as “employees” in terms of the legislation; and secondly, unions are unable to represent a significant number of workers and consequently cannot exercise the amount of power that they were capable of wielding in the past.

2 Changing Nature of Work in South Africa¹³⁷

2.1 Terminology

Before any attempt can be made at discussing the extent of this phenomenon it is necessary to give meaning to and define the terminology that is used to describe

¹³⁰ Bendix *Industrial Relations in the New South Africa* (1998) 101.

¹³¹ Theron *op cit* 1248 at footnote 2.

¹³² Act 66 of 1995.

¹³³ See ch 3 *infra*.

¹³⁴ Act 66 of 1995.

¹³⁵ Theron *op cit* 1271.

¹³⁶ *Idem*.

¹³⁷ See in general Welch “Collectivism v Individualism in Employee Relations: For Human Rights at the Workplace” 1996 *ILJ* 1041; Baskin “South Africa’s Quest for Jobs, Growth and Equity in a Global Context” 1998 *ILJ* 986, Mhone “Atypical Forms of Work and their Policy Implications” 1998 *ILJ* 197, Olivier “Extending Labour Law and Social Security Protection: The Predicament of the Atypically Employed” 1998 *ILJ* 1329; Theron “Employment is Not What it Used to be” 2003 *ILJ* 1247; Thompson “The Changing Nature of Employment” 2003 *ILJ* 1793; Mills “The Situation of the Elusive Independent Contractor and Other Forms of Atypical Employment in South Africa: Balancing Equity and Flexibility” 2004 *ILJ* 1203.

what is generally termed “atypical” or “non-standard” employment.¹³⁸ The meanings that are ascribed to the different forms are the same as those given by Theron.¹³⁹ As a starting point, it makes sense to define what the “standard employment relationship” (SER) entails because this is what “atypical” employment is not. The SER refers to employment that is indefinite (or permanent) and full-time, and the work is usually done at a workplace controlled by the employer.”¹⁴⁰ “Casualisation” refers to the use of part-time and temporary workers.¹⁴¹ “Part-time work refers to work that is not full-time. However many part-time workers “have only one employer, and work on the premises of the employer in terms of an employment contract.”¹⁴² A temporary worker, on the other hand, also works in terms of a contract of employment, but that contract is not for an indefinite period; it is for a fixed term.¹⁴³ Once that time period has elapsed the contract automatically comes to an end unless there is a legitimate expectation of renewal.¹⁴⁴ “Outsourcing” refers to a situation where an employer reverts to making use of an outside contractor to provide certain services that were until then provided by employees of the organisation.¹⁴⁵ The employer then “outsources” services that are peripheral to the “core” business of the employer to the “sub-contractor”. Such non-core functions include services such as catering, cleaning, security, maintenance and transport.¹⁴⁶ “Homework” is a form of sub-contracting.¹⁴⁷ With homework the work is done in someone’s home and it is usually women who do the work.¹⁴⁸ In short, with sub-contracting the contract of employment is replaced by a commercial contract.¹⁴⁹ In this way the employer or “core-enterprise” is relieved of its duties imposed by labour legislation with regard

¹³⁸ Theron *op cit* 1247.

¹³⁹ “Employment is Not What it Used to be” 2003 *ILJ* 1247.

¹⁴⁰ *Ibid* 1249.

¹⁴¹ *Ibid* 1250.

¹⁴² *Idem*.

¹⁴³ *Idem*.

¹⁴⁴ See Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* (2004) pars 1100-1102; Basson *et al Essential Labour Law* 3rd ed (2002)127-132.

¹⁴⁵ Theron *op cit* 1252.

¹⁴⁶ Cheadle *et al Current Labour Law* (2004) 145.

¹⁴⁷ Theron *op cit* 1253.

¹⁴⁸ *Idem*.

¹⁴⁹ *Ibid* 1254.

to the workers that perform the non-core functions because they do not qualify as “employees” of that enterprise. Another means of achieving this result is by making use of a “temporary employment service” (hereinafter TES). In other words, workers are employed by an intermediary, and not by the core-enterprise.¹⁵⁰ In this situation the core-enterprise is referred to as the “client” or “user” and a “triangular employment relationship is created.¹⁵¹ Outsourcing, sub-contracting, homework and the use of TES’s are all forms of “externalisation”.¹⁵² Externalisation results in a situation where the employment relationship is not regulated. This is termed “informalisation”.¹⁵³

2.2 *Surveys and Statistics*

The Labour Market Policy Chief Directorate commissioned a research project on “the changing nature of work and atypical forms of employment”.¹⁵⁴ The research report comprises four research papers. The findings of these papers are summarised below.

Paper 1: The Prevalence of Casualisation and Externalisation in South Africa

This research was conducted by the National Institute for Economic Policy. The research used the Labour Force Surveys of September 2000, 2001 and 2002. Unfortunately there was confusion in those surveys as to what exactly was meant by “casual worker”. The researchers stated: “when analysing casualisation and externalisation in the labour market using the large cross-sectional data sets there was a clear reliability issue. This issue can only be resolved by face to face interviews and extensive training of field interviewers. The reliability problem with available large data sets could well be why the report’s findings are often inconsistent with extensive case-studies findings. Since the study is quantitative in nature it is acknowledged that some of the findings are not consistent with other studies that use different methodologies. In particular there is an extensive case

¹⁵⁰ *Ibid* 1255.

¹⁵¹ *Ibid* 1254.

¹⁵² *Idem*.

¹⁵³ Cheadle *et al op cit* 139.

¹⁵⁴ Socpol Circular No. 73A/04.

study literature that finds increasing evidence of casualisation in the workplace and an increasing use of contracting out by employers to independent contractors in order to bypass the Labour Relations Act. Labour brokers and employment agencies too have increased in number.”

The general conclusion was that in some categories casualisation had increased and in other categories it had declined during the period 1999-2003. The research also indicated that there was an increase in self-employment in both the formal and the informal economies. The number of home workers increased from 460 000 to 520 000 between 2000 and 2002.

Paper 2: Atypical Forms of Employment and their Policy Implications

The object of this research paper was “to evaluate the impact of ‘atypical’ forms of employment on our labour legislation”, and “to address the impact of atypical form of employment on the following policy areas: social security and social protection; skills development; and collective bargaining.” The research was conducted by the Sociology of Work Unit of the University of the Witwatersrand and the Labour and Enterprise Project of the University of Cape Town.¹⁵⁵

The researchers conducted four sectoral studies: mining, construction, manufacturing (particularly household appliances) and retail. The following was concluded: Since the 1990s the mining sector had shed almost 50% of its jobs and a number of activities had been externalised. The outsourcing of non-core functions such as catering, cleaning, security and maintenance of hostels had occurred. Even outsourcing of core-functions, such as the mining of certain shafts or sections of shafts had also occurred. Subcontracting also took the form of the use of labour brokers or TES's to recruit and supply labour.

¹⁵⁵ Although the study included an evaluation of international literature and case studies, only the findings with regard to South Africa are summarised herein. The impact of the use of “atypical” forms of employment on certain policy areas is discussed hereunder under the heading “Legislation”.

As far as the construction industry is concerned the researchers found that in the last 15 years the most prevalent form of atypical or non-standard employment is the “labour only sub-contracting” (LOSC). This is where firms or individuals supply unskilled and semi-skilled workers on construction sites to perform a specific task. These workers are regarded as part of the informal economy and according to Labour Force Survey data 40% of the construction industry is in informal employment. However, since the Labour Force Survey data used registration with the Receiver of Revenue to reach this figure, the researches found that according to insiders’ estimates the figure is about 60% of total employment.

The researches found that employment in the manufacturing sector had also declined since the 1990s. According to figures supplied by the Metal and Engineering Industry Bargaining Council, the industry had 425 000 employees in 1986, and only 235 544 in 2003. Since the mid 1990s fixed term contracts in the household appliance industry have increased. The researches found that about one third of employees in that sector are on short term contracts.

As far as the retail industry is concerned, the researches found that the majority of workers were non-standard or atypical. This is the result of the increased use of “casual” employees who work on a part-time basis, the outsourcing of non-core functions and the sub-contracting of shelf packers. According to the Labour Force Survey 38% of the retail sector is informal.

Paper 3: Temporary Employment Services

The research for this paper was conducted by the Labour and Enterprise Project of the University of Cape Town. Aside from collecting and analysing existing data, the researches also conducted interviews with key TES's and representatives of the industry, officials of the Department of Labour, as well as with union officials. Access to data compiled by the Metal and Engineering Industry Bargaining Council concerning TES's was obtained. Based on this information the researches estimate that the number of TES's in the formal economy is over 3000. If the informal economy were included the number would be significantly higher.

According to one estimate for every one TES in the formal economy, there are three in the informal economy. The researches compiled the following graph which shows the growth of TES's in the past 10 years.



Paper 4; The Economic Determinants of Casualisation and Externalisation

The research was conducted by the Development Policy Research Unit of the University of Cape Town. The methodology was to conduct interviews with senior managers at a sample of firms. The sample of firms was drawn from manufacturing firms that employed more than 150 people in the Cape Town metropolitan area between 2000 and 2003. The sectors represented are: food and beverages, clothing, leather and textiles, paper products and publishing, chemical and petroleum products, rubber, glass and other non-metallic products, metals, machinery, electronics, wood and furniture.

It was found that 89% of the firms made use of casual / temporary employment in 2003 and 79% of the firms made use of outsourcing and sub-contracting. Only 26% of the firms made use of part-time workers. The ratio of sub-contracted labour to permanent employees increased from an average of 11% in 2000 to 18% in 2003. More than 90% of the firms were engaged in multi-skilling their employees. 66% of the firms experienced an increase in production volumes from 2000 to

2003. 75% experienced increased levels of productivity over the same period. 60 % reported increased profits over the period.

Other Surveys

In 1999 the World Bank conducted a survey of firms in the greater Johannesburg area that employed more than fifty people. The survey reported that the proportion of firms sub-contracting varied from 62% in the smaller firms (employing less than a hundred people), to almost 90% in the large firms (employing more than two hundred people).¹⁵⁶ Using a postal questionnaire Andrew Levy and Associates conducted a survey on outsourcing in 1999. They found that of the 101 firms that responded 68% had outsourced over the past five years and nearly 79% of these firms had outsourced more than once.¹⁵⁷

3 *Legislation*

In this section the absence of legislative protection for certain workers as a result of the use of non-standard or atypical forms of employment is discussed. Secondly, the various legislative provisions that render employer escape from certain legislative duties towards employees possible are highlighted and discussed.

The South African system of labour law is premised on the contract of employment in the sense that such contract creates standard or typical employment.¹⁵⁸ Where the relationship between employer and independent worker is not based on the contract of employment, the worker generally cannot enjoy certain privileges and protections that are available to typical employees whose relationship with the employer is premised on a contract of employment in the traditional sense.¹⁵⁹

¹⁵⁶ Bhorat, Lundall & Rospabe *The South African Labour Market in a Globalising World: Economic and Legislative Considerations* (2002) ILO Report.

¹⁵⁷ Kelly "Outsourcing Statistics" 1999 *SALB* vol 23 no 3.

¹⁵⁸ Theron "Employment is not What It Used to be" 2003 *ILJ* 1257.

¹⁵⁹ See in general Olivier "Extending Labour Law and social Security Protection: The Predicament of the Atypically Employed" 1998 *ILJ* 669; *Ongevalle Kommissaris v Onderlinge Versekerings-Genootskap AVBOB* 1976(4) SA 446 (A); *Smit v Workmen's Compensation Commissioner* 1979(1) SA 51 (A); *Niselow v Liberty Life*

Since only employees can be trade union members,¹⁶⁰ a contract of employment also seems to be a prerequisite for the protection afforded by trade unions. Secondly, organisational rights can only be exercised in the workplace.¹⁶¹ A workplace is defined in terms of the LRA as “the place or places where the employees of an employer work. If an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organisation, the place or places where the employees work in connection with each independent operation, constitutes the workplace for that operation.”¹⁶² The outcome of this is that certain atypical employees, such as home workers¹⁶³ are excluded from exercising organisational rights for two reasons: Firstly they cannot be trade union members; and secondly, they do not work at the workplace of the employer. In short therefore, the emphasis on the use of collective bargaining by trade unions and employers as a means, *inter alia* of advancing and protecting employee interests prevalent in the LRA,¹⁶⁴ cannot come to the rescue of unprotected atypical employees. The increase in the use of atypical employees has also affected bargaining councils negatively.¹⁶⁵ Theron explains: “The erosion of standard employment has far-reaching implications for our current system of collective bargaining, which is premised on the definition of workplace discussed above, and which encourage bargaining at sectoral level, in bargaining councils. Indeed the vision which appears to inform the scheme on which our collective bargaining system is premised is that bargaining councils would be established at

Association of Africa Ltd 1998 ILJ 585 (LAC); *SA Broadcasting Corporation v Mc Kenzie* 1999 ILJ 585 (LAC).

¹⁶⁰ S 213 of the LRA defines a trade union as “an association of **employees** (my emphasis) whose principal purpose is to regulate relations between employees and employers, including any employers’ organisations”.

¹⁶¹ Ss 11-16 of LRA.

¹⁶² S 213; see also *Specialty Stores v CCAWU* 1997 ILJ 992 (LC); *SACCAWU v Specialty Stores Ltd* 1998 ILJ 557 (LAC).

This refers to workers who work from their own homes for their own account (not domestic workers).

¹⁶⁴ This is discussed in detail in ch 3 *infra*.

¹⁶⁵ The growth of “labour only sub-contractors” has resulted in the demise of bargaining councils. (which, as demonstrated in ch 3 *infra*, are the preferred forum for collective bargaining in terms of the LRA), in certain areas. See Cheadle and Clarke *ILO National Studies on Worker Protection* International Labour Office Report (2000) 67.

a sectoral level in all major sectors of the economy. In sectors where there was not sufficient organisation to do so, statutory councils would be established. In fact the scope of the sectors covered by bargaining councils today is limited...Moreover, the prospects of extending the current scope of bargaining council coverage appear extremely limited.

There is no simple explanation as to why bargaining councils have not grown, but casualization and externalisation is certainly part of it. A crucial element of the bargaining council system is that agreements concluded at bargaining councils may be extended to non-parties in certain circumstances. But both because of policies to promote small enterprises and a proliferation of satellite enterprises as a consequence of restructuring, the extension of agreements have long been a vexed issue. At the same time where agreements have been extended to non-parties, it has not enabled bargaining councils effectively to regulate such enterprises.

Although unions and others frequently call for stricter enforcement of collective agreements, it is no simple matter to do so. As a general proposition bargaining council inspectorates are complaints driven, and do not have the resources to investigate clandestine operations or the like. No enforcement strategy is likely to be effective unless it is underpinned by organization. Still less will inspectors be able to uncover the economic relationships that may connect a clandestine operation to an employer in the formal sector. Even if they were to do so, such formal sector employer might well be outside the jurisdiction of the council. This would be the case with a retailer putting out work to a home-based clothing manufacturer, for example. The tendency for externalization to erode the relevance of conventional notions of a sector thus has far-reaching implications.”¹⁶⁶

¹⁶⁶ *Op cit* 1276-1277.

The Department of Labour is aware of these problems and certain attempts have been made to remedy the situation: The 2002 amendments¹⁶⁷ to the Basic Conditions of Employment Act (BCEA)¹⁶⁸ and the Labour Relations Act (LRA)¹⁶⁹ create a presumption that a person will be considered an employee in the traditional sense if one of any seven criteria applies.¹⁷⁰ Theron is concerned that these provisions will have limited success in extending protection to atypical employees and states: “But the limited scope of the new presumption must be emphasized. An employer may rebut the presumption. Even on the most optimistic interpretation it is not likely to extend effective legislative protection to all categories of workers that may be in need of protection. The person producing goods or providing services from her/his home, for example, may be economically beholden to another.”¹⁷¹

Another legislative provision that attempts to protect the atypical employee is section 83 of the BCEA which gives the Minister of Labour the power to deem certain categories of persons to be employees. However the Minister has to date not made use of this provision.¹⁷² Section 51 of the BCEA also gives the Minister of Labour the power to deem certain persons to be employees. This is in regard to sectoral determinations. However, this provision is to date yet to be invoked. Theron is of the view that the reason for this is that the same difficulties that prevail in enforcing bargaining council agreements are applicable to sectoral determinations in terms of the BCEA.¹⁷³

¹⁶⁷ S 200A of the Labour Relations Amendment Act 12 of 2002 and s 83A of the Basic Conditions of Employment Amendment Act 11 of 2002; Clarke “The Basic Conditions of Employment Act Amendments-More Questions Than Answers” (2002) 6(1) *LDD* 1; Ernest “Employee and Independent Contractor: The Distinction Stands (2002) *SAMLJ* 107; Bosch A survey of the 2002 Labour Legislation Amendments: Is There Really ‘Something for Everyone?’” 2003 *ILJ* 1; 5.

¹⁶⁸ 75 of 1997.

¹⁶⁹ 66 of 1995.

¹⁷⁰ These provisions are discussed in detail in ch 5 *infra* under the heading “Employees’ Rights Extended to Atypical Employees”.

¹⁷¹ Theron *op cit* 1273; see also Theron “The Erosion of Workers’ Rights and the Presumption as to Who is an Employee” 2002 *LDD* 27; Christianson Defining Who is an Employee” 2001 11(3) *Contemp LL* 21.

¹⁷² Cheadle *et al Current Labour Law* (2004) 149.

¹⁷³ Theron *op cit* 1277.

Legislation has allowed for a system where TES's can be considered the employer in a triangular relationship.¹⁷⁴ This creates an opportunity for organisations to avoid the provisions of labour legislation with regard to the workers provided by the TES's. The study in Paper 3¹⁷⁵ examined forty eight CCMA and Labour Court cases that dealt with TES's. The major problem was determining who the employer was.¹⁷⁶ As a result the applications were normally dismissed. Another problem was determining whether or not there was a dismissal. This is because, if the TES is the employer, only the TES can effect a dismissal. Once again the decisions on this issue were found to be contradictory. These uncertainties give rise to a number of questions: For example, must the TES remunerate the worker when the client no longer requires that person's services?

Finally, a contract of employment is not only a prerequisite to qualify for the protection afforded by labour legislation and collective bargaining, but is often a prerequisite for social security protection.¹⁷⁷ Atypical employees are excluded from social security protection that requires employers and/or employees to make contributions. Examples are the Compensation for Occupational Injuries and Diseases Act,¹⁷⁸ Unemployment Insurance Act,¹⁷⁹ the Pension Funds Act.¹⁸⁰

¹⁷⁴ S 198(2) of the LRA deems a TES to be the employer.

¹⁷⁵ Discussed *supra* under the heading "Surveys and Statistics" in sub-heading 2.2.

¹⁷⁶ See for example *Lad Brokers (Pty) Ltd v Mandla* 2001 ILJ 1813; *Bargaining Council for the Contract Cleaning Industry and Gadeza Cleaning Services and Another* 2003 ILJ 2019; *National Union of Metalworkers of SA on behalf of Fortuin and Others and Laborie Arbeidsburo* 2003 ILJ 1438.

¹⁷⁷ See Olivier "Extending Law and Social Security Protection: The Predicament of the Atypically Employed" 1998 ILJ 669.

¹⁷⁸ Act 130 of 1993.

¹⁷⁹ Act 63 of 2001.

¹⁸⁰ 24 of 1956.

4 Conclusion

South African atypical employees generally do not enjoy the protection offered in terms of legislation or in terms of collective organisation.¹⁸¹ Consequently, as a result of their financial dependence on the provider of work, they are at the mercy of the provider of work with reference to wages and other conditions of work.¹⁸² These employees are not protected from unfair dismissal, exploitation in the form of the payment of very low wages, they sometimes work in conditions that are hazardous to their health and safety, are excluded from certain social security protection and, do not enjoy the benefit of skills development levies.¹⁸³ All this is because they do not qualify as standard employees.

¹⁸¹ Mills “The Situation of the Elusive Independent Contractor and Other forms of Atypical Employment in South Africa: Balancing Equity and Flexibility” 2004 *ILJ* 1203, 1234-1235.

¹⁸² Theron “Employment is not what it used to be” (2003) *ILJ* 1255.

¹⁸³ Cheadle *et al Current Labour Law* (2004) 162.

CHAPTER 7

CONTRACT OF EMPLOYMENT

ABRIDGED CONTENTS

	Page
A	Introduction ----- 247-248
B	Socialisation of the Law of Contract in Judicial Decision Making in South African Law
1	Introduction----- 248-252
2	Legal Rules and Standards of the Law of Contract----- 252-254
3	Rules and Social Policy in the South African Law of Contract----- 255-262
4	Standards and Social Policy in the South African Law of Contract----- 262-270
5	Conclusion----- 270-271
C	England
1	Introduction----- 271-272
2	Public Policy----- 272-273
3	Implied Term of Mutual Trust----- 273-280
4	Atypical Employees----- 280-281
5	Conclusion----- 281-282
D	Australia
1	Introduction----- 282-283
2	Good Faith as an Underlying Philosophy of the Law of Contract----- 283-285
3	Conclusion----- 285
E	United States of America
1	Introduction----- 285-286
2	The Rules of Private Contract Law----- 287-290
3	Employer Rules and Policies----- 290
4	Dismissals----- 291-294
5	Conclusion----- 294-295
F	Conclusion ----- 295

A Introduction

The latter part of the industrial era in industrialised economies witnessed the “burying of the individual contract beneath layers of safeguards for the subordinate employee.”¹ The reality of the imbalance of power inherent in the employment relationship is not denied. In the light of worldwide trends towards individualisation, decollectivisation and deregulation in the quest for flexibility,² alternative means of attaining more equitable bargains between employers and employees should be explored. The resurgence of the individual contract of employment calls for an adaptation of the common law to accommodate these changes that have come about as a result of new world socio-economic circumstances.

It is trite that the social model of employment upon which labour law systems were based in the industrial era (and upon which the South African labour law dispensation is presently based) has to a large extent retreated and even collapsed in many countries.³ This leaves individual employees more vulnerable to employer exploitation. Judges have in the past, and continue to ‘socialise’ the general law of contract in order to avoid harsh outcomes that result from differences in power between contracting parties.⁴ This imbalance of power between the parties is not only present between employer and employee but can

¹ Chin “Exhuming the Individual Employment Contract: A Case of Labour Law Exceptionalism” 1997 10 *AJLL* 257-259.

² As discussed in chapters 5 and 6 *supra*.

³ Arup “Labour Market Regulation as a Focus for Labour Law Discipline,” in Mitchell *Redefining Labour Law: New Perspectives on the Future of Teaching and Research* (1995), 29 explains this phenomenon as follows: “However widespread it once was, the norm of the industrial model of employment relations is now under attack from all sides. A norm of mass production and consumption, characterised by such features as large organisations, the assembly line mode of production, Keynesian economic policies, the welfare state, the nuclear family, suburbia, cultural homogeneity, specific work location, and gender segmentation, is often treated today as an ideological construct and indeed as an historical artefact.

A form of labour law was linked to this social structure – the law of industrial relations and collective bargaining, bolstered in some cases by centrally arbitrated awards and categorical legislative protections. The law’s subject was the full-time, unionised, industrial, male, bread winner...”

⁴ *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A).

exist for example between the grantor of credit and the receiver of credit, or between suppliers and consumers and so on.⁵

B The Socialisation of the Law of Contract in Judicial Decision Making in South African Law

1 Introduction

Any discussion on the influence of decisions in the moulding of the law of contract must begin with an acknowledgment of the existence of judicial activism⁶ as apposed to rigid legal formalism.⁷

The doctrine of precedent or *stare decisis* is part of our law.⁸ This doctrine might *prima facie* suggest that the common law is static.⁹ This is, however, not the case.¹⁰ It will be demonstrated hereunder¹¹ that our common law has changed markedly in the last century or so. The duty of good faith, as well as the concepts

⁵ *Ibid.*

⁶ Judicial activism refers to a system where fair outcomes should be reached in decisions. Such justice is achieved by the application of standards to the facts at hand. Each case is decided with reference to public policy considerations and what is best for the community. See Cockrell “Substance and Form in the South African Law of Contract” 1992 *SALJ* 55.

⁷ ‘Legal formalism’ implies that legal rules are applied in a mechanical way and certainty demands that judicial discretion is eliminated. A judges’ function is merely to apply these rules in a non-creative manner. The fact that such a strict application of rules might at times result in injustices is according to the adherents of legal formalism a small price to be paid for certainty of the law – Cockrell *ibid.*

⁸ See *Afrox Healthcare Bpk v Strydom* 2002 (4) SA 125 (SCA) par 26.

⁹ See Cockrell *op cit* 55 where he states: “Reading the standard South African textbooks on the law of contract, one would be hard pressed to believe that any contentious policy issues existed in this area of the law. In these texts contract law is routinely presented as a seamless web of rules that possesses a determinative rationality of its own, such that answers to any disputes will be thrown up by the inexorable logic that is internal to the system itself. All legal problems are solved by the dextrous manipulation of a few ground rules that are assumed to be beyond controversy; the issues regarding the policy justification for those rules are usually brushed aside as ‘non-legal’ or short-circuited by a question-begging appeal to ‘freedom of contract’. In the result we are presented with the curious edifice of a law of contract that seems to be built around a valuational vacuum – the hard edges of legal policy have been smoothed away by the sandpaper of legal doctrine.”

¹⁰ *Ibid.*

¹¹ Under sub-heading 3.

of *bonos mores*, reasonableness, unconscionability and so forth have on many occasions been interpreted and moulded by our courts so as to reflect the mores and surrounding socio-economic circumstances of the day.

Many of the *dicta* in support of a formalistic approach are nothing more than a facade to disguise the application of social policy behind the apparent strict application of legal precedent. An example of such a dictum is that of Kotze JA in *Weinerlein v Goch Buildings Ltd*¹² that reads: “Our common law, based to a great extent on the civil law contains many an equitable principle, but equity, as distinct from and opposed to the law does not prevail with us. Equitable principles are only of force insofar as they have become authoritatively incorporated and recognised as rules of law.”

Despite making use of the doctrine of *bona fides* as the basis for the identification and acceptance of a fictitious fulfilment of a condition in discharge of duties in the facts before the court, Kotze JA nevertheless found it necessary to deny any creative role on the part of judges. As Olivier JA points out in his minority judgement in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO*,¹³ the problem with this dictum is that it implies a static, closed system, as if the principle of *bona fides* was established in the past and is not capable of different interpretations with reference to new legal norms. Olivier JA stated:¹⁴ “Die probleem met hierdie stelling is dat dit skyn uit te gaan van ‘n statiese, afgeslote sisteem: as billikheid nie reeds as ‘n regsreël gepositiveer is nie, *cadit quastio*. Beteken dit dat die *bona fide*-beginsel êrens in die verlede iutgewerk is en nie in die toekoms tot nuwe regsreëls of verwerre aanleiding kan gee nie? Hierdie *dictum* staan vernuwing en aanpassing in die weg en reflekteer dat dit slegs die taak van die howe is om die reg te vind en nie te skep nie, ‘n seining wat nie by die gees van ons reg of die behoeftes van ons gemeenskap pas nie.” As Olivier JA opines, a *dictum* such as this, that denies any creativity on the part of judges and

¹² 1925 AD 282 at 285.

¹³ 1997 4 SA 302, at 319J-320A.

¹⁴ *Idem*.

perceives the task of court as merely to apply the law as opposed to creating law, is out of touch with reality.¹⁵

Dicta of this kind are associated with the classical theory of the law of contract. This theory of the law of contract has its origins in the eighteenth and nineteenth centuries and is aligned to the theory of laissez faire and economic liberalism.¹⁶ This theory emerged as a result of the industrial era. The paternalistic approach associated with the previous agrarian society was replaced by “an aggressive entrepreneurial industrial society in the nineteenth century”.¹⁷ The foundation of such theory is formed by the notion of freedom of trade and hence freedom of contract. Such values are premised on the belief that contractants are on an equal footing when they negotiate. The role of the courts therefore is to enforce the terms of the contract as voluntarily agreed to by them. It is not for the courts to look into the fairness or otherwise of the bargain. This theory overlooks the inherent inequality that may exist between individuals that arise as a result of wealth, knowledge, positions of power and influence and so forth. Nevertheless, it appears prima facie, that the South African law of contract still adheres to this classical theory.¹⁸ However, Cockrell is of the view that despite the views expressed in the “standard South African text books on the law of contract”, the South African law of contract is “shot through with normative commitments and the

¹⁵ See Olivier AJ’s minority judgment in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* at 320B where he states that such an approach to a judges’ role is contrary to the spirit of our law and cannot cater for the needs of our society. See also Grové “Kontraktuele Gebondenheid, Die Vereistes van die Goeie Trou, Redelikheid en Billikheid” 1998 *THRHR* 686 at 696 where he concludes that ‘reasonableness’ will play a greater role in the law of contract in the future. In the words of Lord Reid as quoted in Kollmorgen and Riekert “Social Policy and Judicial Decision Making in Australian Employment Law” in Mitchell *Redefining Labour Law* (1995) 167: “There was a time when it was thought almost indecent to suggest judges made law – they only declare it. Those with a taste for fairy tales seem to have thought that in some Aladdin’s cave there is hidden the common law in all its splendour... But we do not believe in fairy tales anymore.”

¹⁶ Hawthorne “The Principle of Equality in the Law of Contract” 1995 *THRHR* 164.

¹⁷ *Ibid.*

¹⁸ Hawthorne *op cit* 163.

allegedly ‘value neutral’ veneer which covers the text book tradition is in truth only obtained by a sub privileging of certain values over others”.¹⁹

There are, however, many more dicta that support the approach of judicial activism. As early as 1909 Innes J stated: “There come times in the growth of every living system of law when old practice and ancient formulae must be modified in order to keep in touch with the expansion of legal ideas, and to keep pace with the requirements of changing conditions.”²⁰ If the purpose of the law is the achievement of justice,²¹ it follows that social policy considerations upon which the rules and doctrines of common law are based must be applied to the particular facts of each case. Even though it might prove difficult at times for a court to choose between conflicting values and interests this is part of a judge’s function.²²

¹⁹ “Substance and Form in the South African Law of Contract” 1992 *SALJ* 40. Christie shares this optimistic view and states in the preface to *The Law of Contract* (2001) 4th ed and states: “The South African law of contract continues to advance, and it seems to me that the gap between law and justice is steadily closing as the judges become more confident in applying the concepts of good faith and public policy. If the concepts can be further developed without undermining the predictability on which the law of contract must be founded, I anticipate even greater pleasure in preparing the next edition...”

²⁰ *Blower v Van Noorden* 1909 TS 890 at 905.

²¹ See Van der Merwe and Van Huyssteen “The Force of Agreements: Valid, Void, Voidable, Unenforceable” 1995 *THRHR* 549 where it is categorically stated: “Justice and fairness are universally accepted to be the purpose- or at least a vital part of the purpose – of any system of law. Essential as the commitment to such an ideal may be, the legitimacy of a legal system depends finally on the extent to which it is experienced as just and fair in its particular applications.”

²² Botha J in *Rand Bank Ltd v Rubenstein* 1981 (2) SA 207 (W) acknowledged such judges function and stated: “Counsel for the plaintiff, echoing misgivings expressed in some of the cases referred to earlier, submitted that it must be a matter of extreme difficulty for a Judge to decide whether the enforcement of a right would amount to unconscionable conduct or great inequity. With great respect to others who have expressed such misgivings, I do not share them. A Judge must often, in the exercise of his judicial function, move about in areas of relative uncertainty, where he is called upon to form moral judgments without the assistance of precise guidelines by which to arrive at a conclusion. Examples in the field of contracts are the determination of whether a contract is contrary to public policy or contra bonos mores (see e.g. *Couzyn v Laforce* 1955 2 SA 289 (T)). The application of broad considerations of fairness and justice is almost an everyday occurrence in a court of law, for instance, in relation to awards of costs. I do not see why a judge should shirk from performing this kind of task, however difficult it may seem to be. Of course, in connection with the *exceptio doli*, difficult questions may and do often arise as to a Court’s freedom to depart from the rules and principles of the

It is submitted that the application of notions such as fairness and equity on a case-by-case basis is more likely to result in justice than adherence to a strictly rigid and formalistic approach.

2 Legal Rules and Standards of the Law of Contract

2.1 Introduction

If it is accepted that judges do have some discretion and that there is such a thing as “judge made law” and that judges are entitled to (in fact at times required and expected to) make value judgments, the following questions arise:

- (i) How are judges to exercise such discretion?
- (ii) What is the extent of such discretion?

These questions can only be answered by distinguishing between legal principles (or standards) and legal rules, and analysing the roles they play in the South African law of contract.

The law of contract can be examined in terms of its substance and its form.²³ Legal standards and rules make up the form component of the law of contract, while the “political morality that under press the law of contract”²⁴ makes up the substance component of the law of contract. The substance will influence the form of the law of contract.²⁵ Cockrell identifies two opposite extremes that form the “spectrum of substantive values”.²⁶ They are individualism²⁷ and collectivism.²⁸

substantive law, and I certainly do not wish to minimise that kind of difficulty in this field. However, in this particular case with which I am dealing, I do not perceive any difficulty of that kind.”

²³ Cockrell *op cit* 41-46.

²⁴ *Ibid* 41.

²⁵ See Kollmorgen and Rickert *op cit* 171 who state “Underlying social policy has always informed the standards of justice which have in reality, shaped the common law.”

²⁶ *Ibid*.

²⁷ Cockrell *op cit* 41 defines individualism as follows: “Individualism conceives of persons as atomistic units joined to other agents by bonds that are wholly contingent. The dominant ideas are those of individual autonomy and self-reliance. Other people are viewed with a guarded distrust, since there is an omnipresent danger that one’s personal liberty will be restricted when rival spheres of autonomy collide. Values are regarded as the subjective preference of the individual will, such that we are separated from others by our own idiosyncratic

The form that the law of contract will take is dependent on whether the substance is more collectivist or more individualist in nature.

2.2 Rules

If the law of contract is made up solely of rules (and there is no room for standards or principles), judges will have no creative function. A judges' role will be tantamount to that of an administrator and the rules will simply be applied to the facts at hand. With the emphasis on rules the main aim is to ensure certainty of the

conception of the good life. In its economic form, individualism assumes a world of traders who meet briefly on the market floor, where they engage in discrete and furtive transactions. In its political form, individualism posits a universe of agents with exclusive control over their private domain of autonomy – a domain that is staked out on the perimeter by the claims of rights. In such a world, the role of the state is limited to the night watchman function of protecting each person's area of individual autonomy from uninvited intrusions. Legal relationships with others are first and foremost defined by free consent on the assumption that consent is itself a manifestation of individual autonomy; non-voluntary positive obligations are regarded with suspicion as potentially harmful restrictions on personal liberty.”

28

Collectivism is described by Cockrell *ibid* as follows: “Collectivism is a loose term which I use to describe a scheme of association defined principally by its opposition to individualism. At this end of the spectrum we find an emphasis on ‘collective goods’ which concern matters of value that are neither mine nor yours but rather our; these collective goods depend on membership of a community and play a crucial role in constituting and identifying the individual agent. Collectivism is informed by a ‘communitarian’ vision, in terms of which the free-floating self comes to be replaced by the encumbered self who is an ‘implicated’ member of a community. According to this version of communal life, we are social beings with the benefits and burdens that come from living in a collective society. While individualism is a thesis of separation, communitarianism stresses the value of connection. It emphasizes reciprocity, solidarity and co-operation, and is committed to an ethics of altruism in terms of which the interests of others make a legitimate claim on us. Thus positive obligations are not exhausted by the category of consent, since such duties may also arise from the nature of the collective enterprise itself. We are said to be joined by communal ties, not separated by the boundaries of consent, such that open-ended obligations may flow from identity and relatedness even in the absence of voluntary choice.”

law.²⁹ Such mechanical application of rules by judges has been referred to as ‘formalism’.³⁰

While admitting that such a rigid application of rules might at times result in unfairness, unreasonableness or injustice, those who prefer this approach feel that this is a small price to pay for certainty of the law.³¹

2.3 Standards

A preference for standards as opposed to rules has been referred to as ‘pragmatism’,³² ‘judicial activism’ and ‘judicial realism’.³³ This approach acknowledges the role of social policy in judicial decision-making. More emphasis is placed on ensuring an equitable, fair and reasonable result than on ensuring certainty of the law. Consequently social policy considerations must play a role in determining the outcome reached by the judicial officer. Since these standards or policy considerations might at times be somewhat vague and abstract, their application could result in a certain amount of uncertainty in the law. Proponents of such an approach³⁴ suggest that a little uncertainty in the law is a small price to pay for a fairer, more equitable and just system. The judge or judicial officer has a creative role to play – all facts and circumstances of a case are ascertained on a case-by-case basis and the most appropriate (in the sense of fair) standards are applied.

²⁹ It is interesting to note that the argument that “the reality of decision making within common law involves a significant role for considerations of social policy can only increase predictability” has been convincingly put forward. See Kollmorgen and Riekert *op cit* 167ff.

³⁰ Kollmorgen and Riekert “Social Policy and Judicial Decision Making in Australian Employment Law” in Mitchell *Redefining Labour Law* (1995) 167 and Cockrell *op cit* 42.

³¹ Cockrell “Substance and Form in the South African Law of Contract” 1992 *SALJ* 40 at 43.

³² *Ibid.*

³³ Kollmorgen and Riekert *op cit* 172.

³⁴ See for example Neels “Die Aanvullende en Beperkende Werking van Redelikheid en Billikheid in die Kontraktereg” 1999 *TSAR* 684.

3. Rules and Social Policy in the South African Law of Contract

3.1 Introduction

It might prima facie appear that there is no link between rules and standards. This is not the case as most rules are created with certain policy considerations in mind. What follows is a brief overview of how certain rules in the law of contract operate to prevent bargains between individuals from being unreasonable or unfair.

The starting point in the South African law of contract is that in order for a contract to be valid there must be consensus.³⁵ Where there is no consensus there is no contract, that is, the contract is void.³⁶ The basis of liability is the individual's consent.³⁷ At common law, where consensus is obtained in an improper manner, for example where the person was coerced by some threat of violence or other duress (duress) to enter into the contract, or the person gained the wrong impression concerning certain material facts as a result of the other party's misrepresentation, there is said to be a defect of will. Such defect of will justifies the setting aside of the contract. In other words, such a contract is considered to be 'voidable'.³⁸

South African law has developed to allow the setting aside of a contract in cases of undue influence³⁹ and improperly obtained consent generally.⁴⁰ Procedural fairness refers to situations where at the time of entering into the contract there existed irregularities in the manner in which the consent was obtained.⁴¹ Consent

³⁵ Van der Merwe *et al Kontraktereg: Algemene Beginsels* (2003) 17.

³⁶ *Ibid.*

³⁷ Hence reference to the "choice theory" which has been referred to as the "quintessence of individualism," Cockrell *op cit* 48.

³⁸ Van der Merwe and Van Huyssteen "The Force of Agreements: Valid, Void, Voidable, Unenforceable?" 1995 *THRHR* 549, 565.

³⁹ See sub-heading 4.3 below.

⁴⁰ *Ibid* and *Plaaslike Boeredienste (Edms) Bpk v Chemfos (Bpk)* 1986 1 SA 819 (A).

⁴¹ Lubbe "Bona Fides, Billikheid en die Openbare Belang in die Suid-Afrikaanse Kontraktereg" *Stell LR* 1990 1, 7, 18; Grové "Kontraktuele Gebondenheid, die

obtained through duress, undue influence and misrepresentations (defects of will) refer to procedural unfairness.

A *iustus error* can result in there being no consensus and hence no contract.⁴² This is the case where the contractant wishing to set the contract aside laboured under a misapprehension concerning the contents of the contract that is material (in other words such error goes to the very root of the contract); such misapprehension is reasonable; and is a result of the wrongful action of the other party.⁴³ In such a case there appears to be consensus but in reality there is none.

Substantive fairness, on the other hand, refers to the contents of the contract as opposed to the means used to acquire consensus.⁴⁴ A value judgment is made *ex post facto* in order to ascertain whether or not the contract is in the public interest.⁴⁵ What is in the public interest is determined with reference to vague criteria such as *boni mores*, public policy and the principles embodied in statute such as the Bill of Rights in the Constitution.⁴⁶ Where, for example A sells an unlicensed gun or uncut diamonds illegally to B, the maxim *ex turpi causa non oritur actio* is applicable. The contract is void because it is illegal and also because it is contrary to public policy. This is so even though both parties consented to the terms of the contract, such consent was not improperly obtained, and there was no *iustus error*. The substantive fairness of contracts is discussed in more detail *infra*.⁴⁷

Vereistes van die Goeie Trou, Redelikheid en Billikheid” 1998 THRHR 687, 692; Van der Merwe and Van Huyssteen *op cit* 78.

⁴² Grové *op cit* 693.

⁴³ See *Spindrifter v Lester Donovan (Pty) Ltd* 1986 1 SA 303 (A); *Steyn v LSA Motors* 1994 1 SA 49 (A); *Sonap Petroleum (SA) (Pty) Ltd v Pappadogianis* 1992 3 SA 234 (A).

⁴⁴ Grové *op cit* 694.

⁴⁵ See *Magna Alloys & Research (SA) (Pty) Ltd v Ellis* 1984 4 SA 874 (A) for an overview of what is meant by ‘public interest’.

⁴⁶ Grové *idem*.

⁴⁷ See sub- heading 4.2.

Since our law of contract is premised on the classical theory of contract it follows that there is an emphasis on rules as opposed to standards (i.e. procedural fairness).⁴⁸ The rules that enable the setting aside of a contract on the basis that consensus was improperly obtained are discussed hereunder.

3.2 *Improperly Obtained Consent*

(a) *Misrepresentation*

Where a party enters into a contract on the basis of a misrepresentation (usually made during the course of negotiations) by the other party, and such misrepresentation results in a material error, there is no consensus. Consequently the contract is void.⁴⁹

(b) *Duress and Undue Influence*

The doctrines of duress and undue influence were introduced to invalidate contracts where one of the contracting parties coerced or forced the other party to enter into a contract he or she would otherwise not have entered into. In such cases consent is said to have been improperly obtained in the sense that the contract was not entered into voluntarily.⁵⁰ Duress can either be exercised directly by threatening violence,⁵¹ or indirectly by threatening some harm or prejudice,⁵² for example the threat of prosecution,⁵³ or the threat of abandonment by a spouse,⁵⁴ or the threat of some kind of economic sanctions,⁵⁵ or civil proceedings.⁵⁶

⁴⁸ Van der Merwe *et al op cit* 1.

⁴⁹ For a detailed discussion on the elements of misrepresentation, the different kinds of misrepresentations, the remedies available to the aggrieved party, see Van der Merwe *et al op cit* 95.

⁵⁰ See Hawthorne “The Principle of Equality in the Law of Contract” 1995 *THRHR* 169.

⁵¹ Threat of physical violence is called *vis absoluta*, see Van der Merwe *et al op cit* 85.

⁵² A threat of harm or prejudice in order to induce another person to enter into a contract is known as *vis compulsive*, *ibid*.

⁵³ In *Ilanga Wholesalers v Ebrahim and Others* 1974 2 SA 292 (D) the creditor used the threat of criminal prosecution to induce a debtor to sign an acknowledgment of debt.

⁵⁴ *Savvides v Savvides* 1986 2 SA 325 (T).

⁵⁵ *Malilang and Others v MV Houda Pearl* 1986 2 SA 714 (AD).

At common law fraud and duress were accepted as grounds for setting aside a contract.⁵⁷ Towards the end of the nineteenth century a third specific ground, namely undue influence,⁵⁸ came to be accepted as justifying the setting aside of a contract.⁵⁹ Another ground, namely improperly obtained consent generally has also been accepted by the courts.⁶⁰ The ground for setting aside a contract in the form of improperly obtained consent generally has not been accepted without criticism.⁶¹ The fact that the notion of improperly obtained consent generally is not part of our law from a historical perspective; duress and misrepresentation are sufficient to prevent such improperly obtained consent; and lastly, the fact that such notion is incapable of a precise and accurate definition resulting in uncertainty of the law, are some of the arguments levelled against the inclusion of this ground for the setting aside of contracts.⁶²

In terms of the classical theory of contract an individual's freedom to contract is of paramount importance.⁶³ Certainty of the law is also a major policy objective. It follows that rules as apposed to standards would form the major component of such a system of law. The fact remains, however, that most rules are put in place in order to pursue some kind of policy objective. In other words rules are normally motivated by standards. Such rules, therefore, cannot be immune from values, norms and the like. The value or policy consideration applicable to the rules discussed above is the sanctity of an individual's free will. Or alternatively, as Cockrell states:⁶⁴ "The defences of 'misrepresentation', 'duress' and 'undue

⁵⁶ *Slater v Haskins* 1914 TPD 264.

⁵⁷ Van der Merwe *et al op cit* 95.

⁵⁸ Undue influence has its origins in English law - Van der Merwe *et al op cit* 92.

⁵⁹ *Preller v Jordaan* 1956 1 SA 483 (A).

⁶⁰ See *Plaaslike Boeredienste (Edms) Bpk v Chemvos Bpk* 1986 1 SA 819 (A) where the agent of the other contracting party was bribed into consenting on behalf of his principal. Such consent was said to have been improperly obtained.

⁶¹ See Van der Merwe *et al op cit* 95-98.

⁶² *Ibid.*

⁶³ See *Bank of Lisbon and South Africa Ltd v De Ornelas & Another* 1988 (3) SA 580 (A).

⁶⁴ Cockrell "Substance and Form in the South African Law of Contract" 1992 *SALJ* 40 at 56.

influence' may be usefully recast in the language of bona fides. It is sometimes suggested that the reason why these defences render contracts voidable is because they induce 'defects in the will' (albeit that these defects fall short of nullifying consent). But this explanation looks in the wrong place, for the better view is that the defect resides not in the promisor's will but rather in the improper conduct of the promisee. For one thing the misplaced emphasis on the promisor's will seem to be 'agent neutral' and quite unable to account for the fact that the law requires that the misrepresentation or undue influence derive from the promisee and not from a third party. These three defences are all concerned with the legitimacy of the promisee's conduct, and one way of linking them is to say that they all amount to instances of bad faith conduct from which the law will not allow the promisee to benefit."⁶⁵

Whether one accepts Cockrell's argument that bona fides is the underlying value, or that the underlying value is the ability to enter into contracts freely, the result is the same – these rules are value-laden.

3.3 *Tacit Terms and Implied Terms*

Those who adhere to the theory of formalism⁶⁶ would like to believe that contractual terms are determined solely by the will or intent of the respective parties. Tacit terms are supposedly based upon the common intention of the parties.⁶⁷ Implied terms are implied by the law and their content is determined with reference to broad concepts such as fairness and reasonableness.⁶⁸ Terms that

⁶⁵ A similar view is expressed by Van der Merwe and Van Huyssteen *op cit* 566: "In the final analysis, the major consideration in instances of rescission is not the integrity of the will of the aggrieved contractant, but the propriety or impropriety of the conduct which causes the defect of will. Determining impropriety requires an evaluation of the conduct by means of objective standards which serve to determine illegality, for example the boni mores, good faith and reasonableness."

⁶⁶ See footnote 7 *supra*.

⁶⁷ Examples of such terms implied by law are found in sale agreements in the seller's implied warranty against defects and in the undertaking by the lessor in a contract of lease to quiet enjoyment and absence of defects.

⁶⁸ Neels "Regsekerheid en die Korrigerende Werking van Redelikheid en Billikheid" (1999) *TSAR* 684 at 696. Changing socio-economic circumstances, such as amended trade practices, are relevant in this regard. See *Afrox Healthcare Bpk v*

are implied *ex lege* (or *naturalia*) need not necessarily coincide with the intention of the contracting parties.⁶⁹ It has been argued that such *ex lege* terms do reflect the intention of the parties since individuals wishing to exclude these terms are free to do so. This argument is not entirely convincing. This is because of the courts' general aversion to exemption clauses.⁷⁰ The approach of our courts is that although valid these clauses must be interpreted restrictively. This suspicion towards exemption clauses by our courts is evident in many cases⁷¹ as well as the accepted rule that it is not possible to exclude liability for fraud in terms of an exemption clause.⁷²

An attempt is also made by those who adhere to theory of formalism to ascribe tacit terms to the intention or will of the contracting parties. Such intention is said to be 'actual' or 'imputed'.⁷³ The basis for allowing such 'imputed' intention is that if the contracting parties had been alerted to the possibility of such a term at the time of entering into the contract, they would have agreed to such term. There is in other words no consent – how could there have been consent, if at the time of entering the agreement the parties did not even think of the imputed term? The absence of real consent necessitates recourse to the courts' subjective interpretation of what in its opinion the parties would have agreed to.⁷⁴ This in turn necessitates recourse to standards.⁷⁵ Neels suggests that the role of

Strydom 2002 4 All SA 125 (SCA) 131 where Brand JA cites *Government of the Republic of South Africa v Fibre Spinners and Weavers (Pty) Ltd* 1978 2 SA 794 (A) at 804C-806D and *Durban's Water Wonderland (Pty) Ltd v Botha & Another* 1991 All SA 411 (1999 1 SA 982) (SCA) at 989 as authority for this view.

⁶⁹ Cockrell *op cit* 53.

⁷⁰ An exemption clause excludes a remedy that a contracting party would otherwise have had access to in terms of common law.

⁷¹ See *South African Railways and Harbours v Lyle Shipping Co Ltd* 1958 3 SA 416 (A); *Galloon v Modern Burglar Alarms (Pty) Ltd* 1973 3 SA 647 (C) at 652-5; *Zietsman v Van Tonder en Ander* 1989 2 SA 484 (T).

⁷² *Wells v South African Alumenite Company* 1927 AD 69.

⁷³ See Cockrell "Substance and Form in the South African Law of Contract" 1992 SALJ 53.

⁷⁴ See Vorster "The Basis for the Implication of Contractual Terms" 1988 TSAR 161, 163-169.

⁷⁵ Cockrell *op cit* 56 expressed himself thus: "In truth the absence of 'real consent' opens the door so as to allow the courts to imply those terms which are considered to be fair and reasonable, and which are then justified retrospectively as deriving

reasonableness and fairness in imputing implied and tacit terms should be openly admitted instead of concealing such role behind fictions of individualism and formalism.⁷⁶

In conclusion, it appears that implied and tacit terms like the rules relating to the setting aside of contracts where consensus was ‘improperly obtained’ also have their roots in standards such as reasonableness, fairness and good faith.

3.4 *Estoppel and Iustus Error*

A distinction between the so-called ‘reliance theory’ and the ‘choice theory’ must be made. In terms of the choice theory liability is based on individual consent. The ‘reliance theory’,⁷⁷ on the other hand, has its basis on the notion that an individual should be held liable for the harm caused to others as a result of reliance on such individual’s original promise.⁷⁸ This theory clearly imposes liability on communitarian as opposed to individual standards. Liability is premised upon the reasonableness of such reliance. Voluntary assumption of liability can thus be negated and the party who created the wrong impression is prevented from holding the party, who reasonably relied on such impression, liable. This application of the reliance theory in South African law is called ‘estoppel’. The principle of estoppel can also function negatively in the sense that it not only can negate liability where there was consent, but it can also operate to create liability where there is no consent. This was the case in *National and Overseas Distributors Corporation (Pty) Ltd v Potato Board*.⁷⁹

The principle of *iustus error* can also operate to negate liability on the part of the party who made the error provided such error was reasonable or where the other

from ‘imputed consent’: A communitarian standard for the content of contractual obligation is thus achieved while remaining true to the language of individualism.”

⁷⁶ *Op cit* 694-697.

⁷⁷ Also known as the ‘harm-to-interests theory’.

⁷⁸ See Cockrell *op cit* 46-50.

⁷⁹ 1958 2 SA 473 (A).

party unreasonably relied on the appearance of consent.⁸⁰ It is interesting to note that the party who is at 'fault' is penalised. Thus contractual liability has a similar basis to delictual liability and the party who is at 'fault' is held liable *ex contractu* even though there is no consent. Once again, to conclude it appears that standards in the guise of rules prevail. In the words of Cockrell:⁸¹ "In the result, the principle of autonomy shades into the principle of reliance, and the ascription of responsibility is made to centre on the reasonableness of the act of reliance. This shift in emphasis allows for the imposition of community standards of tortious reasonableness in a contractual setting." And "...the intrusion of the law of negligence into the traditional domain of contract suggests the existence of a rival interpretation of obligations under which the purpose of contract is to compensate for harm caused to the interests of others and which is not exhausted by the extent of the responsibility that was voluntarily assumed. In this we can discern a collectivist standard existing alongside the rule of privity; it reflects an ethos of open-ended obligation rather than sharply defined contractual commitment."⁸²

4 Standards and Social Policy in the South African Law of Contract

4.1 Introduction

In order for a contract to be valid it must be legal⁸³ but at times it is not all that simple to determine legality. If justice and fairness are universally accepted to be the purpose – or at least a vital part of the purpose – of any system of law,⁸⁴ it follows that legality should be determined with reference to a balancing of different interests – what is fair or just in term is determined by concepts such as 'public policy' and 'public interest'. These terms have not been given precise content by our courts⁸⁵ and are often used interchangeably.⁸⁶ It is trite that contracts that are

⁸⁰ See *Nasionale Behuisingskommissie v Greyling* 1986 4 SA 917 (T) and Lubbe "Estoppel, Vertrouensbeskerming en die Struktuur van die Suid-Afrikaanse Privaatreg" 1991 TSAR 1 at 15.

⁸¹ *Op cit* 48.

⁸² *Op cit* 52.

⁸³ The maxim *ex turpi causa non oritur actio* means that an illegal agreement is void and that no contract comes into being.

⁸⁴ Van der Merwe & Van Huyssteen *op cit* 549.

⁸⁵ The meaning of these concepts is discussed under the heading "Public Policy and Bona Fides" in section 4.2 *infra*.

contrary to public policy are unenforceable.⁸⁷ “Public policy should properly take into account the doing of simple justice between man and man”.⁸⁸ As such contracts including contracts of employment that if strictly applied would be unfair can be declared unenforceable by the courts.⁸⁹ The fact that there is an imbalance of power between the parties has been recognised as a factor to take into account in determining whether the contract is contrary to public policy. In *Afrox Healthcare Bpk v Strydom*⁹⁰ where Brand JA declared: “Wat die eerste grond betref spreek dit eintlik vanself dat ‘n ongelykheid in die bedingingsmag van die partye tot ‘n kontrak op sigself nie die afleiding regverdig dat ‘n kontrakbeding wat tot voordeel van die ‘sterker’ party is, noodwendig teen die openbare belang sal wees nie. Terselfdertyd moet aanvaar word dat ongelyke bedingingsmag wel ‘n faktor is wat, tesame met ander faktore, by oorweging van die openbare belang ‘n rol kan speel.”

A one-sided emphasis on the protection of one of the parties’ interests at the expense of the other party, can possibly be an indication that the contract is contrary to bona fides.⁹¹

It is not denied that the *stare decisis* rule is part of our law. This fact has often been re-iterated by our judges.⁹² Nevertheless this rule is not inconsistent with the fact that notions such as boni mores and public policy considerations, or the interests of the public one not static.⁹³ Furthermore it is the courts’ prerogative to

⁸⁶ See *Magna Alloys and Research (SA) Pty Ltd v Ellis* 1984 4 SA 874A 891-893.

⁸⁷ *Ibid.*

⁸⁸ Per Smalberger JA in *Sasfin (Pty) Ltd v Beukes* 1989 1 SA 1 (A) at 1G with reference to *Jajbhay v Cassim* 1939 AD 537 544.

⁸⁹ See *Katzen v Mguno* 1954 1 SA 277 (T) where Ramsbottom J held that an old African woman (of about 90 years) who was illiterate, almost deaf and blind and clearly did not understand the contract could not be liable on the contract. See also *Sasfin v Beukes (Pty) Ltd op cit* where the contract was found to be contrary to public policy and unenforceable.

⁹⁰ 2002 4 All SA 125, (SCA) 130.

⁹¹ Grové “Kontraktuele Gebondenheid, die Vereistes van die Goeie Trou, Redelikheid en Billikheid” 1998 *THRHR* 687 at 695.

⁹² See *Afrox Healthcare Bpk v Strydom* 2002 4 All SA 125 (SCA) at 134-135.

⁹³ See *Carmichele v Minister of Safety and Security & Another* 2001 4 SA 938 (CC); *Amod v Multilateral Motor Vehicle Accidents Fund* 1999 4 All SA 421 (SCA);

develop the law.⁹⁴ In developing the law judges must have recourse at times vague to principles of fairness, justice, the public good, boni mores and so forth.⁹⁵ Instances where the courts have utilised their discretion and relaxed certain rules in the interests of justice include the following: relaxing the *in pari delicto*-rule,⁹⁶ recognising that if a contract is contrary to public policy it is unenforceable⁹⁷ and reducing a stipulated penalty to a sum the court considers being fair.⁹⁸

Neels put forward the view that the court must first identify the *prima facie* legal rules applicable, and then the possible unfairness or unreasonableness in the strict application of such rules. Thereafter, it must weigh up the need for certainty of the law against the extent of unreasonableness or unfairness in the strict application of the rule in coming to its final ruling.⁹⁹

4.2 Public Policy and Bona Fides

The concepts of public policy and *bona fides* would qualify as standards as opposed to rules. As such they do not enjoy the same status in terms of applicability. Du Plessis and Davis state:¹⁰⁰ “It is a trite observation, however, that judges and lawyers are generally reluctant to apply such vague notions as morality and public policy – it is almost as if such principles and policies are inferior to rules. Therefore it is considered important that decisions should either be based entirely on clear rules or made to appear as such.”

The strict enforcement of contracts in terms of the classical theory of contract has no room for judicial discretion. Our courts have generally been averse to such

Ryland v Edros 1996 4 All SA 557 (1997 2 SA 690 (C)); and Lubbe “Bona Fides, Billikheid en die Openbare Belang in die Suid-Afrikaanse Kontrakereg” *Stell LR* 1990 1 at 11.

⁹⁴ *Afrox Healthcare Bpk v Strydom op cit* 135.

⁹⁵ See *Rand Bank Ltd v Rubenstein* 1981 2 SA 207 (W) 215 F-G.

⁹⁶ *Jajbhay v Cassim* 1939 AD 537; *Van der Merwe et al op cit* 152.

⁹⁷ *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 4 SA 874 (A) 891.

⁹⁸ S 3 of the Conventional Penalties Act 15 of 1962.

⁹⁹ Neels “Regsekerheid en die Korrigerende Werking van Redelikheid en Billikheid” 1999 *TSAR* 684 at 685.

¹⁰⁰ “Restraint of Trade and Public Policy” 1984 *SALJ* 86 at 91.

judicial discretion, and where it has been applied there have been warnings that such discretion should be applied with caution and sparingly.

This is clear from *Afrox Health Care v Strydom*¹⁰¹ where Brand JA refers to Smalberger JA, in *Sasfin (Pty) Ltd v Beukes*,¹⁰² with apparent approval: “The power to declare contracts contrary to public policy should, however, be exercised sparingly and only in the clearest of cases, lest uncertainty as to the validity of contracts result from an arbitrary and indiscriminate use of the power. One must be careful not to conclude that a contract is contrary to public policy merely because its terms (or some of them) offend one’s individual sense of propriety and fairness. In the words of Lord Atkin in *Fender v St John-Mildmay* 1938 AC 1 (HL) at 12 ‘the doctrine should only be invoked in clear cases in which the harm to the public is substantially incontestable, and does not depend upon the idiosyncratic inferences of a few judicial minds’...In grappling with this often difficult problem it must be borne in mind that public policy generally favours the utmost freedom of contract, and requires that commercial transactions should not be unduly trammelled by restrictions on that freedom.”

A preference for the standards of freedom of contract and certainty over equity can be gleaned from our cases.¹⁰³ In *Bank of Lisbon and South Africa Ltd v De Ornelas and Another*¹⁰⁴ it was held that despite the fact that the principle of freedom of contract and *pacta servanda sunt* are not absolute values, there is no general substantive defence based on fairness since the *exceptio doli* is a

¹⁰¹ 2002 4 All SA (SCA) 129.

¹⁰² 1989 1 SA 1 (A).

¹⁰³ See Hawthorne “Equality in Contract Law” 1995 *THRHR* 174 where she stated: “Most judges ignore the discrepancy between the formal requirements of freedom and equality and socio-economic reality, and continue to uphold the assumptions of the nineteenth century... Thereby they refuse to use the judicial function for measures of social and economic redistribution.” Also see *Tamarilla (Pty) Ltd v BN Artken* 1982 1 SA 398 (A); *Alfred McAlpine and Son (Pty) Ltd v Transvaal Provincial Administration* 1974 3 SA 506 (A); *Brummer v Gorfil Brothers Investments (Pty) Ltd and Others* 1999 3 SA 389 (SCA) at 420F; *Brisley v Drotsky*, unreported, case number 432/2000 (SCA); *De Beer v Keyser and Others* 2002 1 SA 827 (SCA) 837C-E.

¹⁰⁴ 1988 3 SA 580 (A) 613.

“superfluous, defunct anachronism”.¹⁰⁵ This decision was severely criticised by many¹⁰⁶ and the concepts of public policy and *bona fides* have nevertheless subsequently been utilised to set aside contracts.¹⁰⁷ This is because as pointed out by Olivier JA,¹⁰⁸ a general substantive defence based on equity is unnecessary as all contracts are *negotia bonae fide*. Olivier JA went to great lengths to demonstrate that all contracts in our law are *bona fide*,¹⁰⁹ and that in applying the principles of *bona fides* and public policy judges are required to exercise their discretion.¹¹⁰

Our case law is inundated with authority for the view that the *bona fide* principle is recognised as part of our law¹¹¹ and this view is also generally accepted by

¹⁰⁵ At 607B per Joubert JA.

¹⁰⁶ See Cockrell “Substance and Form in the South African Law of Contract” (1992) *SALJ* 59; Neels *op cit* 689; Glover “Good Faith and Procedural Unfairness in Contract” 1998 *THRHR* 328; Cornelius “Bepaalde Verskyningsvorme van Goeie Trou in die Kontraktereg” 2001 *TSAR* 255; Lewis “The Demise of the Exceptio Doli: Is There Another Route to Contractual Equity?” 1990 *SALJ* 26 at 30; Lubbe “Bona Fides, Billikheid en die Openbare Belang in die Suid-Afrikaanse Kontraktereg” 1990 *Stell LR* 7 at 10; Hawthorne “The Principle of Equality in the Law of Contract” 1995 *THRHR* 157 at 166; Van der Merwe, Lubbe and Van Huyssteen “The *Exceptio Doli Generalis: Requiescat in Pace – Vivat Aequitas*” 1989 *SALJ* 235.

¹⁰⁷ See *Sasfin v Beukes (Pty) Ltd* 1989 1 SA 1 (A); Olivier JA’s dissenting judgment in *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 4 SA 302 (A); and *Botha (now Griessel) and Another v Finanscredit (Pty) Ltd* 1989 3 SA 773 (A) where it was acknowledged that public policy must take into account the necessity of doing simple justice between man and man, and a court may set a contract aside which is contrary to public policy aside.

¹⁰⁸ In *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1997 4 SA 302 (A) at 322 F-H Olivier JA states with reference to the *exceptio doli generalis*: “Hierdie regsmiddel is in die Romeinse reg geskep deur die praetor en was daarop gemik om ‘n eiser af te weer wanneer hy ‘n geding instel wat volgens die streng reg geoorloof is, maar waar die bring van die aksie self as *dolus* beskou is. *Dolus* het hier beteken groot onbillikheid of onregverdigheid, dws strydig met die *bona fides*. So ‘n remedie was nie nodig by die *negotia bonae fidei* nie, want daar kon die *bona fides* vryelik deur die regter se diskresie tereg kom, aangesien van die regter verwag is om in elke sodanige geding die *bona fides* toe te pas. Toe alle kontrakte in die Romeins-Hollandse reg *negotia bonae fidei* geword het, het die noodsaak aan ‘n regsmiddel soos die *exceptio doli generalis* weggeval. Die regter het egter steeds die diskresie behou om *bona fides* te laat geld.”

¹⁰⁹ See *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 320-326.

¹¹⁰ *Ibid* 318-320.

¹¹¹ *Weinerlein v Goch Buildings Ltd* 1925 AD 282 where Wessels JA said: “The commentators put it thus: As a general proposition your claim may be supported by a strict interpretation of the law, but it cannot be supported in this particular case

academics.¹¹² However, the exact content of the principles of bona fide and public policy remain vague.¹¹³ Some writers are of the view that the principles of bona fide and public policy are distinct and separable and that transactions that are contrary to bona fide must be distinguished from those that are contrary to public policy.¹¹⁴ It is submitted, however, that Olivier JA correctly pointed out that these two concepts are interlinked since public policy demands that the principle of bona fide be applied.¹¹⁵ This view is also that of Lubbe who argues as follows: “Afgesien daarvan dat dit moeilik is om die grens tussen hierdie elemente te trek, opereer etiese en beleidsoorwegings nie in isolasie van mekaar nie. Dit wil voorkom asof

against your particular adversary, because to do so would be inequitable and unjust, for it would allow you, under the cloak of the law, to put forward a fraudulent claim... It is therefore clear that under the civil law the Courts refused to allow a person to make an unconscionable claim even though his claim might be supported by a strict reading of the law. This inherent equitable jurisdiction of the Roman Courts (and of our Courts) to refuse to allow a particular plaintiff to enforce an unconscionable claim against a particular defendant where under the special circumstances it would be inequitable, date back to remote antiquity and is embodied in the maxim ‘*summum jus ab aequitate dissidens jus non est*.’” In *Meskin NO v Anglo-American Corporation of SA Ltd & Another* 1968 4 SA 793 (W) at 320 G-H Jansen J put it this way: “It is now accepted that all contracts are bona fide (some are even said to be *uberrimae fidei*). This involves good faith (bona fide) as a criterion in interpreting a contract and in evaluating the conduct of the parties both in respect of performance and its antecedent negotiation.” See also *Magna Alloys and Research (SA) (Pty) Ltd v Ellis* 1984 4 SA 874 (A); *Paddock Motors (Pty) Ltd v Igesund* 1976 3 SA 16 (A); *Mort NO v Henry Shields-Chiat* 2001 1 SA 464; *Sasfin v Beukes op cit*; *Plaaslike Boeredienste (Edms) Bpk v Chemfos Bpk* 1986 1 816 (A); *Ismail v Ismail* 1983 1 1006 (A); *Mutual and Federal Insurance Co Ltd v Oudshoorn Municipality* 1985 1 SA 419 (A); *LTA Construction Bpk v Administrateur Transvaal* 1992 1 SA 473 (A); *Savage and Lovemore Mining (Pty) Ltd v International Shipping Co (Pty) Ltd* 1987 2 SA 149 (W).

¹¹² See Cornelius “Bepaalde Verskyningsvorme van Goeie Trou in die Kontraktereg” 2001 *TSAR* 241; Neels “Die Aanvullende en Beperkende Werking van Redelikheid in die Kontraktereg” 1999 *TSAR* 684 at 693; Glover “Good Faith and Procedural Unfairness in Contract” 1998 *THRHR* 334-335; Lubbe “Bona Fides, Billikheid en die Openbare Belang in die Suid-Afrikaanse Kontraktereg” 1990 *Stell LR* 7 at 9; Grové “Kontraktuele Gebondenheid, die Vereistes van die Goeie Trou, Redelikheid en Billikheid 1998 *THRHR* 687 at 693-694.

¹¹³ Brand JA in *Afrox Healthcare Bpk v Strydom* 2002 4 All SA 125 (SCA) at 136 refers to good faith, reasonableness, fairness and justice as ‘abstrakte idees’.

¹¹⁴ See Kerr “Morals, Law, Public Policy and Restraints of Trade” 1982 *SALJ* 183; Trakman 1977 *SALJ* 327; Corbett 1987 *SALJ* 63; Du Plessis and Davis “Restraint of Trade and Public Policy” 1984 *SALJ* 88. See also *Afrox Healthcare Bpk v Strydom op cit* where Brand JA dealt separately with public policy and *bona fides*.

¹¹⁵ See *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO* 1977 4 SA 302 (A) at 322 and 324.

so ‘n gefragmenteerde benadering nie meer houbaar is nie. Meer aanvaarbaar is ‘n algemene norm van openbare belang wat rekening hou met die *boni mores*, regsbeleid en statutêre verorderinge as relevante oorwegings.”¹¹⁶

The view that the concepts of *bona fide* and public policy should be given more concise and specific content has been put forward.¹¹⁷ According to Olivier JA¹¹⁸ *bona fides* is a product of the community’s perceptions of reasonableness and fairness. He stated: “Die *bona fides*, wat weer gebaseer is op die redelikeheidsopvattinge van die gemeenskap, speel dus ‘n wye en onmiskenbare rol in die kontraktereg.” Admittedly this does not bring one closer to a definitive concept. However, given the fact that public policy cannot remain static¹¹⁹ and must change and develop as the socio-economic milieu and even mores within the community within which it operates develop and change, it is difficult to draw up a *numerus clausus* of criteria that result in fairness, reasonableness, or justice i.e. criteria that are in line with *bona fide* and public policy. This is precisely why recognition of the fact that judges can and do play an activist role is inevitable.

It has been suggested that the role of *bona fide* in setting aside contracts that would otherwise be unfair or unreasonable is growing.¹²⁰ Cornelius¹²¹ comes to this conclusion on the basis of an overview of South African case law where our courts applied the principle of good faith to contracts so as to attain a fair and reasonable result.¹²² Grové reaches the same conclusion and concludes:

¹¹⁶ Lubbe *op cit* 11.

¹¹⁷ Hawthorne *op cit* 171 and Neels *op cit* 690.

¹¹⁸ *Eerste Nasionale Bank van Suidelike Afrika Bpk v Saayman NO op cit* 321.

¹¹⁹ Lubbe *op cit* 11 and *Magna Alloys and Research SA (Pty) Ltd v Ellis* 1984 4 SA 874 (A) at 891 where it was stated that “opvattinge oor wat die openbare belang is of wat die openbare beleid vereis, nie altyd dieselfde is nie en van tyd tot tyd kan verander”.

¹²⁰ Cornelius *op cit* 255 and Grové *op cit* 695.

¹²¹ *Ibid.*

¹²² Amongst the cases discussed are *Katzen v Mguno* 1954 1 SA 277 (7) and *Eerste Nasionale Bank v Saayman NO op cit*. These cases both dealt with a situation that involved an imbalance of bargaining power between the parties and an exploitation of the situation. In both cases the terms of the contract were not applied because to do so would be unfair and contrary to public policy. This is particularly relevant for

“Wat wel duidelik is, is dat die begrip ‘redelikheid’ in die toekoms ‘n baie groter rol in ons kontraktereg gaan speel.”¹²³

The view that the Constitution, in providing for the right to equality, is going to result in an increased role played by the concepts of bona fide, fairness, justice and the like in the law of contract has been adhered to *inter alia* by Hawthorne,¹²⁴ Neels,¹²⁵ and Van der Merwe and Van Huyssteen.¹²⁶ The constitutional right to fair labour practices¹²⁷ is obviously of great relevance to the contract of employment. In *Denel (Pty) Ltd v Vorster*¹²⁸ Nugent JA, after noting that section 39(2) of the Constitution requires the courts, when developing the common law, to promote the spirit, purport and objects of the Bill of Rights, ruled as follows with reference to the constitutional right to fair labour practices: “If the new constitutional

the contract of employment due to the inherent imbalance of power between employer and employee.

¹²³ Grové “Kontraktuele Gebondenheid, die Vereistes van die Goeie Trou, Redelikheid en Billikheid “ 1998 *THRHR* 687 at 696.

¹²⁴ Hawthorne in “The Principle of Equality in the Law of Contract” 1995 *THRHR* 157, after having discussed the concept of equality and the classical theory of contract, demonstrates that the classical theory of contract, which still forms the basis of our law, is incapable of ensuring equality. This is so because “classical theory does not take into account the discrepancies in resources such as ownership, wealth and knowledge, which sustain inequality between the parties to a contract” (166). After demonstrating that “mechanisms to guarantee equality” (175) from part of South African law, the submission is made that the constitutional right to equality will have a significant impact on the law of contract by increasing the role played by the concepts of fairness and bona fide.

¹²⁵ Neels “Regsekerheid en die Korrigerende Werking van Redelikheid en Billikheid” 1999 *TSAR* 684 where he states: “Mede as gevolg van sekere bepalings in die grondwet, is dit waarskynlik dat die invloed van redelikheid en billikheid in Suid-Afrikaanse reg sal toeneem.”

¹²⁶ Van der Merwe and Van Huyssteen “The Force of Agreements: Valid, Void, Voidable, Unenforceable?” (1995) *THRHR* 549 at 550 express themselves as follows: “In a system of law within a constitutional state the process of balancing interests must take place within the framework of the constitution and will regard for the principles and values of the broader society which are reflected in the constitution. In the sphere of contract these principles and values may receive effect mainly in so far as they are subsumed in rules and principles of private law, and particularly contract law, such as the concepts of ‘public policy and public interest’ and ‘reasonableness and good faith’.

¹²⁷ The topic of discussion in ch 8 *infra*.

¹²⁸ *Op cit* 2004 *ILJ* 659 (SCA).

dispensation did have the effect of introducing into the employment relationship a reciprocal duty to act fairly it does not follow that it deprives contractual terms of their effect. Such implied duties would ameliorate the effect of unfair terms in the contract, or even to supplement the contractual terms where necessary, but not to deprive a fair contract of its legal effect.” In *Fedlife Assurance Ltd v Wolfaardt*¹²⁹ the constitutional right to fair labour practices was read into the contract of employment as an implied term.

A somewhat different approach is taken by Brand JA in the *Afrox Healthcare* case.¹³⁰ With reference to section 39(2) of the Constitution¹³¹ which requires that in developing the common law, the courts must promote the spirit of the Constitution, the court cited Cameron AR in *Brisley v Drotsky*¹³² with apparent approval: “Public policy...nullifies agreements offensive in themselves – a doctrine of considerable antiquity. In its modern guise ‘public policy’ is now rooted in our constitution and the fundamental values it enshrines” and “The Constitutional values of dignity and equality and freedom require that the courts approach their task of striking down contracts or declining to enforce them with perspective restraint...contractual autonomy is part of freedom. Shorn of its obscene excesses, contractual autonomy informs also the constitutional value of dignity”.¹³³ Brand JA then went on to hold that *in casu* the term of the contract was not contrary to public policy by attaching more weight to the principle of freedom of contract than the principle of equity.

5 Conclusion

The law of contract as taught in most South African textbooks does not reflect the reality of how the law of contract has been interpreted by our courts.¹³⁴ Hawthorne ascribes this fact to “socio-economic developments, for example the concentration

¹²⁹ [2001] 12 BLLR 1301 (A).

¹³⁰ 2002 4 All SA 125 (SCA).

¹³¹ Act 108 of 1996.

¹³² Unreported, case number 432/2000.

¹³³ 133(b).

¹³⁴ See Hawthorne “The Principle of Equality in the Law of Contract” 1995 *THRHR* 164 at 166.

of power in business and industry, the increasing awareness of fundamental human rights and the expansion of the functions of state”.¹³⁵

Reasonableness and fairness can be said to have grown to the stature of legal rules. This is because they are the “basic materials used in judicial decisions”.¹³⁶ As has been demonstrated above legal rules have their origins in principles and standards and the point has been made that the distinction between rules and standards is sometimes blurred.¹³⁷ Further emancipation of society in the light of our progressive constitution will contribute to increasing the potential part to be played by fairness and justice in our law of contract. Hopefully judges in the future will use their discretion imaginatively to create a body of precedent that will ensure fairness where there is an inherent imbalance of power between the parties such as in a contract of employment.

C England

1 Introduction

From 1981-2001, the coverage of collectively bargained agreements in England declined from 83% of the workforce to 35% of the workforce.¹³⁸ This has resulted in an increase in the use of individual employment contracts for setting terms and conditions. The renewed importance of the common law for the protection of employees has been acknowledged by the judiciary. In the case of *Johnson v Unisys Ltd*¹³⁹ Lord Steyn made the remark that as a result of the decreasing coverage of collective bargaining: “...individual legal rights have now become the main source of protection of employees.” The inherent imbalance of power in the employment relationship has resulted in a situation where management often imposes its own terms and conditions on the employee in a standardised contract

¹³⁵ *Ibid.*

¹³⁶ Du Plessis and Davis “Restraint of Trade and Public Policy” 1984 *SALJ* 86 at 90.

¹³⁷ See Van der Merwe and Van Huyssteen *op cit* 567.

¹³⁸ Hepple and Morris “The Employment Act 2002 and the Crisis of Individual Employment Rights” 2002 *ILJ* (UK) 245 247.

¹³⁹ (2001) 2 All ER 801 at 811.

on a take it or leave it basis.¹⁴⁰ Consequently, the need to strengthen, ameliorate and enforce individual rights has come to the fore. Recent court decisions (which are discussed hereunder) have developed the common law by the use of implied terms, most notably the duty to maintain trust and confidence, in order to address the *lacuna* created by the de-collectivisation of employment relations.

Extensive statutory regulation in the 1970's led many labour lawyers to believe that the contract of employment had a minimal role to play in the regulation of the employment relationship. Many share the view that the contract of employment is not the appropriate vehicle for the pursuance of justice due to the imbalance of power inherent in the employment relationship.¹⁴¹ However, as is the case in South African law, one cannot escape from the fact that the individual contract of employment forms the basis of the employment relationship. The combined effect of deregulation and the general decline of trade unions have re-established the importance of the individual contract of employment in regulating employment relations.

2 Public Policy

Usually the starting point of any discourse concerning English labour law is the written works of Kahn-Freund.¹⁴² Kahn-Freund's view was that the contract of employment is a fiction of real agreement since the imbalance of power inherent in the relationship renders any meaningful negotiation between the employer and an

¹⁴⁰ Deakin "Organisational Change, Labour Flexibility and the Contract of Employment in Great Britain" in Deery and Mitchell *Employment Relations: Individualisation and Union Exclusion – An International Study* (1999) 130-131.

¹⁴¹ Freedland "The Role of the Contract of Employment in Modern Labour Law" in Betten *The Employment Contract in Transforming Labour Relations* (1995) 17 where he states: "Labour lawyers tended to conclude that the statute law had almost comprehensively superseded the common law as the regulatory structure for the individual employment relationship, largely reducing the law of the contract of employment to the status of an interpretative jurisprudence for the relevant statute law. From that perspective the main role of the law of contract of employment had become that of telling you to which workers the statutory regulations applied and what meaning to attach to concepts such as dismissal."

¹⁴² Freedland *op cit* 17.

individual employee impossible. The obvious result is that the employer is almost at liberty to impose any conditions of employment on the employee.¹⁴³

The English law of contract is characterized by the underlying principle that contracts should be fair. This truism is aptly expressed in the following *dictum* of Bingham LJ: “In many civil law systems, and perhaps in most legal systems outside the common law world, the law of obligations recognizes and enforces an overriding principle that in making and carrying out contracts parties should act in good faith. This does not mean that they should not deceive each other, a principle which any legal system must recognize; its effect is perhaps most aptly conveyed by such metaphorical colloquialisms as ‘playing fair’, ‘coming clean’ or ‘putting one’s cards face upwards on the table’. It is in essence a principle of fair open dealing. English law has, characteristically, committed itself to no such overriding principle but has developed piecemeal solutions in response to demonstrated problems of unfairness.”¹⁴⁴

One of the consequences of the principle of ‘fair play’ is the doctrine of inequality of bargaining power. This doctrine is especially relevant in the context of a contract of employment given the inherent imbalance of power between employer and employee. Lord Denning proposes this doctrine as follows: “Gathering all together, I would suggest that through all these instances there runs a single thread. They rest on ‘inequality of bargaining power’. By virtue of it, the English law gives relief to one who, without independent advice, enters into a contract on terms which are very unfair or transfers property for consideration which is grossly inadequate, when his bargaining power is grievously impaired by reason of his own needs or desires, or by his own ignorance or infirmity, coupled with undue influences or pressures brought to bear on him by or for the benefit of the other.”¹⁴⁵

¹⁴³ Wedderburn *The Worker and the Law* 3rd ed (1986) 326-343.

¹⁴⁴ *Interfoto Picture Library Ltd v Stiletto Visual Programmes Ltd* (1989) 1 QB 433 at 439.

¹⁴⁵ *Lloyds Bank Ltd v Bundy* (1975) QB 326 (CA) 339, (1974) 3 All ER 757 765d-f.

The doctrine allows the contractant to rescind from the contract in circumstances where the contract's terms were unfair because of the contractant's bargaining power being impaired by personal circumstances such as poverty and ignorance.

Despite these principles and doctrines, there is still uncertainty as to whether the contract of employment is a contract of good faith.¹⁴⁶ This is discussed under the next section.

3 An Implied Term of Mutual Trust and Confidence

3.1 Introduction

*Malik v Bank of Credit and Commerce International*¹⁴⁷ is the *locus classicus*¹⁴⁸ for authority that in all employment contracts there exists an implied term of trust and confidence.¹⁴⁹ Lord Steyn described the implied term, in this decision, as follows:

“The employer would not, without reasonable and proper cause, conduct itself in a manner likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.”¹⁵⁰ In this case, the plaintiff employees were dismissed on redundancy grounds. They claimed that the bank had breached the implied term of trust and confidence by running its business in a corrupt manner. Consequently, they argued, their long association with the bank had seriously decreased their job prospects due to the stigma, which now attached to the bank and its ex-employees.

¹⁴⁶ Brodie “Beyond Exchange: The New Contract of Employment” 1998 *ILJ* (UK) 76 at 86-87.

¹⁴⁷ 1997 IRLR 462.7

¹⁴⁸ The notion of this implied term however did not make its first appearance in the *Malik* case. See Lindsay “The Implied Term of Trust and Confidence” 2001 *ILJ* (UK) 2-3 and Brodie *op cit* 81-84 for a discussion of previous cases where this implied term of trust and confidence was considered.

¹⁴⁹ In *Imperial Group Pension Trust v Imperial Tobacco Ltd* 1991 IRLR 66 70, Browne-Wilkinson J said: “In every contract of employment there is an implied term that the employers will not without reasonable and proper cause conduct themselves in a manner calculated or likely to destroy or seriously damage the relationship of confidence and trust between employer and employee.”

¹⁵⁰ Par 8.

The argument that, since the dishonest conduct was aimed at the bank's clients and not the employees, it did not constitute a breach of the implied term of trust and confidence was rejected. It was held that this dishonest conduct was nevertheless likely to undermine the trust and confidence required in an employment relationship.

In *Bank of Credit and Commerce International SA (in liq.) v Ali*¹⁵¹ on the basis of *Malik*, a 'stigma' claim was brought against an employer for conduct that took place before the *Malik* decision even though stigma claims were not known to exist until that decision in 1997. The employees had received an additional redundancy payment 'in full and final settlement of all or any claims' which they might have against the bank. The employees argued that at the time they signed the release they had no idea of the corrupt manner in which the bank had conducted its business and that they could therefore not be held bound by the release. On the basis of *Malik*, the employees argued that the bank had breached the implied term of trust and confidence by not disclosing its fraudulent conduct to them. Lightman J referred to the case of *Bell v Lever Brothers Ltd*¹⁵² where there was found to be no duty of disclosure in an employment contract since the contract of employment is not a contract *uberrimae fidei*, and concluded that the bank had not breached its obligation of trust and confidence by not disclosing its fraudulent conduct to the employees.

In the second case involving the same parties, *Bank of Credit and Commerce International SA (in liq) v Ali (No 2)*¹⁵³ Lightman J considered the decision of the House of Lords in *Malik* and concluded that the bank's fraudulent conduct was sufficiently serious to constitute a breach of the trust and confidence term. In other words, even though failure to disclose the fraudulent conduct did not constitute a breach of the implied term of trust and confidence, the conduct itself did constitute

¹⁵¹ (1999) 2 All ER 1005.

¹⁵² (1932) AC 1 (1931) All ER Rep 1.

¹⁵³ (1999) 4 All ER 83.

such a breach. However, he held that the claim should fail because the wording of the release was sufficiently broad to include this claim.

The Court of Appeal¹⁵⁴ reversed Lightman J's decision. Even though a majority of the Court of Appeal was in agreement with Lightman J that the language of the release was sufficiently comprehensive to embrace the claim, they found it to be unconscionable to allow the bank to rely on the release in order to bar the claim.

In *Bank of Credit and Commerce (in liq) v Ali and Others*,¹⁵⁵ the bank's liquidators appealed to the House of Lords. The appeal was dismissed (Lord Hoffman dissenting), on the basis that the release could not be construed as including claims which at the time of entering into the contract, the parties could not possibly have contemplated. What is of relevance is that it seems to have been accepted by the courts that fraudulent or dishonest means of conducting business can be construed as a breach of the implied term of trust and confidence rendering the employer vulnerable to a claim for damages because of such breach.

The content and scope of this implied obligation of mutual trust and confidence has been examined in a number of cases.¹⁵⁶ Of great significance is the case of

¹⁵⁴ (2000) 3 All ER 51, (2000) ICR 1068.

¹⁵⁵ (2001) 1 All ER 961 (HL).

¹⁵⁶ In *University of Nottingham v Eyett* (1999) 2 All ER 437 it was held that the university did not breach the implied term of trust and confidence by a failure to inform the employee that he would have received a higher pension if he had worked for an extra month. In *Johnson v Unisys Ltd* (2001) 2 All ER 801 the employee claimed that the manner in which he was dismissed caused him to suffer a nervous breakdown thus impairing his ability to find work. He relied on the implied term of trust and confidence contending that the employer had breached that term by not giving him a fair hearing and by breaching its disciplinary procedure. The House of Lords dismissed the claim on the basis that since statute provided a remedy for unfair dismissal and he had already been compensated in terms thereof, a common law right to recover financial loss resulting from the manner of dismissal would be inconsistent with the statutory regime of unfair dismissal. This decision has been criticized for preventing the common law from developing so as to "reflect modern perceptions of how employees should be treated fairly and with dignity." (Collins 2001 *ILJ* 305). In other words it appears that employees might be better protected in circumstances where there is no applicable legislation (see Hepple and Morris "The Employment Act 2002 and the Crisis of Individual Employment Rights" 2002 *ILJ* (UK) 245 at 247).

Lewis Motorworld Garages.¹⁵⁷ In this case the employer had unilaterally changed the terms and conditions of employment. The employee had tacitly accepted the change. The employer was prevented from relying on the employee's tacit acceptance on the basis that its conduct amounted to a breach of the implied term of trust and confidence.

The case of *O'Brien v Transco plc (formerly BG PLC)*¹⁵⁸ is applicable *in casu*. In this instance, O'Brien, who was initially employed by BG through an agency in 1995, was not offered the same enhanced redundancy terms as the other 'permanent employees' on the basis that BG did not consider him to be a 'permanent employee'. O'Brien brought a claim against BG on the basis of a breach of the implied term of trust and confidence. The employment tribunal found, as a preliminary issue, that O'Brien did qualify as a permanent employee and that by not offering him the same redundancy terms as the other employees BG had breached its duty of trust and confidence. This finding was upheld by both the Employment Appeal Tribunal (EAT)¹⁵⁹ and the Court of Appeal. The Court of Appeal held that if the effect of the conduct, or its likely effect were to destroy or seriously damage trust and confidence, then there would be a *prima facie* breach of the implied term of trust and confidence. Once a *prima facie breach* is identified, the second stage of the enquiry is the determination of whether the employer acted without 'reasonable or proper cause'. The fact that BG held the belief that O'Brien was not a permanent employee was held not to justify the breach.

The consequence of this two-stage enquiry is that: "whether or not the employer had reasonable or proper cause to act as it did will inevitably impact on the effect the conduct had on trust and confidence. Similarly, the question of whether the employer had reasonable and proper cause for certain conduct must be considered in the light of the impact that that conduct had on the employee."¹⁶⁰

¹⁵⁷ (1985) IRLR 445.

¹⁵⁸ (2002) All ER (D).

¹⁵⁹ (2001) All ER (D) 169.

¹⁶⁰ Fisher and Biddle "Is there an Obligation of Fair Dealing to Employees?" May 2002 *All England Legal Opinion* 18 9.

This implied term of trust and confidence is a fundamental term. Consequently, any breach thereof will constitute a material breach of contract.¹⁶¹ The purpose of the implied obligation is to “ensure fair dealing between employer and employee, and that is as important in respect of disciplinary proceedings, suspension of an employee and dismissal as at any other stage of the employment relationship.”¹⁶² Such obligation therefore, is not limited to unacceptable conduct during the course of the relationship.

3.2 Contracting Out of Implied Terms

The traditional or “orthodox view is that this implied obligation may be displaced or qualified by express agreement or necessary implication.”¹⁶³ However, a different view has been convincingly argued by Brodie.¹⁶⁴ It was contended in *Johnstone v Bloomsbury HA*¹⁶⁵ that there is a difference between terms implied in fact and terms implied in law. Where the term is implied in fact it can be contracted out of by an express term. Where, however, the term is implied in law, it cannot be overridden by an express term. This distinction, however, has been rejected as having “no basis in authority”.¹⁶⁶ Perhaps the distinction that was alluded to in the *Johnstone* case was that described in *Scally v Southern Health and Social Services Board*.¹⁶⁷ In this case Lord Bridge identified two types of implied terms: the first type must satisfy the conventional requirements for implied terms, namely, that the term must be reasonable and equitable, it must be necessary from a business efficacy point of view, it must be obvious and it must be capable of clear expression.¹⁶⁸ The second kind of implied term is “based on wider considerations,

¹⁶¹ Fisher and Biddle *op cit* 8; see also *Courtlands Northern Textiles v Andrew* (1979) IRLR 84.

¹⁶² *Johnson v Unisys Ltd* (2001) All ER (HL) 801 813 per Lord Steyn

¹⁶³ Per Lord Steyn in *Johnson v Unisys Ltd op cit* 809.

¹⁶⁴ See Brodie “Beyond Exchange: The New Contract of Employment” 1989 *ILJ* (UK) 76.

¹⁶⁵ (1991) ICR 269 276-277

¹⁶⁶ Brodie *op cit* 83.

¹⁶⁷ 1999 IRLR (HL) 522, 525.

¹⁶⁸ Lindsay “The Implied Term of Trust and Confidence” 2001 *ILJ* (UK) 2.

for a term which the law will imply as a necessary incident of a definable category of contractual relationship.”¹⁶⁹ Lord Steyn referred to this kind of implied term in the *Malik* case where he stated that this kind of implied term arises as an “incident of all contracts between employer and employee.”¹⁷⁰ Oddly, in an *obiter dictum*, Lord Steyn, in the same case, stated, “...implied terms operate as default rules. The parties are free to exclude or modify them.”¹⁷¹ However, as Lindsay points out:¹⁷² If a term is an incident of all contracts, how is it possible to contract out of such term?

If the contract of employment is classified as a *bona fide* contract it would not be possible to contract out of the implied term of trust and confidence, since such term would go to the very root of the contract. As seen above, the judiciary has perceived the implied term as material term going to the very root of the contract,¹⁷³ as an incident of every contract of employment,¹⁷⁴ and has even described this term as the “implied obligation of good faith”.¹⁷⁵ Lord Steyn, in *Johnson v Unisys Ltd*, said: “It could also be described as an employer’s obligation of fair dealing”.¹⁷⁶ Also, the fact that the employer was precluded from relying on general principles of contract law because it had breached the implied term of trust and confidence in *Lewis v Motorworld Garages*¹⁷⁷ is most significant in the introduction of an element of good faith in the contract of employment. So too is the decision of *Scally v Southern Health and Social Services Board*,¹⁷⁸ where without making mention of an implied obligation of trust and confidence it was held that the employer owed the employee a duty of disclosure with reference to concerning employees rights to purchase added years of pensionable service.

¹⁶⁹ *Scally v Southern Health and Social Services Board* 1999 IRLR (HL) 522 at 525.

¹⁷⁰ Lindsay *op cit* 10.

¹⁷¹ *Malik op cit* 15.

¹⁷² Lindsay *op cit* 10.

¹⁷³ *Courtlands Northern Textiles v Andrew op cit* 86.

¹⁷⁴ *Malik op cit* 15.

¹⁷⁵ *Imperial Group Pension Trust Ltd v Imperial Tobacco Ltd* (1991) 1 WLR 589.

¹⁷⁶ *Op cit* 813.

¹⁷⁷ *Op cit*.

¹⁷⁸ *Op cit*.

Another way of preventing the contracting out of the implied term of trust and confidence would be to argue as Brodie¹⁷⁹ does that such prevention is based on public policy considerations. He believes that in situations where there exists an inequality of bargaining power “it is appropriate that implied terms, of fact or law, operate as default rules.”¹⁸⁰ The judiciary has been a most willing partner in pointing out the renewed relevance of insisting on the implied term of trust and confidence in order to protect the employee. For example Lord Steyn in *Johnson v Unisys Ltd*, stated: “...the need for implied terms in contracts of employment protecting employees from harsh and unacceptable employment practices. This is particularly important in the light of the greater pressure on employees due to the progressive deregulation of the labour market, the privatisation of public services, and the globalisation of product and financial markets.”¹⁸¹

4 Atypical Employees

The question whether the implied term of trust and confidence should also apply to contracts entered into by atypical employees is not certain. The rising number of atypical employees have led academics¹⁸² as well as the judiciary¹⁸³ to conclude,

¹⁷⁹ Brodie *op cit* 83-85.

¹⁸⁰ *Ibid* 85.

¹⁸¹ 2001 (2) All ER 801 at 809.

¹⁸² Lindsay *op cit* 11 where he states: “There are plenty of agencies willing to supply companies with workers...There are plenty of workers who find that form of self-employment the best or the only course open to them. There are plenty of companies who find it cheaper and easier to pay the Agency (which of course, adds its own costs and profits to the costs it incurs in paying the worker) rather than bearing the pension NIC, holiday pay, sickness and other expenses that it incurs in relation to its employees. The employer also hopes to gain the convenience of the ability to procure the equivalent of an instant dismissal and the avoidance of redundancy money. The growth in this form of employment has been remarkable. There is an irony that almost any new enhancements of employees’ terms of employment, which almost invariably add to the cost of employing someone, risk driving more people into this particular form of self-employment. A perpetuated exclusion of all the self-employed from the benefits of the implied term would leave a huge number unprotected and could even, of itself drive more into this form of self-employment.” See also Freedland “The Role of the Contract of Employment in Modern Labour Law” in Betten *The Employment Contract in Transforming Labour Relations* (1995) 21 where it is suggested that “the law of the contract of employment ought to cover the territory of work relationships more broadly.”

on public policy grounds that the term of trust and confidence should also be implied in contracts involving atypical employees.

5 Conclusion

Despite the decision of the House of Lords in *Bell v Lever Brothers*¹⁸⁴ where it was held that the employee was under no obligation to disclose his own misconduct to the employer since the contract of employment was not a contract of *uberrimae fides*, as seen above, there are many judicial references to the concept of good faith with reference to the contract of employment. It should be borne in mind that this case was decided in 1932 and it is common knowledge that employment relations have changed dramatically since then.¹⁸⁵ Brodie¹⁸⁶ describes the reasoning in this case as ‘outmoded’ as does Freedland.¹⁸⁷ As Brodie¹⁸⁸ points out, “Bell has already been distinguished in *Sybron Corp v Rochem*¹⁸⁹ where it was held that in certain circumstances, an employee may be under a duty to report the misconduct of fellow employees. Crucially, where such a duty arises the employee is still obliged to report even where he will incriminate himself. It has been said that *Sybron* confirms ‘...the existence of a developing judicial creativeness so far as the fiduciary obligations of employees are concerned, especially where they are senior employees in high trust roles.’”

¹⁸³ In *Spring v Guardian Assurance plc* (1994) ICR 596 (House of Lords), even though the judges were uncertain and even at variance with each other as to whether a contract of employment existed between the parties, they held that the company was bound by the standard of obligation present in contracts of employment. See also *O’Brien v Transco plc (formerly BG plc)* (2002) All ER (D) 80.

¹⁸⁴ (1932) AC 1.

¹⁸⁵ Lord Hoffmann, in *Johnson v Unisys Ltd op cit* 815-816, describes such change as follows” “but over the last 30 years or so, the nature of the contract of employment has been transformed. It has been recognised that a person’s employment is usually one of the most important things in his or her life. It gives not only a livelihood but also an occupation, an identity and a sense of self-esteem. The law has changed to recognise this social reality.”

¹⁸⁶ *Op cit* 88.

¹⁸⁷ Freedland “High Trust, Pensions, and the Contract of Employment” 1984 *ILJ* (UK) 25, 31.

¹⁸⁸ Brodie *op cit* 89.

¹⁸⁹ (1983) ICR 801.

The creativity judges are entitled, perhaps even obliged to display in order to achieve equity has often been referred to by the judiciary. For example, Lord Nicholls in *Bank of Credit and Commerce International SA (in liq) v Ali*¹⁹⁰ cited Wigmore's observation that the law of interpretation had progressed "from a stiff and superstitious formalism to a flexible rationalism"¹⁹¹ and concluded that: "today there is no question of a document having a legal interpretation as distinct from an equitable interpretation." In applying the common law to the prevailing socio-economic milieu, it appears that judges have introduced "a significant element of good faith into the regulation of the employment relationship."¹⁹²

D Australia

1 Introduction

General principles of the law of contract have been relatively insignificant in shaping employment relations in Australia since the beginning of the 20th century.¹⁹³ This is because "as the 20th century progressed, the common law principles, and indeed the contract of employment itself, were increasingly marginalised in practical terms by the emergence of State and Federal systems of compulsory conciliation and arbitration."¹⁹⁴ In the 1980's as a result of the growing globalisation and internationalisation of product and service markets, as well as the recession experienced by most major economies, the collective industrial relations system of compulsory conciliation and arbitration was seen by many as

¹⁹⁰ *Op cit* 971.

¹⁹¹ Chadbourn (ed) *Wigmore on Evidence* (1981) vol 9 (Chadbourn revision) par 2461.

¹⁹² Brodie *op cit* 79.

¹⁹³ Chin "Exhuming the Individual Employment Contract: A Case of Labour Law Exceptionalism" 1997 *Australian Journal of Labour Law* 257 at 258 where the author states: "From the beginning of this century the common law contract of employment has lain submerged between accretive layers of Commonwealth and state compulsory arbitration machinery. Arbitration, and the consequent subordination of the common law governing the individual employment relationship, was a fundamental tenet of the national consensus that attended Federation in 1901 and which endured until recent years. This consensus, dubbed by one commentator the 'Australian Settlement', revolved around the twin pillars of industry protection and centralised wage fixation."

¹⁹⁴ Creighton and Mitchell "The Contract of Employment in Australian Labour Law" in Betten *The Employment Contract in Transforming Labour Relations* (1995) 133. See 133-136 for a discussion of the history and reasons for the evolution of such system.

an impediment to economic growth and recovery. Consequently,¹⁹⁵ the legislature saw fit to “decentralise workplace bargaining and to de-collectivise industrial relations by diminishing the role of trade unions and promoting individual contracts.”¹⁹⁶

Nevertheless, as in English law, the contract of employment has always formed the basis or foundation of any employment relationship. As such, Australian commentators have described the contract of employment as the ‘cornerstone’ of Australian labour law.¹⁹⁷ In the light of the individualization of employment relations in Australia¹⁹⁸ and the fact that the contract of employment forms the basis of the relationship it is not surprising that the contract of employment should gain more relevance in setting terms and conditions in the employment relationship.

2 Good Faith as an Underlying Philosophy in the Law of Contract

There is much scepticism concerning the ability of the law of contract to redress the inherent imbalance of power between employer and employee.¹⁹⁹ Generally, the common law is not concerned with the fairness of the substantive content of a contract.²⁰⁰ The traditional emphasis on the freedom of contract usually leads to the conclusion that the parties can agree to anything as long as they do not agree to something that is unlawful or contrary to public policy.

However, it may under certain circumstances be possible to escape the provisions of an unfair bargain, for example, where there was some form of procedural unfairness when the contract was entered into in that consent was improperly obtained because of undue influence or duress. One of the obstacles identified is the courts’ insistence on something more than inequality of bargaining power in

¹⁹⁵ See section on Australia in ch 6 *supra*.

¹⁹⁶ Chin *op cit* 260.

¹⁹⁷ Creighton and Mitchell *op cit* 136-137.

¹⁹⁸ For a brief discussion of the legislative changes see Chin *op cit* 260-265.

¹⁹⁹ Chin *op cit* 272-279, Stewart “The Legal Framework for Individual Employment Agreements in Australia” in Deery and Mitchell *Employment Relations- Individualisation and Union Exclusion* (1999) 24-25 and Creighton and Mitchell *op cit* 141-147.

²⁰⁰ Creighton and Mitchell *op cit* 143.

order to grant relief to a victim of an unfair bargain. Usually the courts have required, in addition to unequal bargaining power, some form of ‘unconscionable conduct’ on the part of the dominant party.²⁰¹ Another stumbling block is the fact that the courts have required that the ‘illegitimate pressure’ placed on the party must have rendered the party incapable of exercising free will in order for a contract to be vitiated on the basis of undue influence or duress.²⁰² Chin therefore concludes that “...the problem lies in the extent of pressure which the law is prepared to countenance. On closer inspection it appears the law has a high tolerance indeed.”²⁰³

However, in the light of the fact that much of the protection enjoyed by employees in terms of the compulsory arbitration system has been removed, it is hoped that the judiciary will be innovative and mould the common law in order to adapt it to the changed, prevailing socio-economic circumstances. Social policy has always played a crucial role in judicial decision-making.²⁰⁴ Cause for optimism is to be found in the malleability of the common law. In the words of Owens: “Much can be achieved legislatively but legislation is constituted by words, denoting categories and demarcating boundaries. There is a limit to legislation, but there is no limit to law. The structure of the common law recognizes no boundaries. Thus, the great advantage of the common law is its ability to respond precisely to changing contexts in its delivery of individual justice. The greatest failure of labour law is to have lost sight of this. In fact, in recent times the common law has been treated as if it were legislation so that it has become unnecessarily rigid, seemingly unable to adapt to changing contexts. With few exceptions the common law of work relationships has been confined behind artificial borders.”²⁰⁵ The most exciting common law transformation in response to the changing world of work, as in

²⁰¹ See Chin *op cit* 273, Stewart *op cit* 24 and *Commercial Bank of Australia v Amadio* (1983) 151 CLR 459, *Webb v Australian Agricultural Machinery Pty Ltd* (1990) 6 WAR 305 312-13.

²⁰² Stewart *op cit* 24.

²⁰³ *Ibid* 273.

²⁰⁴ See Kollmorgen and Riekert “Social Policy and Judicial Decision Making in Australian employment Law” in Mitchell *Redefining Labour Law* (1995) 167-198.

²⁰⁵ “The Traditional Labour Law Framework: A Critical Evaluation” in Mitchell *Redefining Labour Law* (1995) 17.

England, has been the recognition that there is an implied obligation not to damage or destroy the trust and confidence between the parties and thereby undermine the employment relationship.²⁰⁶

3 Conclusion

Despite the high costs of litigation²⁰⁷, the potential of this implied term to redress the imbalance of power between the parties should not be overlooked.²⁰⁸ The fact that the courts have adhered to a formalistic approach in the past does not necessarily rule out the possibility of the judiciary adopting an approach that is more appropriate to the changing world of work and the current socio-economic circumstances. There are no reasons why the scope of this implied obligation should not be extended to cater for different circumstances, and be extended in order to offer protection for atypical employees as well.

E United States of America

1 Introduction

There are various sources giving rise to obligations between employers and their employees. Arnow–Richman stated as follows in this regard: “Modern employment is a multi-faceted relationship comprised of far more than the exchange of money for labour. Employers typically make other commitments to workers besides the promise of pay. They offer opportunities for extra- wage compensation and benefits, such as pensions, bonuses, and health insurance, which are administered through written policies that create expectations, if not legal entitlements, among participating workers. They also make informal promises through their managers and other agents who may provide assurances of long-term work, opportunities for training and development, and future promotions and advancements. Similarly employees know that they must do more than simply

²⁰⁶ *Burazin v Blacktown City Guardian Pty Ltd* (1996) 142 ALR at 144; *Perkins v Grace Worldwide (Aus) Pty Ltd* (1997) 72 IR 186 at 191.

²⁰⁷ See Chin *op cit* 272-278.

²⁰⁸ See Christie “The Contract of Employment and Workplace Agreements: A Commentary” in Ronfeldt and McCallum (eds), 1993 ACIRRT Monograph No 9 1993 where the prospect of the courts developing a general duty of good faith in the employment relationship is discussed.

show up to work to receive the benefits of employment. Many employers issue personnel handbooks that promulgate disciplinary rules, company procedures, and policies on everything from tardiness to conflicts of interest.²⁰⁹Employees anticipate that their work obligations will develop and change over time, and they know they must oblige instructions and assignments that may exceed the bounds of any static job description. In return they expect employers to abide by the letter and spirit of their official and unofficial promises, exercising managerial discretion equitably and making exceptions to the company policy where appropriate.”²¹⁰

Given the multiple sources of these obligations, the courts are faced with a formidable task when a dispute arises as to the exact content of these obligations. In answering these questions the American courts have historically turned to the rules of the law of private contracts.²¹¹ In doing so the courts have faced the following policy choice: “Whether the court is only an agent of the contract called upon consequently to apply the intent of the parties even though the terms may have been stated unilaterally and irrespective of what they provide; or whether the court, as a public body, is bound by larger societal values to construe, to limit, or even to nullify contract terms in order to lessen overreaching or an abuse of power, even where expressly reserved...though the tension between positivism and the public function is inevitable and abiding, there is no dispute that the latter is permissibly performed in appropriate cases; the tension lies in deciding what those circumstances are.”²¹²

What follows is an overview of the way the courts have managed to come to the assistance of employees in cases where the courts deemed it necessary to do so.

²⁰⁹ Discussed *infra*, under the heading “Employer Rules and Policies”.
²¹⁰ “The Role of Contract in Modern Employment Relationships” 2003 *Texas Wesleyan Law Review* 1.
²¹¹ *Ibid* 2.
²¹² Finkin “Regulation of the Individual Employment Contract in the United States” in Betten *The Employment Contract in Transforming Labour Relations* (1995) 167.

2 The Rules of the Private Contract Law

2.1 Introduction

Finkin has identified and examined “six areas that supply a kind of legal framework of the common law of contract; (1) offer and acceptance; (2) requirement of a writing; (3) consideration; (4) definiteness of terms; (5) ‘illusory’ promises; and, (6) unilateral modification.”²¹³ The way the courts have interpreted these rules provides insight as to how the courts have made use of the common law of contract in order to protect the interests of the employee against employer abuse of power. They are discussed in turn below.

2.2 Offer and Acceptance

A requirement for the creation and validity of a private contract is the existence of mutual assent.²¹⁴ The courts, in determining the existence of consensus, or the existence of an offer and an acceptance (mutual assent), have adopted a rather flexible approach. As Finkin states: “There is no doubt, however, that a manager’s statements made with actual or even only ‘apparent authority’ on the part of the employer and conveying a commitment of sufficient definiteness – most often a concomitant on compensation or, less often, to job security – can supply a term of the employment which, if accepted by the applicant or employee, rises to a contractual commitment.”²¹⁵ In most jurisdictions the terms of a written contract may be altered orally. Consequently, where companies have attempted to exclude contractual liability for such statements by requiring all agreements to be in writing and signed by a designated company officer, it is likely that this limitation will be of no force and effect.²¹⁶

Contracts can be created orally or tacitly. An employer’s well established practice with reference to severance pay, leave pay and bonuses has been taken to be

²¹³ *Ibid* 172-177.

²¹⁴ Arnow-Richman *op cit* 2.

²¹⁵ Finkin *op cit* 172-173.

²¹⁶ *Idem*.

sufficient to establish a mutual assent and consequently a contractually binding term.²¹⁷

2.3 *Contract Must be in Writing*

Most states have legislation to the effect that in order for a contract that is to last for longer than a year to be enforceable it must be in writing.²¹⁸ As far as the applicability of this rule to contracts of employment is concerned the courts have applied a very open ended interpretation: “The generally prevailing view, not without dissent or doctrinal criticism, is that the contract of ‘permanent’ employment subject to termination for cause or other good reason- is capable of being performed within a year; and so an oral commitment of that nature would be enforceable years after it arguably had been made.”²¹⁹

2.4 *Consideration*

In order to render the agreement enforceable there must be an exchange of promises or the doing of an act.²²⁰ At its simplest, this means that in exchange for remuneration in the form of a salary an employer will offer his/her services to the employer. The problem arises when the contracts in question concern so-called ‘permanent’ employment. In such cases the courts have taken the view that something in addition to the offering of services by the employee is necessary to fulfil the requirement of consideration.²²¹ The reasoning behind this was that “the commitment was thought accordingly, to be so ‘highly improbable’, especially where oral and uncorroborated, that the courts were reluctant to enforce it absent some additional circumstance to indicate that such a commitment had indeed been made.”²²² However, where the employee has been able to demonstrate detrimental reliance on the employer’s act or representation, some courts have

217 *Idem.*

218 *Idem.*

219 Finkin *op cit* 174.

220 *Idem.*

221 Finkin *op cit* 175.

222 *Idem.*

come to the rescue of the employee by making use of a doctrine of “promissory estoppel” in order to render the representation enforceable.²²³

2.5 *Definiteness of Terms*

In order to render an obligation enforceable its terms must be sufficiently certain. For example, the courts have refused to enforce general undertakings such as “generalized assurances of good or fair treatment or confident expectations of long duration”.²²⁴ However, where a certain amount of certainty or definiteness is ascertainable by looking beyond the terms of the contract, and the courts were of the opinion that fairness demanded that such term be enforced, the courts have read certainty into the term. An example of such a situation is where “reasonable” compensation has been held to be sufficiently definite or certain by having reference to the surrounding circumstances such as the going rate for that particular job in the industry, the type of work to be performed, and the employer’s custom, usage or practice.²²⁵

2.6 *Illusory Promises*

This occurs when the employer reserves for itself the right to decide the extent or application of a particular obligation.²²⁶ Although some courts have held such obligations to be unenforceable, other courts have held that “an employer cannot reserve to itself the power to declare its underlying obligation an illusion”. Therefore for example, an employer cannot reserve for itself the right to terminate a fixed term contract before the expiry date for no good reason,²²⁷ or promise benefits without an obligation to pay.²²⁸

²²³ *Grouse v Group Health Plan* (1981) 306 N.W. 2d 114 (Minn.)

²²⁴ *Finkin op cit* 176.

²²⁵ *Idem.*

²²⁶ *Idem.*

²²⁷ *Rothenberg v Lincoln Farm Camp, Inc* (1985) 755 F. 2d 1017 (2d Cir.)

²²⁸ *Mabley and Carew Co. v Borden* (1935) N.E 697.

2.7 *Unilateral Modification*

Since employment contracts are held at will, either party can terminate the contract at any point in time for whatever reason, even no good reason at all.²²⁹ Given this fact, many consider the contract of employment to be a unilateral agreement.²³⁰ Since contracts of employment are terminable at will, obligations endure so long as the employer desires them to. If an employer wants to alter the terms and conditions of employment, it can threaten termination if these new terms and conditions are not accepted. The continuance of service constitutes an acceptance and payment for those services constitutes consideration.²³¹ Finkin states: "More recently, however, at least some courts have been troubled by that approach, especially where the employment is conditioned upon the relinquishment of a previously earned benefit or job right, and have required a showing of actual consent, or additional consideration other than retention in employment or have applied notions of fraud or duress to limit the employer's power in that regard."²³² In *Robinson v Ada S. McKinley Community Services*²³³ the court required that actual consent by the employee be proved, and in *Goodwyn v Sencore, Inc.*,²³⁴ the court disallowed the employer's threat to terminate if the employee did not abide to renewed terms on the basis of duress. Consequently the employee was not obliged to accept the new terms of the contract. According to Arnov-Richman it is not surprising that the courts should come to the rescue of employees in these circumstances. She observes: "...courts often resist the conclusion that a disputed employment contract is gratuitous, particularly in cases involving employers reneging to the detriment of employees. And no wonder. Given the economic significance of work to the individual, as well as the centrality of work in our society, the promises and commitments of those we work for play a crucial role in shaping our lives. For many people, personal happiness, sense of purpose, and

²²⁹ Every jurisdiction except for Montana adopts the employment at will doctrine. See Rothstein *Employment Law* (1999) 1-4.

²³⁰ Arnov-Richman "The Role of Contract in the Modern Employment Relationship" 2003 *Texas Wesleyan Law Review* 2.

²³¹ Finkin "The Individual Employment Contract in the United States " in Betten *The Employment Contract in Transforming Labour Relations* (1995) 177.

²³² *Idem.*

²³³ (1994) 19 F. 3d 359 (7th Cir.)

²³⁴ (1975) 389 F. Supp. 824 (D.S.D.)

sense of success, in addition to financial security, all depend significantly on their experiences in their jobs.²³⁵

3 Employer Rules and Policies

One of the most important sources of employee obligations is contained in employer rules and policies. These policies incorporate rules into the individual contract of employment.²³⁶ The adoption of these rules became prevalent after the Second World War.²³⁷ Most jurisdictions have held that these rules are contractually binding terms.²³⁸ These policies and rules usually come in the form of personnel handbooks issued by the employer.²³⁹ These rules, however are generally for the benefit of the employer: Finkin explains: “The incorporation of employer rules into individual contracts underlines a key aspect of industrialisation- the division of labour and the growth of large corporate enterprises. Employers adopted rules to enhance their control of the workforce- rules providing for working time, fines for absences or tardiness, prohibitions on leaving the premises, even from engaging in casual conversation.”²⁴⁰

This type of arrangement is typical of a big manufacturing plant prevalent in the industrial era. As the world of work has changed since the 1970s and 1980s,²⁴¹ these types of rules have become less prevalent.²⁴² Since the main purpose of these rules is the attainment of employer control of the employees, they do not play any meaningful part in enhancing employee interests.

²³⁵ *Op cit* 4.

²³⁶ Finkin *op cit* 178.

²³⁷ *Idem.*

²³⁸ *Ibid* 179.

²³⁹ Arnow-Richman “The Role of Contract in the Modern Employment Relationship” 2003 *Texas Wesleyan Law Review* 1.

²⁴⁰ Finkin *op cit* 178.

²⁴¹ See Befort “Revisiting the Black Hole of Workplace Regulation: A Historical and Comparative Perspective of Contingent Work” 2003 *Berkeley Journal of Employment and Labour Law* 155-159.

²⁴² *Ibid* 158.

4 Dismissals

4.1 Introduction

Dismissals are not classified as unfair labour practices as they are in English law. However, since the principles of fairness and equity are always relevant with reference to 'unfair labour practices', it might be relevant to discuss the American law of dismissals in this context.

4.2 The Common law status of the contract of employment

Employees who are not members of trade unions are dependent on the common law for protection against unfair dismissal. The basic common law principle is that unless there is a specific stipulation to the contrary in the contract of employment, every employment contract is terminable by either party, at any time. This is how contracts of employment came to be called contracts 'at will'.²⁴³ The courts have developed three broad categories of exception to the 'at will' theory in order to attain some kind of fairness. These exceptions take the form of public policy, breach of implied term, and the implied covenant of good faith and fair dealing.

4.3 Implied Terms

In order to show that the dismissal was unfair the employee must prove that the employer had at some stage (during the job interview or during the course of employment) implied orally, tacitly or in writing that he/she would only be dismissed for 'just cause'.²⁴⁴ 'At will' employees cannot establish causes of action for breach of contract and breach of the implied covenant of good faith and fair

²⁴³ See Raza and Anderson *op cit* 452 where the authors state: "Since the 1960's, suggestions have been made to the effect that the at will doctrine should be substantially modified to provide greater protection for non-union employees against 'unjust' termination of employment. The demand for change acquired considerable momentum and by the early 1980's, it had become a viable movement. As the decade of the 1980's closed, there emerged a consensus amongst scholars that, although the at will doctrine remains the general rule of employment, it has been greatly narrowed in scope by exceptions from court decisions and enactments by state legislatures".

²⁴⁴ *Foley v Interactive Data Corporation* 765 P 2d 373 (1988).

dealing.²⁴⁵ The courts have developed three broad categories of exception to the 'at will' theory in order to attain some kind of fairness.

4.4 Public Policy

Some examples of where employees have been protected from unfair dismissal on the basis of public policy is where they were dismissed for refusing to commit a crime,²⁴⁶ whistle blowing on the employers' illegal activities,²⁴⁷ and for serving on a jury against the employer's wishes.²⁴⁸

4.5 Implied Covenant of Good Faith and Fair Dealing

This principle is derived from commercial law. Basically it requires the parties to conduct themselves in an honest manner and not to take unconscionable advantage of the other party in executing and in entering into the contract. However, because of the vague and nebulous nature of this principle, and because most contracts of employment of the 'at will' ²⁴⁹ the courts seldom apply it.²⁵⁰ For example, in the case of *Life Care Centers of America, Inc v Dexter*²⁵¹ the court held that in order for a duty to arise under the implied covenant of good faith and fair dealing in an employment contract there must be a showing of a special relationship of trust and reliance between the employee and the employer. In this case the fact that the employee had worked for the employer for a period of six years was insufficient to establish the required special relationship. The court held that long term employment will be sufficient to support a cause of action for breach of the implied covenant of good faith and fair dealing only if it is coupled with a

²⁴⁵ *Egerer v Computer Parts Unlimited, Inc.* (2002) WL 31648790, *Schlichtig v Inacom Corp* (2003) US District Court New Jersey (2003) civil action No 99- 1208 (SSB), *Horton v Darby Electric Co Inc* (2004) IER 1058 SC.

²⁴⁶ *Nees v Hocks* 272 Or. 210 (1975).

²⁴⁷ *Tameny v Atlantic Richfield Co* 27 Cal. 3d 167 (1980).

²⁴⁸ *Palmateer v International Harvester Co* 85 111 2d 124 (1981).

²⁴⁹ See footnote 112 *supra*.

²⁵⁰ Raza and Anderson *op cit* 455.

²⁵¹ (2003) 19 IER WY 38.

discharge calculated to avoid employer responsibilities to the employee, such as the payment of benefits.²⁵²

4.6 *Regulation of dismissals and other employer disciplinary action by collective agreement*

Unionised employees are protected against unfair conduct of the employer in terms of collective agreements, which prohibit unfair disciplinary action and require 'just cause' for dismissals to be fair. What constitutes 'just cause' has been interpreted by arbitrators and depends on the surrounding circumstances. Although what constitutes 'just cause' inevitably depends on the industrial setting and the special circumstances, arbitrators have achieved substantial consensus about underlying principles and many detailed rules.²⁵³

One of these underlying principles is that employees have the right to work and they cannot be deprived of such right without 'just cause'.²⁵⁴ Arbitration law recognizes that an employee's job may be his most valuable asset, and the value of that asset increases with length of service.²⁵⁵ Although the rules that an employer sets down are open to scrutiny by an arbitrator, as long as the rules are reasonable and they have a commercial rationale they will not be interfered with.²⁵⁶

5 **Conclusion**

As seen above, there might be some cases where the judiciary has made use of its judicial discretion in the application of common law to come to the rescue of employees who in the opinion of the court had become victims of employer abuse of power. However, given the fact that the employment relationship is a "contract

²⁵² In both this case and in *Horton v Darby Electric Co Inc* (2004) IER 1058 SC, it was held that failure to follow a procedure of progressive discipline as provided for in the employee handbook did not constitute a breach of the implied covenant of good faith and fair dealing because in both cases the contracts were 'at will'.

²⁵³ Summers "Individual Protection" 1976 *Virginia Law Review* 481, 500.

²⁵⁴ Poolman *Principles of Unfair Labour Practice* (1985) 132-133.

²⁵⁵ Summers *op cit* 506.

²⁵⁶ *Idem*.

at will”²⁵⁷, the judiciary can do little to protect employee interests. The stark reality, in this kind of situation is that, especially in times of high rates of unemployment, and in the case of unskilled workers, the agreement can be conceived of as a unilateral agreement.²⁵⁸ Employees consequently have very little influence (if any), in determining terms and conditions on creation of the relationship and even later when terms and conditions are unilaterally altered by the employer. In fact, some argue that since historically employment was considered a “legal status” and not a private contract, employment decisions sounding in contract law offer very limited solutions to the problems associated with the employment relationship.²⁵⁹

Furthermore, as pointed out by Finkin,²⁶⁰ compensation is limited to the amount of damages that would put the employee in the same position had there been no breach, less mitigation, from which the employee must pay legal fees. The result of this is that, “contract cases tend to be pursued by the better paid, especially managerial employees, i.e. primarily those for whom the sums eventually involved might justify the expense.”²⁶¹

F Conclusion

The South African law of contract, the “cornerstone of the edifice of labour law”²⁶² is sufficiently malleable to be adapted, without loss of necessary predictability so that legitimate interests of employees can be accommodated. The experience of other countries is enlightening in demonstrating how the gap between law and justice can be closed by the application of good faith and public policy in the employment relationship.

²⁵⁷ See Arnow-Richman *op cit* 2.

²⁵⁸ *Idem*.

²⁵⁹ Snyder “The Role of Contract in the Modern Employment Relationship” (2003) *Wesleyan Law Review* 45.

²⁶⁰ Finkin *op cit* 180.

²⁶¹ *Idem*.

²⁶² Kahn-Freund in Flanders and Clegg *The System of Industrial Relations in Great Britain* (1954) 45.

CHAPTER 8
CONSTITUTIONAL RIGHT TO FAIR LABOUR
PRACTICES
ABRIDGED CONTENTS

	Page
A Introduction -----	297-300
B Historical Perspective -----	300-302
C Meaning of Fairness	
1 Introduction-----	302-305
2 Interpretation of the Concept of Fairness by our Courts Before 1994-----	305-312
D Who Can Rely on section 23(1)? -----	312-314
E A New Unfair Labour Practice?	
1 Introduction-----	314-316
2 Case Law and the Content of the Right to Fair Labour Practices-----	316-319
3 Conclusion-----	319-320
F England -----	320-322
G United States of America	
1 Introduction-----	322-323
2 Specific Unfair Labour Practices-----	323-326
3 Conclusion-----	327
H Conclusion -----	327-328

A Introduction

Section 23(1) of the Constitution¹ provides that everyone has the right to fair labour practices. This provision is becoming very influential and factorial in labour legislation.² Although the exact content of this right is not capable of precise definition,³ it will be demonstrated herein that it is capable of wide definition and scope and that it could be utilized by both typical and atypical employees in order to protect their legitimate interests.⁴ The purpose of this chapter is to provide some clarity as to who can turn to section 23(1) for relief and to shed some light on what constitutes an 'unfair labour practice'. After considering who this section is applicable to, the meaning of the concept of fairness and its determination is considered. Discussion of the old Industrial Court's approach to the meaning of fairness provides some alternatives of how to determine the fairness or otherwise of certain conduct. Finally, a brief overview of some of the latest cases where section 23(1) of the Constitution was considered provide the reader with examples of the type of conduct that can possibly qualify as an unfair labour practice.

The changing world of work has resulted in a growing number of 'atypical employees'. The Department of Labour and the legislature are aware of this fact.⁵

¹ Act 108 of 1996.

² Le Roux "the New Unfair Labour Practice: The High Court Revives the Possibility of a Wide Concept of Unfair Labour Practice" 2002 *Contemp LL* 91.

³ See *National Union of Health and Allied Workers Union v University of Cape Town* 2003 *ILJ* 95 (CC).

⁴ In fact, this right can even be utilized for the protection of employer interests- see *National Union of Health and allied Workers Union v University of Cape Town op cit.*

⁵ In the Department of Labour's Green Paper: Policy Proposals for a New Employment Statute (GG 23 Feb 1996) the legislature expressed itself as follows: 'The current labour market has many forms of employment relationships that differ from full-time employment. These include part-time employees, temporary employees, employees supplied by employment agencies, casual employees, home workers and workers engaged under a range of contracting relationships. They are usually described as non-standard or atypical. Most of these employees are particularly vulnerable to exploitation because they are unskilled or work in sectors with little or no trade union organisation or little or no coverage by collective bargaining. A high proportion is women. Frequently, they have less favourable terms of employment than other employees performing the same work

This knowledge prompted the 2002 amendments to the LRA which provide that a person will be presumed to be an employee if one of the following conditions is met:⁶

- (i) There is control or direction in the manner the person works;
- (ii) there is control or direction in the person's hours of work;
- (iii) the person forms part of the organisation;
- (iv) an average of 40 hours per month has been worked for the last 3 months;
- (v) the person is economically dependent on the provider of work;
- (vi) the person is provided with tools or equipment; or
- (vii) the person only works for one person.

This amendment is also found in the Basic Conditions of Employment Act⁷ (hereinafter the BCEA). The Minister of Labour has the power to extend the provisions of BCEA to persons who do not qualify as employees in terms of the legislation.⁸

However, the legislature's attempt to extend the net of protection to atypical employees has not been altogether successful. The fact that the administrative power of extension of the Minister of Labour provided for in terms of the BCEA has never been utilized has been attributed to 'a lack of capacity within the Department of Labour'.⁹ The courts' traditional approach to defining an employee has also been described as "unimaginative" with the result that there is a certain amount of lack of protection for a "significant proportion of the workforce".¹⁰ The criteria that

and have less security of employment. Often they do not receive 'social wage' benefits such as medical and or pension or provident funds. These employees therefore depend upon statutory employment standards for basic working conditions. Most have, in theory, the protection of current legislation, but in practice the circumstances of their employment make the enforcement of rights extremely difficult.¹

⁶ S 200A. This presumption will only be operative where an employee earns less than approximately R116 000 per annum.

⁷ S 83(A) of Act 75 of 1997.

⁸ S 83(1).

⁹ Benjamin "Who Needs Labour Law? Defining the Scope of Labour Protection" in Conaghan, Fishl and Klare *Labour Law in an Era of Globalization* (2002) 91.

¹⁰ Benjamin *op cit* note 76.

are relied upon for the operation of the presumption of being an employee are based on the 'traditional tests' as applied by the courts. As such the criticisms,¹¹ levelled against the courts' approach to determining who qualifies as an employee, are applicable to the 2002 Amendments of the LRA¹² as well. In short therefore, some 'atypical employees' are not in a position to enjoy the protection granted in terms of the LRA, BCEA and other labour legislation.

Much research to establish the extent of atypical employment in South Africa has been undertaken.¹³ Various categories of such atypical employees have been identified including part-time work, temporary work, day work, outsourcing, sub-contracting, homework, self-employment and so forth. After collecting all the available data in South Africa, Theron concludes:¹⁴ "The extent and effects of the processes of casualization, externalisation and informalization cannot be measured quantitatively at this stage, nor is it realistic to expect to be able to do so. Yet the quantitative indicators are consistent with what is described in qualitative studies and trends that are well established in both developed and developing countries. It does not seem that there is any basis to argue that South Africa is an exception to these trends."

Although many 'atypical employees' enjoy protection in terms of labour legislation¹⁵ some of these 'atypical employees' may still not qualify as employees in terms of the legislation. Consequently they do not enjoy protection in terms of these Acts. These 'atypical employees' can conceivably turn to section 23(1) of the Constitution for protection against employer abuse. Those who are specifically excluded from the legislation¹⁶ may also conceivably turn to section 23(1) of the

¹¹ Benjamin *op cit* 82-85; Brassey "The Nature of Employment" 1990 *ILJ* 528.

¹² S 200A.

¹³ See Theron "Employment is not What it Used to be" 2003 *ILJ* 1247 where a summary of all the available studies and surveys undertaken in South Africa is undertaken; see also ch 6 subsection F *infra*.

¹⁴ Theron *op cit* 1278.

¹⁵ See s 200A of LRA and s 83(A) of BCEA.

¹⁶ S 2 of the LRA provides that it is not applicable to members of the National Defence Force, the National Intelligence Agency and the South African Secret Service.

Constitution for relief. Finally, section 23(1) may possibly also be utilised for relief where the alleged unfair labour practice does not fall within the scope of the definition of an unfair labour practice in terms of section 186(2) of the LRA.¹⁷ This constitutional provision will also have an influence on how individual contracts of employment are interpreted by our courts. Contracts or terms of contracts that are contrary to the spirit of the Constitution or that prevent or limit fundamental rights guaranteed in the Constitution may be set aside.¹⁸ In the light of the worldwide trend towards individualisation of employment contracts, this provision can play a very useful role in redressing the imbalance of power between employers and employees.

B Historical Perspective

This concept originated in the United States as a “handy description for a clutch of statutory torts designed to curb employer action against trade unions organizing.”¹⁹ The phrase was imported into South Africa, in a different context, at a time of political upheaval.²⁰ The concept was introduced into the South African labour law dispensation as a result of recommendations of the Wiehahn Commission.²¹ The first definition of unfair labour practice to be found in legislation was a very open-ended and non-specific definition. An “unfair labour practice” was defined as “any labour practice that in the opinion of the Industrial Court is an unfair labour practice”.²² This obviously gave the Industrial Court enormous leeway and ‘amounted to a licence to legislate’.²³

In 1980 the legislature intervened and a new definition of unfair labour practice was introduced. It was more specific and the definition referred to four

¹⁷ This provision is discussed under heading 5 *infra*.

¹⁸ See Basson “Labour Law and the Constitution” 1994 *THRHR* 498 at 502.

¹⁹ Landman “Fair Labour Practices – The Wiehahn Legacy” 2004 *ILJ* 805.

²⁰ *Idem*.

²¹ Commission of Enquiry into Labour Legislation appointed under GN 445 GG 5651 of 8 July 1977.

²² S 1(f) of the Industrial Conciliation Amendment Act 94 of 1979.

²³ Thompson and Benjamin *South African Labour Law* (1997) A!-60.

consequences that might arise as a result of an act or omission.²⁴ Nevertheless, this was still a general and open-ended definition requiring the Industrial Court to use its discretion in interpreting it.²⁵ In 1988 the definition was once again amended.²⁶ This time it contained a list of specific unfair labour practices with an *omnibus* clause that corresponded with the 1980 definition. Thus it was still open ended and open to interpretation. Unions had negative perceptions concerning the dispositions of the presiding officers of the Industrial Court. Consequently, they were very unhappy about the fact that the new definition allowed the Industrial Court to sit in judgement on the fairness of a strike.²⁷ As a result of union opposition to the 1988 definition an agreement between COSATU, NACTU and SACCOLA was entered into in terms of which the 1991 definition was enacted.²⁸

The 1991 definition reads as follows:²⁹

“An unfair labour practice is defined as any act or omission, other than a strike or lock-out, which has or may have the effect that:

- (a) any employee or class of employees is or may be unfairly affected or that his or their employment opportunities or work security is or may be prejudiced or jeopardised thereby;
- (b) the business of any employer or class of employers is or may be unfairly affected or disrupted thereby;
- (c) labour unrest is or may be created or promoted thereby; or
- (d) the labour relationship between employer and employee is or may be detrimentally affected thereby.”

It is this definition of an unfair labour practice that is of relevance with reference to section 23(1) of the Constitution. As pointed out by Van Jaarsveld, Fourie and

²⁴ S 1(h) of the LRA Amendment Act Amendment Act 95 of 1980.

²⁵ Thompson and Benjamin *op cit* A1-60.

²⁶ S 1(h) of the LRA Amendment Act 83 of 1988.

²⁷ Thompson and Benjamin *op cit* note 28 at 45 A1–30; see also Cameron, Cheadle and Thompson *The New Labour Law* (1989) 139 *et seq.*

²⁸ See Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* 2004 par 775.

²⁹ S 1 of the LRA Amendment Act 9 of 1991.

Olivier,³⁰ since this is the definition that was in place at the time of the enactment of the Constitution, this is the definition that should be used as a 'guideline to determine the meaning of the concept or, alternatively, the broad parameters of the concept of fairness.'³¹ Consequently the old Industrial Court's interpretation of the concept of 'fairness' in the context of unfair labour practices becomes relevant.³²

C Meaning of Fairness

1 Introduction

'Fairness' can be used as a synonym for equitable, reasonable, impartial, just, honest, balanced, according to the rules, right.³³ All these synonyms contain a high degree of ethical and moral notions and consequently so does the notion of fairness.³⁴ As such the notion of fairness is not only difficult to define but is also flexible.³⁵ Different people from different cultures and backgrounds also might have different views as to exactly what constitutes fairness.³⁶ As Baxter points out, fairness is a concept that is ambiguous and difficult to ascertain. Consequently its meaning must be deduced with reference to surrounding circumstances.³⁷

In *WL Osche Webb & Pretorius (Pty) Ltd v Vermeulen*³⁸ the court explained the concept of fairness as containing both procedural and substantive aspects. The

³⁰ *Op cit* par 778.

³¹ *Idem*; see too *NEHAWU v University of Cape Town* 2000 *ILJ* 1618 (LC).

³² See Landman "Fair Labour Practices-The Wiehahn Legacy" 2004 *ILJ* 805.

³³ See Poolman *Principles of Unfair Labour Practices* (1985) 42, and *SADWV v Master Diamond Cutters Association of SA* 1982 *ILJ* 87 (IC).

³⁴ In *The Press Corporation* 1992 *ILJ* 391 (A) at 400 C Grosskopf JA in referring to the determination of unfair labour practices stated: 'In my view a decision of the court pursuant to these provisions is not a decision on a question of law in the strict sense of the term. It is the passing of a moral judgment on a combination of findings of fact and opinions.'

³⁵ See Cameron, Cheadle and Thompson *The New Labour Relations Act* (1989) at 139.

³⁶ Poolman *op cit* 58. See also Van Zyl "The Significance of the Concepts 'Justice' and 'Equity' in Law and Legal Thought" 1988 *SALJ* 272.

³⁷ *Administrative Law* (1984) 543.

³⁸ 1997 *ILJ* 361 (LAC) at 366A-366C.

court opined that although the courts readily enforce procedural fairness,³⁹ they do not so easily enter the debate on whether the result of the process is fair since this would be tantamount to an intrusion that would impede the flexibility an employer needs to operate efficiently in the marketplace.⁴⁰ Since a certain amount of creativity and hence subjectivity is inevitable in deciding what is fair or not, not only must there be recourse to substantive fairness, but there must also be procedural fairness.⁴¹

Natural justice as it is understood in its broader sense refers to procedural fairness.⁴² Procedural fairness serves to 'legitimize the outcome.'⁴³ This concept comprises two principles, namely *audi alteram partem* and *nemo iudex in propria causa*.⁴⁴ These two principles are discussed hereunder.

The essence of the *audi alteram partem* principle is that the individual should be given notice of the intended action; and a proper opportunity to be heard.⁴⁵ It is obvious that where there is no notice or inadequate notice, there can also be no opportunity to be heard.⁴⁶ Notice of the impending action should state when and where the opportunity to be heard may be exercised as well as the reasons and salient factors motivating the pending proceedings.⁴⁷ In other words, the individual must be made aware of the charges against him. Secondly the individual must be

³⁹ Baxter *Administrative Law* (1984) 540 states: "The principles of natural justice are considered to be so important that they are enforced by the courts as a matter of policy, irrespective of the merits of particular case in question."

⁴⁰ As Baxter *op cit* 541 states: The courts have 'nearly always taken care to distinguish between the merits of a decision and the process by which it is reached. The former cannot justify a breach in the standards of the latter. The isolated decisions which have overlooked this have seldom received subsequent judicial endorsement.'

⁴¹ Marais *Onbillike Arbeidspraktyke* (1989) 12.

⁴² Baxter *op cit* 541.

⁴³ *Idem*.

⁴⁴ Baxter *op cit* 542.

⁴⁵ Baxter *op cit* 544; see also Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* (2004) par 1097; *Mhlangu v CIM Deltak* 1986 ILJ 346 (IC); *Holgate v Minister of Justice* 1995 ILJ 1426(E).

⁴⁶ Baxter *op cit* 544.

⁴⁷ *Idem*.

given reasonable time to prepare his case.⁴⁸ What is a reasonable time is dependent on the circumstances.⁴⁹ Furthermore the individual should be given an opportunity to present and controvert evidence,⁵⁰ to cross-examine witnesses⁵¹ and to legal representation.⁵²

Since fairness is measured with reference to objectivity and also with the public interest and public confidence,⁵³ the principle of *nemo iudex in propria causa* is very important.⁵⁴ It is obvious that as soon as doubts concerning bias on the part of the judge or arbiter arise, the fairness of the procedure is put into question.

Substantive fairness is concerned with the reason for treating someone unfavourably. Fairness is determined by having regard to equity and the substantial merits of the case in all its circumstances.⁵⁵ In determining the substantial fairness or the reason for the labour practice an objective test of what the reasonable employer or employee would or should have done in the circumstances is applied. What a reasonable employer or employee should have done is determined by reference to the standards of fairness or the boni mores of the community.⁵⁶ In order to ascertain the fairness of a situation one must have recourse not only to the consequences of the action or omission in question, but also to the reasons for such action or omission and the manner which such action

⁴⁸ Baxter *op cit* 551.

⁴⁹ *Idem.*

⁵⁰ Baxter *op cit* 553.

⁵¹ Baxter *op cit* 554.

⁵² Baxter *op cit* 555.

⁵³ Baxter *op cit* 557-558.

⁵⁴ In the case of *Gotso v Afrox Oxygen Ltd* [2003] BLLR 605 (Tk), at par 11, for example, the court held that the plaintiff had been unfairly dismissed because the presiding officer in the disciplinary enquiry had acted as judge and prosecutor. The court stated: "The nub of the applicant's case is that Mr Nel's conduct in the disciplinary hearing constituted an irregularity which caused his dismissal to be unfair. On a proper analysis the respondent is alleged to have breached a fundamental principle of natural justice that no one may be a judge in his own case. The principle is entrenched in our legal jurisprudence and pervades our constitutional law. A proven breach of this principle by the respondent will render his actions both unlawful, and with equal force, an unfair labour practice.

⁵⁵ Poolman *op cit* 64.

⁵⁶ *Idem.*

or omission took place. In other words the notion of fairness must be interpreted with reference to all the surrounding circumstances in a particular situation.⁵⁷ It is not possible to make a *numerus clausus* of what would be fair and unfair. This is so because of the potential different situations and circumstances that could arise.⁵⁸

Procedural and substantive fairness are interdependent.⁵⁹ This is so because procedural fairness requires certain facts to be proved before discretionary power to take disciplinary action is exercised.

2 Interpretation of Concept of Fairness by Courts before 1994

2.1 Introduction

The concept of fairness is of paramount importance in the definition of unfair labour practice. Since it was the 1991 definition of an unfair labour practice that was in force at the time the Constitution was enacted the decisions of the Industrial court dealing with the concept of fairness are relevant.⁶⁰ In analysing the Industrial Court's interpretation of the concept of fairness Marais has identified 3 different approaches to giving content to the term fairness. They are the following:

(i) The first approach⁶¹ uses the definition of an unfair labour practice as its starting point. Commission reports and dictionaries, international law and the laws of other countries are used to interpret the meaning of unfair labour practice. In the process the term is fragmented and each word is interpreted in turn. In the end the words are put back together to give them a meaning. I will call this the 'interpretation of statutes approach'.⁶²

⁵⁷ Baxter *op cit* 533.

⁵⁸ Marais *op cit* 12.

⁵⁹ Baxter *op cit* 533.

⁶⁰ Landman "Fair Labour Practices-The Wiehahn Legacy" 2004 *ILJ* 805.

⁶¹ Marais *Onbillike Arbeidspraktyke* (1989) 15-39.

⁶² Marais calls this the 'wetsuitleg werkwyse'.

(ii) The second approach⁶³ poses the question whether the reasonable employer would have reached the same conclusion as the respondent. I will call this the 'reasonable employer approach'.

(iii) The third approach⁶⁴ poses the question whether there were valid and justified business considerations that were taken into account. I will call this the 'economic rationale approach'.

2.2 *Interpretation of Statutes Approach*

Criticism levelled against this approach is that the definition should be read in context, and that the legislature's intention and the Act as a whole should also be considered.⁶⁵ Such an approach is superficial and as it ignores the scope and content within which the definition is required to operate. Reference to the meaning of the words in a vacuum will result in a failure to consider any underlying policies or objectives.⁶⁶ Secondly, reliance on other legal systems is not always appropriate. Different legislation, different socio-economic circumstances and the like can render comparisons inappropriate. For example English legislation does not provide for an unfair labour practice jurisdiction.⁶⁷ Each legal system also has its own unique problems and might have their own statutory principles.⁶⁸

In summary therefore, to only look to the meaning of individual words with reference to foreign law, commission reports and the like is superficial. Regard should also be had to the surrounding circumstances of the facts at hand, the context of the piece of legislation, as well as the intention of the legislature.⁶⁹

2.3 *The Reasonable Employer Approach*

⁶³ Marais calls this the 'redelikheidskriterium werkwyse'.

⁶⁴ Marais calls this the 'kommersiële rede werkwyse'.

⁶⁵ Marais *op cit* 23.

⁶⁶ Marais *op cit* 23.

⁶⁷ Brassey *et al The New Labour Law* (1987) 78.

⁶⁸ Marais *op cit* 24.

⁶⁹ *Idem*.

The test has its origins in the English law.⁷⁰ However the English law version of 'unfair labour practice' centres on unfair dismissals.⁷¹ The test is not applicable to unfair labour practices in general.⁷² The English court's and tribunal's interpretation of unfair dismissals guided the South African Industrial Court in giving content to the term unfair labour practice in its different versions in respect of dismissals.⁷³ The approach of the Industrial Court with reference to dismissals has more or less been codified in our present legislation.⁷⁴ Even though an unfair dismissal may entail an unfair labour practice in terms of the section 23(1) of the Constitution,⁷⁵ unfair labour practices in terms of the LRA are not limited to unfair dismissals.⁷⁶ Nevertheless, comparisons with English law are still relevant to the question of the interpretation of general and all embracing concepts such as fairness and reasonableness that are inherent in any concept of unfair labour practice. The reasonable employer test can provide guidance as to the determination of both procedural and substantive fairness not only with reference to dismissals but also with reference to other forms of employer conduct that may constitute unfair labour practices.

English legislation provides that in determining whether a dismissal is unfair or not recourse is to be had as to whether or not the employer acted reasonably or unreasonably in treating the conduct in question as sufficient to warrant dismissal.⁷⁷ That question is to be determined in accordance with equity and the substantial merits of the case. The test requires an examination of whether the employer had reasonable grounds for believing that the employee committed the alleged misconduct; whether the procedure adopted was reasonable in the

⁷⁰ See s 57(3) of the English Employment Protection (Consolidation) Act.

⁷¹ *Brassey et al op cit* note 70 at 369.

⁷² See *Brassey et al op cit* 78.

⁷³ See for example *Lefu v Western Areas Gold Mining Co* 1985 6 ILJ 307 (IC); *NUM v Nuclear Fuels Corp of SA* (IC 24.10 1985, unreported); *NUM v Western Areas Gold Mining Co* 1985 6 ILJ 380 (IC); *Robbertze v Matthew Rustenburg Refineries (Wadeville)* 1986 7 ILJ 64 (IC).

⁷⁴ Code of Good Practice: Dismissal in Schedule 8 of LRA

⁷⁵ See *Fedlife Assurance Ltd v Wolfaardt* [2001] 12 BLLR 130 (A).

⁷⁶ See definition of unfair labour practice contained in the LRA s 186(2).

⁷⁷ S 94 of Employment Rights Act 1996.

circumstances; and whether the penalty imposed by the employer was a reasonable one.⁷⁸

This approach focuses on the conduct of the employer and not on the effect of the employers' conduct. Even though such conduct might be found to be reasonable, and hence fair, the results or consequences of such conduct or actions might be unfair on the employee.⁷⁹ Once the employer has shown that it was reasonable in its conclusion on the facts i.e. that it had reasonable grounds for the belief that the employee was guilty of the alleged misconduct, then the employer cannot have committed an unfair labour practice. This is so even if it is later discovered that the employee did not in fact commit the alleged offence or misconduct.⁸⁰

The Industrial Court in *Lefu v Western Areas Gold Mining Co*⁸¹ followed this approach. The facts of the case are briefly as follows: The employer dismissed 205 employees for either inciting or partaking in a riot in its mine. This riot had resulted in nine deaths and the employer had suffered huge financial losses. The employer did not hold a disciplinary enquiry since the process would have taken at least five days during which period the employer would have had to house those it believed guilty of the offences in its hostels. Furthermore, it felt that immediate dismissal would help alleviate the highly emotional state of affairs that existed at the workplace. The dismissed employees alleged that they were innocent and that they had not committed the alleged offences. The court held that the employer had not committed an unfair labour practice. In reaching its conclusion it relied on the English law and referred with approval to *Ferodo v R Barnes*.⁸² It was held in that case that the courts should not enquire as to whether or not an offence was committed, but rather as to whether or not the employer at the time of dismissal had reasonable grounds to believe that the employees had in fact committed the offence.

⁷⁸ *Halsbury's Laws of England* (Employment Law) (2000) 6th ed par 480.

⁷⁹ See *Brassey et al op cit* 72-73.

⁸⁰ *Idem*.

⁸¹ 1985 *ILJ* 307 (IC).

⁸² [1976] *IRLR* 302.

A similar approach was adopted by the Labour Appeal Court in *Yichiho Plastics (Pty) Ltd v Muller*,⁸³ where it was stated⁸⁴ that what is of relevance is what the employer did and not what the employer might have done in other circumstances. The approach taken in the *Lefu* case was followed in *National Union of Mineworkers v East Rand Gold and Uranium Co Ltd*⁸⁵ where Bulbulia AM stated: “An employer need not be satisfied beyond reasonable doubt that an employee has committed an alleged offence. The test to be applied is whether the employer has reasonable grounds for believing that the employee has committed the offence.”

However, in *Hoechst (Pty) Ltd v CWIU & Another*⁸⁶ the Labour Appeal Court was of the view that the Industrial Court should embark on a complete re-hearing of the matter and that it could take into account new evidence that was not available to the employer at the time of the dismissal in its determination of the fairness or otherwise of the employers’ conduct. In other words it was held that the courts should concern themselves with the fairness of the act or omission (*i.e.* its effect). In this case the employee, accused of unlawful possession of property belonging to a co-employee, gave evidence in court, which he had withheld at the disciplinary enquiry. This evidence served to exonerate him from the alleged misconduct.

In 1989 in *Food and Allied Workers Union & others v CG Smith Sugar Ltd, Noodsberg*⁸⁷ the court referred to the *Lefu* case⁸⁸ and *National Union of Mineworkers & Others v East Rand Gold and Uranium cases*⁸⁹ with approval. The court held that in determining whether the alleged conduct constitutes an unfair labour practice the court was limited to evidence available to the employer at the

⁸³ 1994 ILJ 593 (LAC).

⁸⁴ P 4.

⁸⁵ 1986 ILJ 739 (IC).

⁸⁶ 1993 ILJ 1449 (LAC).

⁸⁷ 1989 10 ILJ 907 (IC).

⁸⁸ *Op cit.*

⁸⁹ *Op cit.*

time of the employer's decision and could not take evidence that subsequently became available into account.

In 1990 in *Govender v Sasko (Pty) Ltd t/a Richards Bay Bakery*⁹⁰ it was held that the approach adopted in the *CG Smith Sugar* case⁹¹ was no longer applicable because of the 1988 amendments to the definition of an unfair labour practice. In terms of the 1988 definition an unfair labour practice includes:

“(a) the dismissal, by reason of any disciplinary action against one or more employees without a valid and fair reason.”

The court was of the view that this provision rendered it necessary for the court to establish the fairness and validity of the employer's reason for dismissal. In order to establish such fairness and validity the court should have recourse to all available evidence including evidence that was not available to the employer at the time the employer took its decision.⁹² But the 1991 amendments to the legislation rendered the definition virtually the same as the definition considered by the court in the *Lefu and L Smith* cases. In other words it was no longer required that the courts determine a valid and fair reason for dismissal.⁹³

The reasonable employer test focuses on the actions of the employer and not on the effect of such actions. The most obvious criticism that can be levied against the approach is that there may be circumstances where an employers' conduct can be found to be reasonable, but the effect thereof might be unfair on the employee. This can happen if the employers' reasonable decision is based on incorrect or inaccurate facts, or a misinterpretation of facts. If the employer erred reasonably, there will be no unfair labour practice.⁹⁴ This is unfair. In order to determine whether or not the effects of an act or omission are unfair it is necessary to have recourse to evidence 'beyond the factual circumstances which pertained at the

⁹⁰ 1990 ILJ 1282 (IC).

⁹¹ *Op cit.*

⁹² This decision was followed in *FAWU v South African Breweries Ltd* 1992 ILJ 209 (IC).

⁹³ Van Niekerk 1994 CLL 68-69.

⁹⁴ S98 (4) and (6) of Employment Rights Act 1996.

time of the dismissal.⁹⁵ Since the court has to establish the effect on the employee, it is necessary for the court to establish whether or not the alleged misconduct was committed by the employee or not, not whether the employer was justified in its beliefs. As such the court should have recourse to all evidence, including evidence that was not made available to the employer. The employer can also lead evidence to demonstrate that the effects on the employee are not unfair.⁹⁶

The problem with this approach is that where an employee chooses to withhold evidence at the employers' enquiry and then later (at the court proceedings) leads that evidence, this will render an employers' attempt to apply procedural fairness meaningless. It will result in wasted time and money for the employer even where the employer acts reasonably. If the courts make an order for re-instatement this will be most disruptive for the employer. For these reasons the reasonable employer test is preferable for employers.

Despite this, in the light of the fact the 1988, 1990 and 1991 definitions focus on effects rather than employer conduct, and that labour unrest can be caused by unfairness, my view is that the reasonable employer test is inappropriate for the purposes of the 1991 definition of unfair labour practice and consequently for purposes of section 23(1) of the Constitution..

2.4 *Economic Rationale Approach*

The basis of this approach is that the purpose of the employment relationship for both employer and employee is financial gain.⁹⁷ The legislature accepts this and therefore, if there is an economic rationale the conduct can be justified and it will not be an unfair labour practice. Brassey explains: "A rational employer dismisses an errant employee so as to get a better employee in his place. He aims at improving the quality of his workforce. If there are no better employees available,

⁹⁵ Van Niekerk *op cit* 71.

⁹⁶ *Halsbury's Laws op cit* par 483.

⁹⁷ Van Niekerk *op cit* 65.

dismissal is senseless; the employee would not sooner be dismissed than he would have to be recruited again, because he would be the most suitable applicant for the job. Dismissal, therefore, looks to the future of a better workforce - it does not look to the past. It is remedial, not punitive – punishment in our society being the prerogative only of the parent, the schoolmaster and the bench.”⁹⁸

By the same token, where an employee’s work is not up to standard, a dismissal will be justified on the basis of an economic rationale. Disciplinary action short of dismissal can likewise be justified on the basis of economic rationale. Dismissals based on operational requirements (retrenchments) likewise, will be unfair where there is no commercial rationale. In short, where the conduct complained of is not accompanied by a commercial or economic rationale it will most likely be unfair. The courts have confirmed this when deciding whether or not discrimination is unfair.⁹⁹ One of the criticisms levelled against this approach is that conduct that has an economic rationale is not necessarily fair.¹⁰⁰ Also, it is difficult to confine or limit the boundaries of what exactly is meant by ‘economic or commercial rationale’. It is necessary to emphasize the procedural fairness in implementing decisions that have an economic rationale especially where the employee is not at fault, for example, where there has been no misconduct.

D Who Can Rely on Section 23(1)?

Having established that there may be ‘atypical employees’ that have slipped through the net of legislative protection and spies and soldiers are excluded from the ambit of the LRA,¹⁰¹ it is necessary to discuss what is intended by the word ‘everyone’ in section 23(1) of the Constitution.

⁹⁸ Brassey *et al* *The New Labour Law* (1987) 70.

⁹⁹ See *Kadiaka v Amalgamated Beverage Industries* 1999 ILJ 373 (LC) 380I and *Woolworths (Pty) Ltd v Whitehead* 2000 ILJ 571 (LAC).

¹⁰⁰ Marais *op cit* 36.

¹⁰¹ S 2.

The broad terms used in s 23(1) of the Constitution in describing not only the rights accorded but also the beneficiaries of the right to fair labour practices (namely everyone, all workers) have prompted the suggestion that an extensive interpretation of the definition of an employee would be possible, and that if such an extensive interpretation of employee were to be accepted, it would lay the foundation for the possibility of the Constitutional Court finding the exclusion of some workers from other labour legislation to be unconstitutional.¹⁰²

According to Cheadle,¹⁰³ the subject of the sentence in section 23(1), namely 'everyone' should be interpreted with reference to the object of the sentence, namely 'labour practices'. Since 'labour practices are the practices that arise from the relationship between workers, employers and their respective organisations'¹⁰⁴ the term everyone should be understood in this sense and should only include the persons and organisations specifically named in section 23, namely workers, employers, trade unions and employers' organisations. This interpretation would be in line with an approach that looks to the section as a whole in ascertaining the true intention of the legislature.

This approach renders it essential to ascertain who qualifies as a worker and who does not. In *SA National Defence Union v Minister of Defence & Another*,¹⁰⁵ in considering the meaning of 'worker' the Constitutional Court stressed the importance of its duty in terms of section 39 of the Constitution to consider international law. The Court then in applying the approach of the ILO concluded that even though members of the armed forces did not have an employment relationship with the defence force *strictu sensu*, they nevertheless qualified as workers for purposes of the Constitution.¹⁰⁶ Cheadle also argues for a less

¹⁰² Benjamin *op cit* 79-80.

¹⁰³ Cheadle, Davis, Haysom *South African Constitutional Law: The Bill of Rights* (2002) 364-365.

¹⁰⁴ *Idem*.

¹⁰⁵ 1999 4 SA 469 (CC); 1999 *ILJ* 2265 (CC).

¹⁰⁶ Pars 25 –27.

restrictive meaning than that ascribed to 'employee'¹⁰⁷. The policy consideration put forward in support of this argument is the growth in number and forms of atypical employees who remain vulnerable to employer exploitation.¹⁰⁸ Such broader interpretation is supported by international practice.¹⁰⁹ The crux of the enquiry as to whether a person qualifies as a worker for purposes of section 23 of the Constitution is that the relationship must be 'akin' to the relationship resulting from a contract of employment. What renders such relationship 'akin' to the relationship in terms of the common law contract of service is the presence of an element of dependency on the provider of work.¹¹⁰

E A New Unfair Labour Practice?

1 Introduction

The present LRA does not contain a broad concept of an unfair labour practice. Initially, in the form of a 'residual unfair labour practice' contained in Item 2(1) of Schedule 7 of the LRA, employees enjoyed protection against a *numerus clausus* of certain employer practices that did not amount to dismissal.¹¹¹ In terms of the

¹⁰⁷ S 213 of the LRA defines an employee as follows: "(a) any person, excluding an independent contractor, who works for another person or for the state and who receives, or is entitled to receive, any remuneration; and (b) any other person who in any manner assists in carrying on or conducting the business of an employer and 'employed' and 'employment' have meanings corresponding to that of 'employee'.

¹⁰⁸ Cheadle, Davis, Haysom *op cit* 365-366.

¹⁰⁹ *Ibid.*

¹¹⁰ 'Dependency' in this context refers to a situation where the worker is financially dependent on the provider of work in the sense that the worker has no other means of earning a living.

¹¹¹ Schedule 7 Part B 2 headed "Residual Unfair Labour Practices " reads as follows:

- '(1) For the purposes of this item, an unfair labour practice means any unfair act or omission that arise between an employer and an employee, involving-
- (a) the unfair discrimination, either directly or indirectly, against an employee on any arbitrary ground, including but not limited to race, gender, sex, ethnic or social origin, colour, sexual orientation, age, disability, religion, conscience, belief political opinion, culture, language, marital status or family responsibility;
 - (b) the unfair conduct of the employer relating to the promotion, demotion or training of an employee or relating to the provision of benefits to an employee;
 - (c) the unfair suspension of an employee or any other disciplinary action short of dismissal in respect of an employee;

2002 amendments to the LRA¹¹² the concept of 'unfair labour practice' is no longer 'residual'. However the thrust of the definition has remained the same. In terms of section 186(2) of the LRA an unfair labour practice amounts to any unfair act or omission that arises between an employer and an employee involving-

- (i) unfair conduct of the employer relating to the promotion or demotion of an employee;
- (ii) unfair employer conduct with reference to the training of an employee;
- (iii) unfair employer conduct relating to employee benefits;
- (iv) the unfair suspension of an employee;
- (v) disciplinary action short of dismissal which is unfair; and
- (vi) failure or refusal by an employer to reinstate or re-employ a former employee in terms of an agreement.¹¹³

This definition of 'unfair labour practice' is limited: Firstly it is limited with reference to what an unfair labour practice entails and; secondly, it is limited in the scope of its application since as discussed above, not everyone can rely on the provision for protection.¹¹⁴ Since section 23(1) of the Constitution 'serves a general function as a conceptual foundation for labour legislation'¹¹⁵ the view that 'it could never have been the intention of the legislature to limit the meaning of the constitutional 'fair labour practices' only to the non-dismissal cases provided for in the Labour Relations Act of 1995'¹¹⁶ is not uncommon.¹¹⁷ An argument in favour of this view is the fact that one of the objects of the Basic Conditions of Employment Act (BCEA)¹¹⁸ is to give expression to the concept of 'fair labour practices'.¹¹⁹ In other

-
- (d) the failure or refusal of an employer to reinstate or re-employ a former employee in terms of any agreement.'

¹¹² S 186(2).

¹¹³ The provision contained in Item 2 (1) (a) of schedule 7 is now contained almost verbatim in s6 (1) of the Employment Equity Act 55 of 1998.

¹¹⁴ S 213 of the LRA defines an employee as: "(a) any person excluding an independent contractor, who works for another person or for the State and who receives, or is entitled to receive, any remuneration; and (b) any other person who in any manner assists in carrying on or conducting the business of an employer."

¹¹⁵ Grogan "Organisational Rights and the Right to Strike" 2002 11(7) *Comp LL* 92.

¹¹⁶ Van Jaarsveld *et al op cit* par 778.

¹¹⁷ See Grogan *op cit* 95; and the cases discussed in this section, namely section E.

¹¹⁸ 75 of 1997.

words, other pieces of legislation, aside from the LRA can be used to give content and meaning to section 23(1) of the Constitution. Recent court decisions that have sought to interpret the constitutional right to fair labour practices have led one writer to the following conclusion: 'Unwillingly it seems South African labour law has returned to a point from which it sought to escape – an open textured, wide in scope interpretation – dependent unfair labour practice'.¹²⁰

2 Case Law and the Content of the Right to Fair Labour Practices¹²¹

2.1 Dismissals

In *Fedlife Assurance Ltd v Wolfaardt*,¹²² the respondent claimed damages for a breach of contract. The respondent claimed that the contract of employment was for a fixed term of five years and that after only two years the employer had repudiated the contract by terminating it. The reason given for such termination was that the respondent's position had become redundant. The Supreme Court of Appeal concluded that implicit in the constitutional right to fair labour practices is the right not to be unfairly dismissed. This right, on the basis of the Constitution was read into the contract of employment.¹²³

In *Ndara v the Administrator, University of Transkei*¹²⁴ the court held that the plaintiff had been unfairly dismissed in violation of his constitutional right to *inter alia* fair labour practices. Again in *Gotso v Afrox Oxygen Ltd*¹²⁵ the High Court found that an unfair dismissal constituted an unfair labour practice. The reason the

¹¹⁹ S 1.

¹²⁰ Anonymous "The New Unfair Labour Practice: The High Court Revives the Possibility of a Wide Concept of Unfair Labour Practice" 2002 *CLL* 91.

¹²¹ What follows is not concerned with arguments as to whether the High Court or the Supreme Court of Appeal have concurrent jurisdiction with the Labour Court and labour Appeal Court over certain issues. For a discussion of these issues see Ngcukaitobi 'Sidestepping the Commission for Conciliation, Mediation & Arbitration: Unfair Dismissal Disputes in the High Court' 2004 *ILJ* 1.

¹²² [2001] 12 *BLLR* 1301 (A).

¹²³ S 39(2) of the Constitution provides: 'when interpreting any legislation, and when developing the common law or customary law, every court, tribunal or forum must promote the spirit, purpose and object of the Bill of Rights'.

¹²⁴ Case no 48/2001 (Tk) (unreported).

¹²⁵ [2003] 6 *BLLR* 605 (Tk).

dismissal was found to be unfair in this case was that the principle that no one may be a judge in his own case was not adhered to.

In *Van Dyk v Maithufi NO & Andere*¹²⁶ the court found that it would amount to an unfair labour practice if an employer were to condone conduct which was in contravention of a statutory provision and subsequently without warning prosecute the employee for the contravention.

2.2 Transfers

In *Nelson & Others v MEC Responsible for Education in the Eastern Cape and Another*,¹²⁷ the High Court expressed the view (albeit obiter) that the transfer of the applicants amounted to 'the antithesis of fair treatment'¹²⁸ and that if it had jurisdiction it would have set aside the redeployment directives.

2.3 Constitutional Right to Fair Labour Practices as a 'General Unfair Labour Practice'

In *Ntlabezo & Others v MEC for Education, Eastern Cape & Others*¹²⁹ the High Court made a distinction between what constitutes a (residual) unfair labour practice¹³⁰ and a 'general' unfair labour practice. The court found that the LRA does not deal with general labour practices as provided for in the Constitution and therefore, the Labour Court lacked jurisdiction to pronounce on these general unfair labour practices. The conclusion is that the unfair labour practices against which employees are protected in terms of the LRA are distinct and different from what would constitute an unfair labour practice in terms of the Constitution.

¹²⁶ 2004 ILJ 220 (T).

¹²⁷ [2002] 3 BLLR 259 (Tk).

¹²⁸ At 272.

¹²⁹ [2002] 3 BLLR 274 (Tk).

¹³⁰ Prior to the 2002 Amendments to the LRA Item 2 of Schedule 7 of the LRA contained the definition of a 'residual unfair labour practice'. A very similar definition now appears in s 186(2) and they are now referred to as 'unfair labour practices' not 'residual unfair labour practices'.

In *National Union of Health and Allied Workers Union v University of Cape Town & Others*¹³¹ the Constitutional Court held that the word ‘everyone’ in section 23(1) of the Constitution is broad enough to include employers and juristic persons. As such it is possible for an employee to commit an unfair labour practice. The court expressed the view that the focus of section 23(1) of the Constitution is the relationship between the employer and the worker and its continuation, so as to achieve fairness for both parties. In order to achieve balance between the conflicting interests of the parties these interests should be accommodated. With regard to giving content to the constitutional right to fair labour practices the court stated: “the relevant Constitutional provision is s 23(1) which provides that: ‘everyone has the right to fair labour practices’. Our Constitution is unique in constitutionalising the right to fair labour practices. But the concept is not defined in the Constitution. The concept of fair labour practice is incapable of precise definition. This problem is compounded by the tension between the interests of the workers and the interests of the employers that is inherent in labour relations. Indeed, what is fair depends upon the circumstances of a particular case and essentially involves a value judgement. It is therefore neither necessary nor desirable to define this concept...In giving content to this concept the courts and tribunals will have to seek guidance from international experience. Domestic experience is reflected both in the equity based jurisprudence generated by the unfair labour practice provision of the 1956 LRA as well as the codification of unfair labour practice in the LRA.”¹³²

In *Denel (Pty) Ltd v Vorster*¹³³ the employer (appellant) submitted that since the procedure adopted by it in dismissing the respondent was one that respected respondent’s constitutional right to fair labour practices, it would constitute an infringement on the appellant’s (employer’s) right to fair labour practices if the dismissal were to be regarded as unlawful. In accepting this submission the court

¹³¹ (2003) 24 ILJ 95 (CC).

¹³² Par 33.

¹³³ 2004 ILJ 659 (SCA).

stated that the constitutional dispensation introduced into the employment relationship “a reciprocal duty to act fairly”.¹³⁴

In the case of *National Entitled Workers Union vs. CCMA, Nana Keisho NO and George Laleta Manganyi*¹³⁵ the Labour Court like the Constitutional Court in *National Union of Health and Allied Workers Union v University of Cape Town*¹³⁶ also expressed the view that what constitutes an unfair labour practice for purposes of section 23(1) is not capable of precise definition and that much depends on what is fair in the circumstances and that this concept is flexible. The court found that the concept as provided for in the Constitution was broad enough (unlike the concept in the LRA) to include employee conduct vis-à-vis an employer that might be unfair. The crux, therefore, turns on what would be fair or unfair in the circumstances.

3 Conclusion

The court decisions that have attempted to give some content to the constitutional right to fair labour practices indicate that it is an imprecise concept, incapable of definition, open-ended and that the over-riding criterion should be fairness. The old Industrial Court also had to deal with an open-textured definition and ultimately decide what was fair in the circumstances. The old Industrial Court decisions provide useful precedents to assist the courts in deciding what constitutes fairness in the context of unfair labour practices. In order for conduct not to be considered unfair it should be both procedurally and substantively fair. In the light of the fact that the 1991 definition of an unfair labour practice was in force at the time the Constitution was enacted, it seems appropriate that in determining the fairness of employer conduct the effects of the conduct on the worker or employee should be considered. It is in this sense that the reasonable employer test should be rejected. These effects should then be weighed against the possible justification of employer conduct in terms of the economic rationale approach.

¹³⁴ P 667.

¹³⁵ Case JR 685/02 (unreported).

¹³⁶ 2003 ILJ 95 (CC).

As seen,¹³⁷ the concept of an unfair labour practice can be extended to include unfair employee conduct vis-à-vis the employer. It may also include dismissals¹³⁸ and redeployment or transfer of employees.¹³⁹ Fairness as opposed to lawfulness will be the determining factor. Ultimately, what the judge considers to be fair or unfair in the circumstances will prevail. What is certain, as Landman concludes is that: “The unfair labour practice has crept into the heart of our labour law jurisprudence and it may be expected that it will continue to grow, by conventional and unconventional means, as long as lawful, unilateral action is regarded by the courts, in their capacity as custodians of industrial justice, as unfair and inequitable. This is the legacy of the Wiehahn Commission.”¹⁴⁰

F England

The South African common law has commonalities with the English common law.¹⁴¹ It is not surprising therefore that in interpreting the term ‘unfair labour practices’ the South African industrial court referred to statutory definitions, court cases, judicial opinions emanating from England and the USA.¹⁴² Nevertheless, in undertaking comparative studies, one should not lose sight of the fact that different legislation might have different underlying policies and objectives and national and socio- economic circumstances might also differ. Furthermore, and even more importantly, the statutes that are being compared are different.

Be that as it may, it is nevertheless useful to have recourse to other systems when our law lacks clarity. As was stated in the industrial court: “...one should be cautious of relying on foreign sources in interpreting and developing the concept of

¹³⁷ *National Entitled Workers Union case and National Health and Allied Workers Union case supra.*

¹³⁸ *Fedlife Assurance Ltd v Wolfaardt supra.*

¹³⁹ *Nelson & Others v MEC Responsible for Education in the Eastern Cape & Another supra.*

¹⁴⁰ “Fair Labour Practices – The Wiehahn Legacy” 2004 *ILJ* 805, 812.

¹⁴¹ Poolman *Principles of Unfair Labour Practice* (1985) 128.

¹⁴² Brassey, *et al The New Labour Law* (1987) 367.

‘unfair labour practice ... although ... such development might be enriched by taking cognisance of what is happening overseas on this specialized field.’¹⁴³

The English law version of ‘unfair labour practice’ centres on unfair dismissals.¹⁴⁴ The English courts and tribunal’s interpretation of unfair dismissals guided the South African Industrial Court in giving content to the term unfair labour practice in its different versions in respect of dismissals.¹⁴⁵ Guidance as to what constitutes a fair reason for dismissal (substantive fairness) and what the procedural requirements for a fair dismissal should be is available in English law. Our Industrial Court made use of such guidance.¹⁴⁶ As stated by Brassey *et al.*¹⁴⁷ “The English unfair dismissal cases are also helpful. They can teach us, for example, about the place of warnings in discipline, about the nature and purpose of a disciplinary enquiry and about the function of an internal appeal hearing. They can shed light on the weight to be attached to internal disciplinary codes when they are unilaterally imposed by the employer, and when they are agreed. And, though we know that one case of misconduct is never on all fours with another, they can suggest standards to us by which we can decide whether the misconduct was grave enough to justify dismissal.”

The approach of the Industrial Court with reference to dismissals has more or less been codified in our present legislation.¹⁴⁸ One major difference is that in South Africa unfair labour practices, are not limited to unfair dismissals and entail other

¹⁴³ See also *Mahlangu v CIM Deltak* 1986 7 ILJ 346 (IC) at 354C-D where it was stated: “The decisions of foreign jurisdictions ought to have a strong persuasive influence on the industrial court’s decision and serve as guidelines in the absence of any relevant South African case law”.

¹⁴⁴ Brassey *et al* op cit 369.

¹⁴⁵ See 1980, 1988 and 1991 definitions *supra*.

¹⁴⁶ See for example *Lefu v Western Areas Gold Mining Co* (1985) 6 ILJ 307 (IC); *NUM v Nuclear Fuels Corp of SA* (IC 24.10 1985, unreported); *NUM v Western Areas Gold Mining Co* 1985 6 ILJ 380 (IC); *Robbertze v Matthew Rustenburg Refineries (Wadeville)* 1986 7 ILJ 64 (IC).

¹⁴⁷ *Op cit* 71.

¹⁴⁸ Code of Good Practice: Dismissal in Schedule 8 of LRA

conduct as well, including other disciplinary action, short of dismissal, conduct relating to promotion, training, demotions, the provision of benefits and so forth.¹⁴⁹

Comparisons with English law are also relevant to the question of the interpretation of general and all embracing concepts such as fairness and reasonableness that are inherent in any concept of unfair labour practice.¹⁵⁰

G United States of America

1 Introduction

Until the middle of the 19th century trade unions were regarded as criminal associations. Nevertheless, from 1890 to 1932 the trade union movement grew rapidly.¹⁵¹ Despite trade unions no longer being considered criminal associations their activities were restricted by labour law injunctions (interdicts).¹⁵² Gradually however, the suppression of trade unions was progressively relaxed by legislation. The result of such legislation is that the American system is based on the following premise: Collective bargaining is the principal means of settling disputes of interest.¹⁵³ Consequently the right to freedom of association and organisation for the purposes of collective bargaining is protected.¹⁵⁴ The underlying policy of this legislation is the pursuit of self-determination by the majority of employees and the encouragement and protection of the process of collective bargaining.¹⁵⁵

This change in policy towards trade unions was a result of powerful social, economic and political forces at the end of World War II. When the National Labour Relations Act 1935 (the Wagner Act) was passed one in five Americans

¹⁴⁹ See definition of unfair labour practice contained in the LRA s 186(2).

¹⁵⁰ See ch 7 subsection C where the English courts' application of the concept of fairness in employment contracts is discussed.

¹⁵¹ Gregory *Labor and the Law* (1946) 15.

¹⁵² *Idem*.

¹⁵³ See Raza and Anderson *Labour Relations and the Law* (1996) 4-12 for a detailed analysis of the progression of US law towards tolerance and even encouragement of trade unions.

¹⁵⁴ See the National Labour Relations Act 1946 (NLRA; also known as the Taft Hartley Act). This Act replaced the National Labour Relations (Wagner) Act of 1935 and has been amended on several occasions.

¹⁵⁵ Raza and Anderson *op cit* 167.

was unemployed.¹⁵⁶ Sympathy for the working people, patriotism, a determination to reduce unemployment and increase wages were all underlying goals that helped shape the underlying policy of the National Labour Relations Act 1947 (hereafter the NLRA).

The objectives of this legislation are to encourage economic activity by defining and protecting the respective rights of employers and employees and creating orderly and harmonious procedures in order to prevent disregard of these rights by the parties to the employment relationship. All this is in the interests of public policy as is the encouragement of orderly collective bargaining. Ultimately the objective is to prevent or at least curtail industrial action.¹⁵⁷

2 Specific Unfair Labour Practices

2.1 Introduction

Unlike under English law the NLRA makes provision for certain unfair labour practices which do not deal directly with dismissals at all. Instead the Act grants both employers and employees certain rights in order to promote collective bargaining. The most important of these unfair labour practices will be mentioned briefly hereunder.¹⁵⁸

2.2 Unfair Labour Practice of Employers

The NLRA prohibits any employer from:

- (a) interfering with restraining or coercing employees in the exercise of their rights to organize and bargain collectively;¹⁵⁹
- (b) dominating or interfering with the formation or administration of any labour organization or contributing financial or any other support to it;

¹⁵⁶ *Idem.*

¹⁵⁷ S 1 of NLRA.

¹⁵⁸ Only a brief discussion is necessary because the focus of this article is the protection of the individual employee (i.e. individual labour law as opposed to collective labour law).

¹⁵⁹ S 7 of NLRA guarantees employees the right to organize and bargain collectively.

- (c) Discriminating or hiring or tenure of employment or any term or condition of employment to encourage or discourage membership in any labour organisation;
- (d) discharging or otherwise discriminating against an employee because he/she filed charges or gave testimony under the NLRA; and
- (e) refusing to bargain in good faith with representatives of their employees.¹⁶⁰

2.3 *Employer Interference with Protected Employee Rights*

Section 8(a) (i) prohibits employers from interfering with, restraining, or coercing employees in the exercise of their collective bargaining rights. The decisions of the National Labour Relations Board (NLRA) and the Supreme Court have given content to this right. For example employer speech held to be *per se* coercive must consist of threats of discharge, lay-offs, or demotion because of union activity.¹⁶¹ It has at times been difficult to distinguish between a threat of reprisal and a legitimate prediction about the future state of affairs within the company. An important determining factor is whether or not the predictions are based on 'objective facts'. Secondly the court and NLRB also look to the 'surrounding context' in determining whether or not employer speech constitutes a threat or coercion.¹⁶² It is still unclear as to whether employer intent is a prerequisite for such violations.¹⁶³

Employer interrogation of employees concerning union membership and/or union activity has been found to be unlawful where such interrogations would restrain or interfere with employee's lawful rights.¹⁶⁴

2.4 *Employer Domination of Labour Unions*

Section 8(a) (2) of the NLRA outlaws employer interference or domination with the formation or administration of union activity as well as the provision of financial and

¹⁶⁰ S 8(a) and 8(e) of NLRA.

¹⁶¹ Raza and Anderson *op cit* 237.

¹⁶² Raza and Anderson *op cit* 238.

¹⁶³ *Ibid* 236.

¹⁶⁴ *Ibid* 240-241.

other assistance to unions. This is to prevent the creation of company unions. Both the Supreme Court and the NLRB have found difficulty in differentiating between unlawful employer support for a union and lawful co-operation with the union. Generally, what is decisive is the 'totality of the employer's conduct and the tendency to coerce employees in their choice of bargaining agent'.¹⁶⁵

2.5 *Discrimination Against Employees for Engaging or not Engaging in Union Activity.*

Section 8(a) (3) of the NLRA outlaws discrimination against employees for taking part in union activities or for not taking part in union activities. Such discrimination includes dismissal, denying promotion, reduction of benefits, change in work conditions and less favourable working conditions than other employees.¹⁶⁶ The purpose of this section is to prevent employers from encouraging or discouraging trade union membership.

Employers are prohibited from discriminating against employees for taking their grievances to the NLRB in terms of section 8(a) (4). prohibits Employer actions that are prohibited include hiring, firing, lay off, demotion, transfer and forced resignation. Protected employee action includes participating in NLRB investigations, refusing to testify, testifying, filing charges and announcing an intention to file an unfair labour practice charge.¹⁶⁷

2.6 *Refusal to Bargain in Good Faith*

The employer's refusal to bargain in good faith is prohibited.¹⁶⁸ This prohibition is problematic because the legislation does not oblige either unions or employers to accept proposals in the bargaining process. In terms of this section the employer must bargain in accordance with the principles contained in Section 8(d), which defines good faith bargaining. The test of good faith is flexible and dependent on

¹⁶⁵ *Ibid* 259.

¹⁶⁶ Poolman *Principles of Unfair Labour Practice* (1985) 141.

¹⁶⁷ Raza and Anderson *op cit* 260.

¹⁶⁸ S 8(a) (5).

the surrounding circumstances and what the reasonable employer would do. The employer must display an open mind and sincere intention to bargain.¹⁶⁹

2.7 *Unfair Labour Practices of Unions*

Since South African law does not deal specifically with union unfair labour practices it is not necessary for the purposes of this article to discuss these unfair labour practices in detail.¹⁷⁰ Briefly, it is an unfair labour practice for a union to inter alia:

- (i) restrain or coerce employees in the exercise of their rights to join a union, to bargain collectively, or refrain from such activities;¹⁷¹
- (ii) to discriminate against an employee or cause an employer to discriminate against an employee who has been denied union membership on a ground other than failure to pay membership fees;¹⁷²
- (iii) to refuse to bargain collectively in good faith;¹⁷³
- (iv) to engage in secondary strikes, boycotts, picketing and other actions specified in the Act.¹⁷⁴
- (v) To attempt to or to cause an employer to pay or deliver or agree to pay or deliver any money or other thing of value, in the nature of an exaction, for services which are not performed or not to be performed.¹⁷⁵ The purpose of this provision is to create and maintain more jobs than are required by the employer.
- (vi) To engage in organizational and recognitional picketing by uncertified unions.¹⁷⁶

¹⁶⁹ Poolman *op cit* 144.

¹⁷⁰ For a detailed discussion of these unfair labour practices, see Raza and Anderson *op cit* ch 10.

¹⁷¹ S 8(b) (1).

¹⁷² S 8(b) (2).

¹⁷³ S 8(a) (3).

¹⁷⁴ S 8(b) (4).

¹⁷⁵ S 8(b) (6).

¹⁷⁶ S 8(e).

3 Conclusion

American labour law attempts to regulate labour relations by collective bargaining. As such it sets the ground rules for collective bargaining and creates rights for both parties so as to protect and encourage the collective bargaining process. Much can be gleaned from American law with reference to the process of collective bargaining including what is meant by bargaining in good faith,¹⁷⁷ and what constitutes reasonable procedures.¹⁷⁸

However, it must be borne in mind that the South African legislative system deals with unfair labour practices in a completely different manner. It follows therefore that our courts should not rely too heavily on the American labour law. 'Arbitrator law', on the other hand, could provide some assistance in determining both substantive and procedural fairness of employer's disciplinary action.¹⁷⁹

H Conclusion

The court decisions that have attempted to give some content to the constitutional right to fair labour practices seem to indicate that it is an imprecise concept, incapable of definition, open-ended and that the over-riding criterion should be fairness. The old Industrial Court also had to deal with an open-textured definition and ultimately decide what was fair in the circumstances. It follows, therefore, that the old Industrial Court decisions will provide useful precedents to assist the courts in deciding what constitutes an unfair labour practice. As seen,¹⁸⁰ the concept can

¹⁷⁷ *SADWU v The Master Diamond Cutters Association of SA* 1982 3 ILJ 87 (K) 120E-G where the Industrial Court applied the American principle of *bona fide* negotiation.

¹⁷⁸ See *NAAWU v Pretoria Precision Castings* 1985 6 ILJ 369 (IC) 378D-E.

¹⁷⁹ For an analysis of the interpretation of the concepts of fairness and reasonableness in the context of the employment relationship by the courts in the USA, see ch 7 sub-section E *infra*.

¹⁸⁰ *National Entitled Workers Union case (supra)* and *National Health and Allied Workers Union case (supra)*.

be extended to include unfair employee conduct vis-à-vis the employer. It may also include dismissals¹⁸¹ and redeployment or transfer of employees.¹⁸²

Fairness as opposed to lawfulness will be the determining factor. As such recourse to other systems of labour law, especially the English system might be useful to the courts. In the end, what the judge considers to be fair or unfair in the circumstances will prevail.

¹⁸¹ *Fedlife Assurance Ltd v Wolfaardt (supra)*.

¹⁸² *Nelson & Others v MEC Responsible for Education in the Eastern Cape & Another (supra)*.

CHAPTER 9

CORPORATE SOCIAL RESPONSIBILITY

ABRIDGED CONTENTS

	Page
A	Introduction----- 330
B	The Concept of Corporate Social Responsibility-----332-335
C	Motivations of Companies to Spend Money for the Benefit of Third Parties and the Community at Large
1	Introduction----- 335
2	Benefits to the Company----- 336
3	Abuse by Directors----- 337
D	The Law and Corporate Social Responsibility
1	General----- 337-339
2	The Neo-American Model----- 339
3	Constraints on Management Conduct----- 339-350
4	Conclusion----- 350-352
E	Employees as Stakeholders of Corporate Governance
1	Introduction----- 352-354
2	The Role of the Corporation in Society----- 354-355
3	King Report II and Stakeholder Theory----- 355-358
4	King Report II and Ethics----- 359-365
5	Enforceability of Good Corporate Governance----- 365-368
F	Director's Fiduciary Duties Towards Employees in terms of Entrepreneurial Law
1	Introduction----- 368-369
2	Director's Duty to Act in the Best Interests of the Company--- 369-370
3	Conclusion----- 370
G	Conclusion----- 371

A Introduction

The inability of governments worldwide to protect individuals from economic insecurity has led to a renewed interest and public expectation that corporations have public responsibilities in furthering the interests of the public or the public good. Crowther explains: "...it might be argued that the focus of war has shifted from imperialistic or ideological reasons to economic reasons – at least as far as governments and countries are concerned. But governments, as the epitome of the nation state, are becoming less important because what are becoming more important than governments and nation states are the multinational companies operating in a global environment. Some of these multinationals are very large indeed – larger than many nation states and a good deal more powerful. Arguably it is here that the economic war for the global village is taking place."¹ There exists no consensus as to what the 'interests of the public' or the 'public good' entail. In this chapter these terms will refer to benefits that may be made available to certain sections of the community including employees, customers, suppliers, even the community as a whole as a result of corporations' philanthropic acts.

Other factors contributing to this renewed interest in corporate social responsibility have been an increased awareness of impending ecological crises as well as changes in the structure of the economy. The political climate in the 1980's and 1990's has led to a move towards ideological preference for private sector solutions to socio-economic ills. Conservative and social democratic governments in Europe and Australasia have generated a non-interventionist trend and a move to privatisation.²

This renewed interest has re-opened the debate as to whether decision-making in companies or corporations should be guided purely by considerations of profit or

¹ *International Dimensions of Corporate Social Responsibility* (2005) v-vi.

² Deery and Mitchell "The Emergence of Individualisation and Union Exclusion as an Employment Relations Strategy" *Employment Relations* (1999) 3; Parkinson *Corporate Power and Responsibility* (1996) xiii; Harrington "Public Sector on the Wane" 1992 *Business and Society Review* 1992 28.

whether companies should also consider the interests of third parties including the community at large. This question is enveloped in controversy.³ There is also uncertainty and controversy as to the following:

- (i) What exactly does corporate social responsibility entail?
- (ii) What motivates companies to spend money for the benefit of others?
- (iii) On what basis, if at all, do companies owe this responsibility?
- (iv) Does the law allow for such philanthropic acts by companies, and if so, to what extent?
- (v) To whom and to what extent are there responsibilities owed?
- (vi) Is corporate social responsibility good for business?⁴

It is the purpose of this chapter to address some of these questions from differing viewpoints. Since employees are amongst the recipients of the benefits of corporate social responsibility it can be used as a means to address employee needs where other means such as legislation or collective bargaining⁵ have proved insufficient. Specific benefits derived by employees as a result of corporate social responsibility include the following:⁶

- (i) ethical and honest conduct with respect to employees;
- (ii) proper flow of information between employees and their superiors;
- (iii) a say in the creation of social politics within the company;
- (iv) careful consideration of employee complaints and proposals by the company;
- (v) company facilitation of the formation of trade unions or other employee representative bodies and participation in their activities;

³ Crowther and Jatana *Representations of Social Responsibility* (2005) 2 state: "...over the last decade the question of the relationship between organisations and society has been subject to much debate, often of a critical nature. The decade has witnessed protests concerning the actions of organisations, exposures of corporate exploitation and unfolding of accounting scandals."

⁴ Carter "The Limit of Corporate Social Responsibility" 1982 *Merc Law Review* 519; Butler and McChesney "Why They Give at the Office – Shareholder Welfare and Corporate Philanthropy in the Contractual Theory of the Corporation" 2001 *Cornell Law Review* 1195.

⁵ See ch 5 subsections B and C *infra* where the decline of trade unions and consequent decentralisation of collective bargaining is discussed.

⁶ Crowther and Jatana *op cit* 28.

- (vi) the provision of safe working conditions;
- (vii) in case of redundancies the company takes care of ex-employees;
- (viii) the possibility of equal development for employees;
- (ix) salaries that are adjusted in such a way by the company that they at least fulfil basic needs of employees.

It will be demonstrated that not only is corporate social responsibility legally possible, but it is also good for business. Furthermore the benefits both to employees as well as employers of the implementation of good governance systems will be discussed.

B The Concept “Corporate Social Responsibility”

Socially responsible behaviour has been described as “action that goes beyond the legal or regulatory minimum standard with the end of some perceived social good rather than the maximisation of profits”.⁷ The recipients of this socially responsible behaviour can be categorised into the following groups:

- (i) The community within which the company operates;
- (ii) suppliers of the company;
- (iii) employees of the company;
- (iv) consumers of the company’s goods or services;
- (v) society generally;
- (vi) the environment.

Parkinson distinguishes between relational responsibility and social activism.⁸ Relational responsibility refers to assistance to groups such as employees, suppliers, consumers or the community who are affected by the company’s business activities. Social activism on the other hand, benefits groups who fall outside the scope of the company’s business activities. Parkinson explains it

⁷ Slaughter “Corporate Social Responsibility: A New Perspective.” 1997 *The Company Lawyer* 321.

⁸ Parkinson *Corporate Power and Responsibility* (1996) ch 9.

thus: “Social activism, in contrast constitutes an effort by companies to address social issues that arise independently of the way the company conducts its business and thus represents an extension of corporate activity into essentially non-commercial spheres”.⁹ Although, as Parkinson admits, these concepts can sometimes overlap in practice, the distinction is useful since relational responsibility will usually coincide with company objectives to make profits, or at least have a neutral effect on profits, whereas social activism can result in profit sacrifice and consequently a shift in the corporate goal of profit maximization. Purely charitable donations that are not related to the company’s business are difficult to reconcile with the goal of profit maximization. The constraints imposed by the law on such philanthropic acts are discussed hereunder.

It has been demonstrated by some writers on this topic,¹⁰ including Parkinson, that usually there is no real conflict between profit maximization and socially responsible behaviour on the part of companies. This being so, from whatever viewpoint one departs, such philanthropic behaviour causes no controversy. Problems arise however, as will be demonstrated hereunder, when the conduct clashes with a profit maximization motive. This will be the case where the philanthropic behaviour is not a response to exterior or interior forces in the interests of profit maximization of the company, but rather it is conduct for the sake of the interests themselves. In short, the interest of outsiders, not those of the company are preferred. Therefore Parkinson makes a further distinction: Responsibility that requires a change in company objectives as opposed to responsibility that only constrains the pursuit of existing company objectives to maximise profits.¹¹ These constraints might be legally imposed such as minimum wage laws or legislation that protects the environment, or they can be self-imposed in the sense that they constitute an economically rational response to market pressure in the form of public opinion generally, or the opinion of the parties with whom the company has dealings. These self-imposed constraints usually reduce

⁹ *Ibid* 269.

¹⁰ See Carter “The Limit of Corporate Social Responsibility” 1982 *Merc Law Review* 1982 519; Slaughter *op cit* 323; Crowther and Jatana *op cit* 9.

¹¹ Parkinson *op cit* 268 – 271.

profits in the short term in the interests of bigger long-term company profits. They are therefore not inconsistent with the goal of profit maximization.

Parkinson concludes that the content of company codes, the attitude of managers and directors and the way companies spend their money indicate that there has been no shift away from the profit goal in the corporate world.¹² The same conclusion is reached by Slaughter when she states: “Much of the debate about social responsibility can be disposed of by the simple observation that what is considered to be socially responsible behaviour is often also good for business or at least a sensible course of public relations which will improve the company’s image and contribute to profitability in the long run.”¹³ After having done a thorough survey of US cases Carter concludes¹⁴: “Corporate managements rightly believe that it is their responsibility to obtain corporate benefit from every dollar spent and courts have almost uniformly insisted on it” and “the author has searched the literature and his memory without success for a purely altruistic corporation act. Those which have come to his attention could be or usually were justified on the basis that they satisfied public expectations and therefore were of value to the corporation or were otherwise of direct benefit to the corporation. Furthermore, in more than 25 years of attending meetings of a board, which was known to be quite public-spirited, the author does not recall ever having heard the term public interest or a synonym uttered. It is his distinct impression that with respect to all decisions the members of the board believed they were acting in the corporate interest”.

He also refers to a study undertaken by the Conference Board, an independent, non profit business research organization, to determine the motivation for corporate giving, as well as a study undertaken by the Foundation of the South Western Graduate School of Banking of Corporate Ethical Policy Statements and concludes: “In summary it appears corporate altruism under the present system of corporate governance and under the law today, not only is not practiced, it is not

¹² Parkinson *op cit* ch 9.

¹³ Slaughter *op cit* 321.

¹⁴ *Ibid* 534.

permissible. Corporations make contributions and other expenditures for social benefit only when, in the business judgment of management it is in the corporate self-interest".¹⁵ On the other hand, the view that companies are not always motivated by self interest and that companies can and do act altruistically for no other reason than charity has also been put forward.¹⁶

Although it is rarely possible to predict or accurately calculate in real money terms exactly what the long term benefit to the company of socially responsible acts will be, it is clear that the bulk of such corporate conduct can easily be classified or interpreted to be of benefit to the company in the long run.¹⁷ In terms of Slaughter's definition of social responsibility quoted above¹⁸, therefore, most of the so-called socially responsible conduct which companies indulge in would not be classified as socially responsible behaviour since its end is the maximization of profits as opposed to some perceived social good.

C Motivation of Companies to Spend Money for the Benefit of Third Parties and the Community at Large

1 Introduction

Motivation for these seemingly philanthropic acts is many and varied. Furthermore, it is impossible to establish with certainty what the motivation of a company is. It is usually based on a combination of factors. As shown hereunder benefits a company can possibly derive from such actions are largely dependent on whom the beneficiaries of such conduct are.

¹⁵ *Op cit* 537-539.

¹⁶ See Mangrum: "In Search of a Paradigm of Corporate Social Responsibility" 1983 *Creighton Law Review* 21.

¹⁷ For discussion on how socially responsible behaviour towards the community, customers and consumers, employees and various charities are of benefit to companies see Slaughter *op cit* 322 - 324 and Parkinson *op cit* 281-303.

¹⁸ *Op cit* 321.

2 Benefits to the Company

Although moral responsibility might be a motivating factor for company expenditure on for example the control of pollution, or community projects, or the provision of safe and pleasant working conditions, or ensuring products and services are of an acceptable quality, or the sponsorship of art or education, and so on, it is apparent that such expenditure can also provide benefits to the company.¹⁹ These include:

- (i) an enhanced public image;
- (ii) tax rebates, for example where a company contributes to social welfare, education or the arts;
- (iii) the ability to attract and retain a productive, loyal and competent workforce (usually by sponsoring education, paying competitive wages and providing superior working conditions);
- (iv) companies can commercially apply the results of research they have sponsored;
- (v) involvement in community projects such as job creation schemes can improve morale amongst employees and the community at large. This in turn will stimulate the local economy on which the company relies for survival. A social environment, which is healthy, is essential for the conduct of successful business enterprises;
- (vi) opportunities for business contacts, staff perks, and an advertising medium for high profile groups as well as tax incentives can all flow from company sponsorship of the arts;
- (vii) the prevention of further government intervention. Where companies address social and environmental problems it will not be necessary for government to find their own solutions such as increased taxes, prohibitive legislation, compulsory regulations and intervention. In this way, voluntarily assumed constraints for the prevention of for example environmental damage reduces the need for government intervention.²⁰

¹⁹ Parkinson *op cit* 290-301.

²⁰ *Idem* 299.

Most authors ²¹ including Parkinson²² and Slaughter²³ would agree that socially responsible behaviour is usually also good for business and will contribute to the profitability of the company in the long run. It is often not possible to predict or gauge exactly how much money particular socially responsible conduct will generate especially where the pay-off comes in the form of an enhanced public image or the conduct serves as a form of advertising. Nevertheless it seems to be generally accepted that companies will act in the public interest so long as it is also in the company's interest. Self-interest and not altruism therefore seems to be a major motivating factor for corporate social responsibility.²⁴

3 Abuse by directors

Since spending on charity is often up to the discretion of directors, the abuse by directors of company money in the pursuit of self-interest is commonplace. Donations to an art gallery or a favourite charity might benefit no one besides the director in that s/he will receive preferential treatment amongst those of high social profiles. Clearly such donations are inconsistent with the goal of profit maximization.

D The Law and Corporate Social Responsibility

1 Introduction

Company law plays an important role in how well the economy works. How well the economy works, in turn, is crucial to the economic and social well being of a country's citizens.²⁵ Re-election of governments operating in democratic systems is largely dependent on the overall performance of the economy, which is in turn largely determined by business. It follows therefore, that it is essential for any capitalist democratic state to retain the confidence and hence the co-operation of

²¹ See Carter *op cit* 538-539.

²² Parkinson *op cit* chapter 9.

²³ Slaughter *op cit* 321.

²⁴ See Carter *op cit* where the author's thesis is that the limit of corporate social responsibility in USA is long-term self-interest.

²⁵ Saxena *Taxman's Politics, Ethics and Social Responsibility of Business* (2004) 17.

the business sector.²⁶ Such confidence can only be achieved where a country's laws not only permit but also encourage profitability. In an increasingly globalised world economy, governments must be sensitive to the possibility of reduced investor confidence (both local and international), resulting in not only massive capital outflows, but also a failure to attract foreign investment. The *King Commission Report*²⁷ (hereinafter "King Report II") is fully aware of these facts and states as follows: "However, it must constantly be borne in mind that entrepreneurship and enterprise are still among the important factors that drive business: Emerging economies have been driven by entrepreneurs, who take business risks and initiatives. With successful companies, come successful economies. Without satisfactory levels of profitability in a company, not only will investors who cannot earn an acceptable return on their investment look to alternative opportunities, but it is unlikely that the other stakeholders will have an enduring interest in the company."²⁸:

Government policies and legislation that are insensitive to business confidence will clearly have disastrous effects on employment and economic growth and stability. The King Report II continues:²⁹ "The Company remains a key component of modern society. In fact, in many respects companies have become a more immediate presence to many citizens and modern democracies than either governments or other organs of civil society. As a direct consequence, companies remain the legitimate and necessary focal point for profit making activities in market economies. They are also increasingly a target for those discontented with business liberalisation and globalisation, an agenda that companies are perceived as driving. In the global economy are many jurisdictions to which a company can run to avoid regulation and taxes or to reduce labour costs ..."

²⁶ *Idem.*

²⁷ *King Commission Report II* 2002 (hereinafter King Report II).

²⁸ *Ibid* par 7.

²⁹ *Ibid* par 14.

Any suggestions therefore that companies should be forced by law to be more socially responsible and to allocate funds to the public good at the expense of profitability should be considered carefully in the light of the above.

2 *The Neo-American model*

The company laws of South Africa, England and the United States of America (hereinafter USA) will be compared hereunder. All three of these countries embody what has been referred to as the neo-American model of capitalism as compared with the Rhine model found operating in parts of Western Europe and Japan.³⁰

In terms of the neo-American model the starting point is that since companies are essentially the property of shareholders, shareholders have the right to insist that the company be run for their benefit.

The separation of ownership and control (i.e. shareholders own the shares of a company whereas directors control the administration and general running of the company), has led to the need for company law in these systems to intervene to protect the interests of shareholders. As such, company law places some constraints on management behaviour thus curtailing the ability of management to use company funds for philanthropic ends. These constraints come in the form of the common law *ultra vires* doctrine, the common law duty of directors to act in good faith in the best interests of the company, and the duty of directors to exercise diligence, care and skill. These will be discussed in turn hereunder.

3 *Constraints on Managerial Conduct*

3.1 *The Ultra Vires Doctrine.*

The objects clause in a company's memorandum of association sets out the activities for which the company has been formed. These activities, however, may be altered by special resolution in terms of both South African and English company law. In terms of the *ultra vires* doctrine a transaction beyond the scope of

³⁰ For a detailed description of these models, see Parkinson *Corporate Power and Responsibility* (1996) ix-x.

the objects clause is *ultra vires* and void. The justification for this doctrine, which could easily result in hardship to innocent third parties contracting with the company, was that it protected both shareholders and creditors of the company from abuse of power by directors. The English Companies Act has been amended so that the objects clause no longer limits the company's capacity in that the validity of such act or contract may no longer be questioned on the grounds of lack of capacity.³¹ The company is bound by the transaction. Nevertheless, directors who enter into contracts beyond the capacity of the company in terms of its objects clause remain liable to the company for any loss that may result from entering into such *ultra vires* transaction. Where such transactions are beneficial to the company they can be ratified.³²

Section 36 of the South African Companies Act states: "No Act of a company shall be void by reason only of the fact that the company was without capacity or power so to act or because the directors had no authority to perform that act on behalf of the company by reason only of the said fact and except as between the company and its directors neither the company nor any other person may in any legal proceedings assert or rely upon any such lack of capacity or power or authority."³³

As is the case with English law, despite the validity of the *ultra vires* transaction the directors in South African law are still liable to the company. Prior to the conclusion of the *ultra vires* act, a court on application of a member/shareholder can grant an interdict preventing such action. If the act has already been concluded the director(s) responsible can be held liable for breach of their fiduciary duty.³⁴

³¹ Companies Act 1989 s108 inserting ss 35-35B into the Companies Act of 1985.

³² S 35(3) of the English Companies Act of 1989 specifically provides for this.

³³ Companies Act 61 of 1973.

³⁴ Cilliers *et al Entrepreneurial Law* (2000) 150.

The modern trend however has been to have very broadly drafted objects clauses so that most activities will probably not be *ultra vires*.³⁵ In so far as philanthropic acts that fall outside the objects clause are concerned, the law will in order to protect the interests of the company and indirectly the interests of the shareholders, hold directors responsible for such acts liable for any loss.

3.2 *Duty to Act in Good Faith and in the Interests of the Company*³⁶

An action, which is within the power or capacity of the company, may still constitute a breach or fiduciary duty on the part of directors. This duty to act *bona fides* is in technical terms owed to the company as a separate legal entity in terms of both English and South African law. However, usually in promoting the success of the business, the best interests of the shareholders are also served. The fact that directors owe a fiduciary duty to the company, as a separate legal entity is not incompatible with the notion that directors owe such a duty to shareholders. Despite the fact that the standard formulation of the duty of directors in running the business is expressed in terms of benefiting the company, Parkinson³⁷ argues that this does not mean that the directors must literally direct their efforts at benefiting a legal entity. This he concludes would be futile since an artificial entity is not incapable of expressing well-being nor is it capable of having interests. Therefore he concludes³⁸ that “the duty of management can accordingly be stated as a duty to promote the success of the business venture in order to benefit the members”.

The law in the USA differs from South African and English law in that in many states the legislation specifically states that fiduciary duties are owed to the shareholders.³⁹ In USA shareholders can specifically define duties of directors for

³⁵ Slaughter “Corporate Social Responsibility: A New Perspective” 1997. *The Company Lawyer* 326.

³⁶ Directors’ fiduciary duties towards employees will be discussed hereunder in sub-section F.

³⁷ Parkinson *op cit* 76.

³⁸ *Ibid* 77.

³⁹ Slaughter *op cit* 320.

which they will be held liable for breaching and which breaches could bear the sanction of loss of office.⁴⁰

The King Report II, when delineating the role of directors, re-iterates this common law duty of directors by stating that directors must always: “exercise the utmost good faith, honesty and integrity in all their dealings with or on behalf of the company”⁴¹ and “act in the best interests of the company and never for any sectoral interest.”⁴²

It appears however, that in the view of the King Report II this duty can coexist and is quite compatible with a duty to take other stakeholders’ interests into account. The report states further that directors “must act with enterprise for and on behalf of the company and always strive to increase shareowner’s value, while having regard for the interests of all stakeholders relevant to the company”.⁴³

This statement is reminiscent of English company law. Legislation provides that: “The matters to which the directors of the company are to have regard in the performance of their functions include the interest of the company’s employees in general as well as the interests of its members”.⁴⁴ The Act then goes on to provide that this duty is owed “to the company and is enforceable in the same way as any other fiduciary duty owed to the company by its directors”.⁴⁵ In other words it would be incumbent upon the directors themselves to enforce such duty and the employees would not be able to bring an action to prevent a breach of such duty. It seems unlikely however that the directors would bring an action against themselves!

⁴⁰ Butler and McChesney “Why They Give at the Office – Shareholder Welfare and Corporate Philanthropy in Contractual Theory of the Corporation” 2001 *Cornell Law Review* 1201.

⁴¹ *Ibid* par 2.2.

⁴² *Ibid* par 2.4.

⁴³ *Ibid* par 2.13.

⁴⁴ S 309(1) of English Companies Act of 1985.

⁴⁵ S 309(2) of English Companies Act of 1985.

In summary therefore, despite the mandatory language used in both the English law and the King Report II, such obligations are practically unenforceable, and merely provide directors with the discretion to have 'due regard' to the other stakeholders.

The King Report II does not spell out who all the stakeholders relevant to the company are. However stakeholders are defined as follows:

- “1.1 Shareowners as providers of capital.
- 1.2 Parties that contract with the enterprise either as providers of input to its various business processes and activities, or as purchasers of its output. This would include, for example, customers, employees, suppliers, sub-contractors and business partners.
- 1.3 Parties that have a non-contractual nexus with the enterprise but provide it with its licence to operate and thereby exercise an influence on its ability to achieve its objectives. This class could include, for example, civic society in general, local communities, non-governmental organisations ('NGOs') and other special interest groups whose concerns may be with issues such as market stability, social equity and the environment.
- 1.4 The State as policy maker, legislator and regulator of the economy generally and specific sectors of it. The State's power, as opposed to mere influence, over the activities of companies sets it apart from other parties with a non-contractual nexus.”⁴⁶

In summary, stakeholders can be described as those upon whose co-operation and creativity it depends for its survival and prosperity.

Whether section 309 of the English Companies Act allows the interests of employees to take precedence over those of shareholders is not entirely clear. The weight of opinion however, is that shareholders interests can never be subordinated to employee interests.⁴⁷ Nevertheless Parkinson argues that this

⁴⁶ King Report II 97-98.

⁴⁷ Parkinson *Corporate Power and Responsibility* (1996) 84-85.

section will provide directors who have favoured employee interests over shareholder's interests with a defence.⁴⁸

The wording in the King Report II appears to subordinate the interests of all stakeholders relevant to the company to the shareholders' interests since the directors "must act with enterprise for and on behalf of the company and *always* (my emphasis) strive to increase value, *while* (my emphasis) having regard for the interests of all stakeholders ..."⁴⁹

Even though USA corporate law also provides for standard form fiduciary duties, USA law differs in that many states have introduced legislation that specifically permits corporate powers that go beyond profit maximization.⁵⁰ The first such piece of legislation was promulgated in Texas as early as 1917. Many other states subsequently followed suit.⁵¹ Some states specify charitable, humanitarian and social goals for which contributions are permitted.⁵² Generally companies are entitled to act for mixed profit and humanitarian purposes. It should be noted that this legislation is enabling in that it permits such conduct. It is not mandatory and does not enforce or oblige companies to make any contributions or perform any other form of charitable conduct.⁵³

The duty to act in good faith is subjective. The courts will not look into the merits of directors' decisions but will look merely to their subjective intention. If their subjective intention was to pursue the interests (albeit long term interests), of the company, they will have satisfied the duty to act in good faith. It will be difficult to prove that a director's motivation was something other than maximisation of profits, even where maximisation of profits did not result from the action. For example, donations to charity can usually be defended on the basis that they contribute to

48

Idem.

49

(2002) 98.

50

For an overview of such legislation see Mangrum *op cit* 66-70.

51

Ibid 68.

52

Idem.

53

Op cit 70.

the goodwill of the company. The English and American court cases generally bear this out.⁵⁴ Some American cases however, have openly permitted and justified US corporations making charitable donations not on the basis of long-term profit maximisation, but rather on the basis of public policy arguments.⁵⁵ In contrast to these decisions the court in *Dodge v Ford*⁵⁶ (hereafter the *Dodge* case) ignored public policy arguments and implemented what has been termed the ‘contract model’ of corporate responsibility⁵⁷ where the corporation is exclusively responsible to shareholders who have contractual rights for profit maximisation. However Mangrum contends that as far as USA is concerned, “the strict contract version articulated in *Dodge* had little historical support then and has since been substantially revised by common law decisions and statutory reform.”⁵⁸

A number of English and American cases that were decided prior to the *Dodge* case permitted altruistic actions by corporations on the basis of economic and humanitarian justifications⁵⁹. Although these decisions could be justified on the basis that the conduct complained of was conceivably beneficial to the long-term interests of the company, the language used by some of the judges indicates the pursuit of social purposes beyond profit maximisation.⁶⁰

Mangrum⁶¹ highlights how many of the post *Dodge* decisions in both England and USA display an even greater tolerance towards legitimate objectives besides the pursuit of profit maximisation. The conclusion arrived at is that some decisions

⁵⁴ See Slaughter “Corporate Social Responsibility: A New Perspective” 1997 *The Company Lawyer* 316-324 for a survey of the English and United States cases.

⁵⁵ *Ibid* 320.

⁵⁶ 204 Mich 459. 170 N.W. 668 (1919).

⁵⁷ See Mangrum “In Search of a Paradigm of Corporate Social Responsibility” 1983 *Creighton Law Review* 50-55 for a detailed discussion of this model and *Dodge v Ford*.

⁵⁸ *Op cit* 54.

⁵⁹ *Ibid* 55-57.

⁶⁰ See *Steinway v Steinway & Sons* 17 Misc. 43 40 N.Y.S. 718 1896; *People v Hotchkiss* 136 A.D. 150, 120 N.Y.S. 649 1909; *Hawes v Oakland* 104 U.S. 450 1881; *Taunton v Royal Ins. Co.* 71 Eng. Rep. 413 (1864).

⁶¹ *Op cit* 58-66

have paid lip service to the fiction of long-term benefit to the company.⁶² Mangrum states: “Some courts revise the strictures of *Dodge* by considering what appear to be altruistic corporate acts as compatible with the long term economic interest of the corporation. These cases give descriptive credence to both the contract and economic models. At some point the liberality of the interpretation of economic interest transforms the profit maximisation constraint into a legal fiction which obscures the real justification for the decision.”⁶³

Carter,⁶⁴ having reviewed the US cases comes to a very different conclusion to that of Mangrum. He argues that the requirement that some kind of benefit be derived by the company, albeit indirect has remained constant. Slaughter and Parkinson⁶⁵ come to a similar conclusion concerning the English cases and suggests that the English courts insist on corporate benefit to legitimize corporate acts even though the benefit may not be immediate or calculable.

Although some decisions may have interpreted the profit maximization goal very liberally the fact remains that usually socially responsible conduct is good for business,⁶⁶ even though the extent of the benefit is often incapable of exact calculation. This is especially the case when socially responsible actions serve the purpose of public relations, advertising and the creation of general goodwill.⁶⁷

⁶² Parkinson *op cit* 280 comes to a similar conclusion concerning United States cases. See for example *AP Smith Manufacturing Co. v Barlow*. 39 ALC 2D 1179 (1953) 1187.

⁶³ *Op cit* 54.

⁶⁴ “The Limit of Corporate Social Responsibility” 1982 *Merc Law Review* 533.

⁶⁵ Slaughter “Corporate Social Responsibility: A New Perspective” 1987 *The Company Lawyer* 316, and Parkinson *op cit* 272.

⁶⁶ See Slaughter *op cit* 321-322 and Parkinson *op cit* 273-274 for discussion of *Evans & Brunner Mond and Co. Ltd* (1921).

⁶⁷ For a discussion of socially responsible conduct as a response to consumer opinion, see Slaughter *op cit* 322-324.

Solomon⁶⁸ in analyzing two publicly held corporations that are noted for being socially responsible and having objectives other than profit maximization, namely, *Ben and Jerry's Homemade Inc.* and *The Body Shop International PLC*, actually demonstrates how the socially responsible conduct brought in great profits.

There are however, always exceptions to the rule, and socially responsible conduct might not always be in the best interest (albeit long-term interests) of the company. Charitable donations are the type of socially responsible conduct by companies which are the most difficult to reconcile with the profit maximisation object. This usually occurs where directors are motivated by self-interest in making donations with company funds. In the light of preceding discussion concerning the ease with which the duty to act in good faith is complied with and the liberal interpretation the courts have sometimes given to the end of profit maximisation, it might be argued that shareholders might be unable to prevent such self-interested acts by directors. In situations like this, the effect of market forces (which go beyond the scope of this article) might well step in to act as a restraint on management conduct.⁶⁹

In short therefore, it appears that although the law is not mandatory and does not oblige companies to be socially responsible, the law usually does permit such conduct. The driving force behind such conduct is not any legal obligation but rather market forces that render such conduct good for business.⁷⁰ A rather ironic illustration of this is the *Dodge* case: Henry Ford was prevented from acting for the benefit of his employees and the community on the basis that this would not be in the best interests of the company. Ford subsequently paid out the minority shareholders (the *Dodge Brothers*) who had objected to this conduct and obtained

⁶⁸ Solomon "On the Frontier of Capitalism: Implementation of Humanomics by Modern Publicity Held Corporations – A Critical Assessment" in Mitchell *Progressive Corporate Law* (1996) 78.

⁶⁹ Butler and McChesney "Why They Give at the Office – Shareholder welfare and Corporate Philanthropy in Contractual Theory of the Corporation" 2001 *Cornell Law Review* 1197-1202, argue that market fines have a much more profound effect than the law on managerial conduct.

⁷⁰ See Carter op cit 519; Slaughter "Corporate Social Responsibility: A New Perspective" 1997 *The Company Lawyer* 321.

the court order preventing it, and proceeded with his social policies that resulted in the company being more profitable than it had ever been.⁷¹

3.3 *Duty to exercise Diligence, Care and Skill*

Directors in England, South Africa and USA must exercise certain standards of care and skill. In all three countries the standards of care and skill are very low. The standards of the ordinary prudent man⁷² have been constantly applied in England. The similar reasonable man test is applied in South Africa. This means that the care and skill required is that which “can reasonably be expected of a person with his knowledge and experience. A director is not liable for mere errors of judgement.”⁷³

Historically the courts have been reluctant to second-guess business judgments. Another reason that judges were reluctant in the past to interfere with managerial discretion is that the courts felt that shareholders could control management. Clearly today, particularly with large, public companies shareholder control is not always possible. Contributing to the particularly low standard of care and skill required by the courts has been the misconception that management is not a profession requiring specific skills.⁷⁴ Clearly this is not the case. The extensive literature and qualifications available on the topic of ‘management’ verify this.

Imposing a higher standard of care and skill on directors however, might result in reluctance on the part of directors to take risks. Risk-taking is, and always has been part of any successful business. Too stringent a standard therefore might hinder progress, productivity and profitability. It has been suggested⁷⁵ that courts should scrutinize decisions more closely from a procedural aspect in order to ensure that at least, the risk embarked upon was preceded by adequate research.

⁷¹ Mangrum “In Search of a Paradigm of Corporate Social Responsibility” 1983 *Creighton Law Review* 54.

⁷² *Overend and Gurney v Gibb* (1872) LRS HL 480 HL.

⁷³ Celliers *et al Entrepreneurial Law* (2000) 153.

⁷⁴ For an illustration of this misconception by English courts see Parkinson *Corporate Power and Responsibility* (1996) 108.

⁷⁵ *Ibid* 110-113.

The argument is that requiring directors to gather reasonably sufficient information before embarking on a risk will help insure that more calculated risks are taken without hampering risk-taking to too great an extent.

The King Report II⁷⁶ may require a slightly more stringent duty of care and skill expected of directors in terms of the common law. It states that directors “must, in line with modern trends worldwide, not only exhibit the degree of skill and care as may be reasonably expected from persons of their skill and experience (which is the traditional legal formulation), but must also:

- (i) exercise both care and skill any reasonable persons would be expected to show in looking after their own affairs as well as having regard to their actual knowledge and experience; and
- (ii) qualify themselves on a continuous basis with a sufficient (at least a general) understanding of the company’s business and the effect of the economy so as to discharge their duties properly, including where necessary relying on expert advice”⁷⁷;
- (iii) “must insist that board papers and other important information regarding the company are provided to them in time for them to make informed decisions”;⁷⁸
- (iv) “must ensure that procedures and systems are in place to act as checks and balances on the information being received by the board and ensure that the company prepares annual budgets and regularly updated forecasts against which the company’s performance can be monitored”;⁷⁹
- (v) must be diligent in discharging their duties to the company, regularly attend all meetings and must acquire a broad knowledge of the business of the company so that they can meaningfully contribute to its direction”.⁸⁰

⁷⁶ These provisions are not legally enforceable.

⁷⁷ *Ibid* ch 4 par 2.3.

⁷⁸ *Ibid* par 2.6.

⁷⁹ *Ibid* par 210.

⁸⁰ *Ibid* par 211.

In line with Parkinson's suggestions⁸¹ it appears that what was envisaged by the King Report II is an emphasis on procedural aspects with a more stringent obligation on the acquisition of knowledge and information. Nevertheless, it appears that there still would be no grounds for questioning an error of judgment provided it was preceded by the necessary accumulation of information and knowledge.

4 Conclusion

The forces of the market provide a greater incentive than the law to constrain management conduct that serves personal management interests as opposed to shareholder or company interests.⁸² The forces of the market create the threat of management job losses through hostile take-overs, mergers and so forth. Capital markets, product markets, markets for managerial talent all act as incentives for directors to run a company in a professional, efficient, and productive manner.⁸³ However, since the constraints afforded by the markets might not be complete,⁸⁴ some argue that the law should be amended to provide for a more comprehensive duty of skill and care with more stringent liability for management.⁸⁵

Such constraints however will also not necessarily be completely effective in controlling management conduct. Secondly more rigid legal constraints could easily result in the costs exceeding the benefits.⁸⁶ Thirdly such legal constraints might prevent socially responsible conduct that would normally result in increased profits for the company. Fourthly litigation and enforcement by the courts carries with it the following pitfalls:

⁸¹ *Supra*.

⁸² See Yoshiro Miwa "Corporate Social Responsibility: Dangerous and Harmful, Though Maybe not Irrelevant" 1999 *Cornell Law Review* 1195, 1227, 1232-1233.

⁸³ For a detailed analysis of the likely effects of the various markets on management behaviour, see Parkinson *op cit* 113-132 and Butler and McCherney "Why They Give at the Office – Shareholder Welfare and Corporate Philanthropy in Contractual Theory of the Corporation" 2001 *Cornell Law Review* 1197-1202.

⁸⁴ Parkinson *op cit* 33 for a discussion of the inability of the markets to prevent inefficiency as a result of the imperfection of markets.

⁸⁵ *Ibid* 132.

⁸⁶ *Idem* and Butler and McChesney *op cit* 1206.

- (i) It is expensive, disruptive to the company and can result in bad publicity.
- (ii) The outcome is uncertain.
- (iii) Damages are payable to the company not individuals thus significantly reducing the incentive to pursue a matter via the courts.
- (iv) Minority shareholders do not always have *locus stand* to enforce liability.

In conclusion, it would be difficult to successfully challenge philanthropic acts of a company for the following reasons:

- (i) The revision of ultra vires doctrine and the trend towards open-ended and general objects clauses.
- (ii) The fact that the fiduciary duties of good faith and care and skill are easily met and hence seldom violated.
- (iii) The liberal interpretation of long-term interest generally accorded by the courts.
- (iv) The general refusal by the courts to interfere with management judgement and discretion.

This however, is not too disturbing in the light of the overall benefit that usually accrues to the company as a result of philanthropic conduct as well as the constraining effect on managerial discretion that market forces provide. A reliance on the effect of the market on management conduct is apparent in the King Report II in its recommendations for remuneration of directors and it reads: “Levels of remuneration should be sufficient to attract, retain and motivate executives of the quality required by the board” and “performance-related elements of remuneration should constitute a substantial portion of the total remuneration package of executives in order to align their interests with the shareowners, and should be designed to provide incentives to perform at the highest operational standards.”⁸⁷

Reliance on market forces is not unfounded as it has been demonstrated that management controlled companies do not spend more on social expenditure than

⁸⁷ King Report II 61.

those under ownership control.⁸⁸ Ironically then, market pressure generally functions as a constraint on management conduct in that it ensures that the company is run efficiently, and at the same time, market pressure is an incentive for socially responsible conduct. This is also the view of the King Commission when it states: “Impetus for change will therefore come from market and society which will be the ultimate arbiters in corporate behaviour”.⁸⁹

It is clear therefore that in this view the pursuit of company interests is not incompatible with being socially responsible. The King Report emphasizes the importance of social, ethical and environmental issues and specifically states that they can “no longer be regarded as secondary to more conventional business imperatives”.⁹⁰ The conclusion is that a company’s long term survival and success is “inextricably linked to the sustainable development of the social and economic communities within which it operates”⁹¹ and that “this inclusive approach (i.e. inclusion of other stakeholders) is the way to create sustained business success and steady, long term growth in shareowner value”⁹² since “stakeholders have a direct bearing on ongoing corporate viability and financial performance”.⁹³

E Employees as Stakeholders of Corporate Governance

1 Introduction

“The 19th century saw the foundations being laid for modern corporations: this was the century of the entrepreneur. The 20th century became the century of management: the phenomenal growth of management theories, management consultants and management teaching (and management gurus) all reflected this pre-occupation. As the focus swings to the legitimacy and the effectiveness of the wielding power over corporate entities worldwide, the 21st century promises to be

⁸⁸ Parkinson *Corporate Power and Responsibility* (1996) 64.

⁸⁹ King Report II 97 par 23.

⁹⁰ *Ibid* 92.

⁹¹ *Idem*.

⁹² *Idem*.

⁹³ *Idem*.

the century of governance.”⁹⁴ This is a reflection and manifestation of how the world of work has changed over the last three centuries. The entrepreneur of the 19th century usually owned his business. The business was usually small and the employer was also the individual who owned the business. Because there were only a few employees the relationship between employer and employee was usually a personal relationship. As the era of Fordism⁹⁵ emerged in the 20th century, the economies of scale dictated that in order for an enterprise to survive it had to be large (i.e. many employees) and production was dictated by post-war Keynesian economic policies. In order to exercise control over these many employees, they had to be arranged into a hierarchy beginning at the bottom with unskilled labourers going up through a number of levels of supervisors and eventually management. Management was also divided into various levels in a hierarchical structure, beginning at lower management, going through to middle management and eventually reaching top management.⁹⁶ This hierarchical structure resembling an army was typical of the large corporations of the 20th century. With such large enterprises, a natural consequence was the fact that the relationship between the employer (now usually a company and not an individual) was no longer a personal relationship. In the 20th century employee interests in the industrialized economies were generally protected by trade unions and collective bargaining.⁹⁷ Collective bargaining regulated employer-employee relations, institutionalized conflict and protected employees from “arbitrary management action”.⁹⁸ The need to remain competitive in the global economy has resulted in a quest for flexibility. The result is *inter alia* flatter management structures,⁹⁹ an ever-increasing number of “atypical employees,”¹⁰⁰ decentralization of collective

⁹⁴ King Report II 15 Par 24.

⁹⁵ ‘Fordism’ refers to an economy of mass production fuelled by mass consumption. (See Slabbert *et al The Management of Employment Relations* (1999) 87.)

⁹⁶ Blanpain “Work in the 21st Century” 1997 *ILJ* 185,195.

⁹⁷ Anstey “National Bargaining in South Africa’s Clothing Manufacturing Industry: Problems and Prospects of Multi-employer Bargaining in an Industry under Siege” 2004 *ILJ* 1829.

⁹⁸ Anstey *op cit* 1830.

⁹⁹ Blanpain “Work in the 21st Century” 1997 *ILJ* 185.

¹⁰⁰ See Theron “Employment Is Not What It Used to Be” 2003 *ILJ* 1247, and Cheadle *et al Current Labour Law* 2004 135-170.

bargaining,¹⁰¹ the individualization of the employer employee relationship¹⁰² and a general world-wide decline in union membership and power.¹⁰³ Given these facts it becomes necessary to look to alternate means to protect the employee against employer abuse of power in a relationship where the balance of power between the parties is inherently uneven. The possibility of corporate governance and acceptance of the stakeholder theory as a protector of employee interests is explored hereunder.

2 The Role of the Corporation in Society

No enterprise or corporation can survive without society. In fact business enterprises are a creation of society.¹⁰⁴ Society is made up of what has been referred to as the 'stakeholders' of business.¹⁰⁵ They include the community in which the corporation or business enterprise operates, its customers, employees and its suppliers.¹⁰⁶ Business and society are mutually dependent. In pursuit of wealth and profit maximization, companies utilize human and other resources and in doing so provide employment, investment, goods and services.¹⁰⁷ Business therefore forms part of the fabric of society. In fact as King explains: "In the current era, the company remains a key component of business. It is the chosen medium for entrepreneurs and business people to perform their tasks. It has more immediate presence for the citizens of a country than governments can ever hope to have while it is the legitimate agent for profit making activities."¹⁰⁸ Since "there

¹⁰¹ Anstey 1831-1833; and ch 5 *supra*.

¹⁰² See in general Deery and Mitchell *Employment Relations: Individualisation and Union Exclusion* (1999) and ch 6 *infra*.

¹⁰³ See Raday "The Decline of Union Power – Structural Inevitability or Policy Choice?" in Conaghan, Fischl and Klare *Labour Law in an Era of Globalization* (2002) and ch 5 *supra*.

¹⁰⁴ Saxena *Taxman's Politics, Ethics and Social Responsibility of Business* (2004) 17.

¹⁰⁵ Edward Freeman, Professor of Applied Ethics at the University of Virginia's Darden School, developed the 'stakeholder theory'. In terms of this theory managers should serve the interests of all those who have a stake in the company. These are employees, suppliers, customers and the community in which the company operates.

¹⁰⁶ King Report II 8 par 5.3.

¹⁰⁷ Saxena *op cit* note 9 at 17.

¹⁰⁸ "Corporate Governance: Creating Profit with Integrity" *Management Today* May 2003 8.

can be no escape from sceptical consumers, activists and protestors,”¹⁰⁹ a company must support the wider societal values in performing the functions of wealth creation, economic growth and the creation of employment opportunities. Unfortunately the pursuit of profits has at times led to exploitation of human and other resources. As corporations became larger and more powerful, society began to place pressure on these corporations to conduct their business in a socially responsible manner. Since corporations are dependent on society for their survival the necessity to conduct their affairs in an ethical and fair manner taking the interests of society in general into account is apparent.¹¹⁰ The need for the legitimacy of corporations becomes more relevant given the immense power that some corporations now wield.¹¹¹

3 King Report II and Stakeholder Theory

The King Report II provides guidelines for South African companies wishing to implement good corporate governance practices.¹¹² It is the view of the King Commission that in this global economy no corporation can afford to run its business without due consideration of the interests of all the stakeholders.¹¹³ This

¹⁰⁹ *Idem.*

¹¹⁰ See De Jongh “Know Your Stakeholders” 30 June 2004 *Finance Week* 34 where he states: “In today’s CNN age everything we do as individuals and companies is exposed in seconds and therefore it’s so important to understand exactly who all the stakeholders are that are affected by our business and how they again affect our business on a daily basis.”

¹¹¹ Crowther and Jatana *International dimensions of Corporate Social Responsibility* (2005) v–vi, explain: “Though the spectre of physical war has not vanished, it might be argued that the focus of war has shifted from imperialistic or ideological reasons to economic reasons – at least as far as governments and countries are concerned. But governments, as the epitome of nation states, are becoming less important because what is becoming more important than governments and nation states are the multinational companies operating in the global environment. Some of these multinationals are very large indeed – larger than many nation states and a good deal more powerful.”

¹¹² Corporate governance is defined as “the system by which companies are directed and controlled” by the Cadbury Report on Corporate Governance (UK). This is the meaning that is ascribed to the term in this article.

¹¹³ King Report II par 14 reads: “In the global economy there are many jurisdictions to which a company can run to avoid regulation and taxes or to reduce labour costs. But, there are few places where a company can hide its activities from sceptical consumers, shareowners or protestors. In short, in the age of electronic

view is commonly referred to as “stakeholder theory” in terms of which a company should be run in the interests of all its stakeholders rather than just the shareholders.¹¹⁴ These stakeholders have been defined as “those whose relations to the enterprise cannot be completely contracted for, but upon whose co-operation and creativity it depends for its survival and prosperity”.¹¹⁵ As mentioned this includes the community in which the company operates, its customers, employees and suppliers.¹¹⁶ Since business is dependent on society and does not work in isolation of it,¹¹⁷ it follows that corporate decisions and actions that have a negative impact on stakeholders can in turn impact negatively on the corporation.¹¹⁸

A company’s long term viability is dependent on its reputation.¹¹⁹ Reputation in turn is dependent on a company’s relationship with, and the way it treats anyone and everyone affected by it.¹²⁰ This includes employees. Relationships with all

information and activism, no company can escape the adverse consequences of poor governance.”

¹¹⁴ Vinten “Shareholder Versus Stakeholder – Is There a Governance Dilemma?” 2001 *Corporate Governance* January 36 at 37.

¹¹⁵ King Report II 98 par 1.4.

¹¹⁶ King Report II 8 par 5.3.

¹¹⁷ This is explicitly acknowledged, not only in the King Report II, but also in the 1994 *King Report I*: The King Report II 7 par 4 reads: “In adopting a participative corporate governance system of enterprise with integrity, the King Committee in 1994 successfully formalised the need for companies to recognise that they no longer act independently from the societies and the environment in which they operate.”

¹¹⁸ An extreme example of such lack of ethics on the part of a corporation is the lack of safety controls that caused a gas leakage at Union Carbide Limited (Bhopal, India) which led to thousands of deaths and led to another 200 000 to 300 000 suffering minor injuries, loss of employment, or found themselves destitute due to the loss of the only bread-winner in the family. The outcome was that the company lost the support of society, it had to pay heavy compensation and was forced to close down. See Ryan “Social Conscience Comes with a Price Tag” 2004 *Without Prejudice* 7-8.

¹¹⁹ See Hyman and Blum “Just Companies Don’t Fail: The Making of the Ethical Corporation” 1995 *Business and Society Review* 48-50.

¹²⁰ As stated in the King Report II 91 par 2: “In a corporate context, ‘sustainability’ means that each enterprise must balance the need for long-term viability and prosperity – of the enterprise itself and the societies and environment upon which it relies for its ability to generate economic value – with the requirement for short-term competitiveness and financial gain. Compromising longer term prospects purely for short-term benefit is counter-productive. A balance must be struck and

stakeholders, including employees must be actively managed in a manner that reflects integrity, trust and transparency, so that the company will gain the support and backing of its stakeholders which becomes even more important if things go wrong.¹²¹ Companies should create a climate which not only attracts talented employees but which also motivates and is able to retain these employees. Employees have been described as forming part of a company's assets and competitive edge.¹²² The ability of an enterprise or company to remain productive in an increasingly competitive global economy is dependent *inter alia* on its ability to develop and retain human talent.¹²³ In order to do this a company must conduct itself in an ethical manner towards its employees. In fact, as Rossouw concludes: "Ethics is no longer viewed as just another aspect of the organization that needs to be managed. On the contrary, it is regarded as an integral part of the company without which it would be unable to fulfil its purpose, mission and goals...Consequently, ethical behaviour is regarded as strategically important and unethical behaviour as jeopardising not only the business success of the organization, but also as undermining the very identity of the organization."¹²⁴ In short where a company treats individual employees with dignity and respect, the human potential necessary for competitive advantage and productivity in a global economy will be unleashed.¹²⁵

failure to do so will prove potentially irreparable, and have far-reaching consequences, both for the enterprise and the societies and environment within which it operates. Social, ethical and environmental management practices provide a strong indicator of any company's intent in this respect."

¹²¹ De Jongh "Know your Stakeholders" 2004 *Finance Week* 30 June 34.

¹²² Rossouw "Unlocking Human Potential with Ethics" February 2005 *Management Today* 28 states: "The way that companies think about their people and what they choose to do (or not to do) in unlocking their human potential determines their future sustainability."

¹²³ See Rossouw *op cit* where he identifies the results of various surveys that demonstrate that "companies that invest in their human capital, develop it and reward people for performance, make more money than those who place less emphasis on human capital."

¹²⁴ Rossouw *op cit* 30.

¹²⁵ *Idem*.

In terms of the Commonwealth Business Council Working Group¹²⁶ the defining characteristics of good corporate citizenship for the attainment of sustainability¹²⁷ with reference to employee relations are:

- (i) Respect for the well-being of employees;
- (ii) fair treatment of employees having due regard to cultural sensitivities;
- (iii) development of employees' potential through skill and technology transfer;
- (iv) sharing of the company's success with the employees;
- (v) recognition of international agreements with reference to the freedom of association and collective bargaining; and
- (vi) elimination of all forms of forced labour.

The above guidelines will automatically be implemented where a company is aware of the immense value of human capital¹²⁸ and consequently treats its employees with dignity and respect. In terms of King Report II: "nurturing, protecting, capturing, retaining and developing human capital can therefore be seen as a vital ingredient for the sustainable economic performance of any company. A focus on developing human capital represents a focus on breathing life into the oft-quoted statement that 'our people are our most important asset'." ¹²⁹

¹²⁶ *Draft Principles for Best Practice on the Relationship Between International Enterprises and Countries to Encourage Foreign Direct Investment*, CBC survey "A Good Environment for Business Development and Investment"; "CAGC Guidelines on Corporate Governance"; "The UN Global Compact", the Work of Prince of Wales Business Leaders' Forum; and the World Business Council for Sustainable Development. See King Report II 92 footnote 22.

¹²⁷ The concept of sustainability in the business context and in terms of the King Report II refers to the "achievement of balanced and integrated economic, social and environmental performance- now universally referred to as the triple bottom line." See Khoza "Corporate Governance: Integrated Sustainability Reporting" *Management Today* May 2002 18.

¹²⁸ King Report II 118 par 2 defines human capital as "the latent, or potential, value that employees at all levels – individually and collectively - represent for a company. This is a function of their knowledge, learning, intuition, skill, expertise and experience, both existing and, importantly, latent."

¹²⁹ Pg 118 par 2.

4 King Report II and Ethics

4.1 Introduction

The link between corporate governance and ethics has already been established in discussing the value of human capital and an organization's need for the support of all stakeholders. This link is inevitable in terms of the King II Report given the fact that it takes an inclusive approach with reference to stakeholders.¹³⁰ The necessity for corporate ethics and morality has been expanded upon in the King Report II by the introduction of seven characteristics or principles which must be adhered to for good corporate governance.¹³¹ These principles serve to guide and govern the moral conduct of individuals in carrying on the business activities of the company. If adhered to by employers, the natural consequence is that employees will be treated with dignity and respect, thus providing the acceptable working conditions and protection of employee interests otherwise provided by collective bargaining. These principles are discussed below.

4.2 Discipline

According to the King Report II “[c]orporate discipline is a commitment by a company's senior management to adhere to behaviour that is universally recognized and accepted to be correct and proper. This encompasses a company's awareness of, and commitment to, the underlying principles of good governance, particularly at senior management level.”¹³² An international survey found that 85% of South African “senior managers have at some stage overridden controls to perpetuate fraud.”¹³³ If this finding is accurate the need for discipline is

¹³⁰ The inclusive approach to stakeholders (also referred to as a “participative corporate governance system,” page 7 of King Report II), contradicts the view that companies have no other obligation than to make as much profits as possible for the shareholders, but contends that corporations have moral obligations to a wide range of stakeholders. See Rossouw “Business Ethics and Corporate Governance in the Second King Report: Farsighted or Futile?” 2002 *Koers* 405 at 410.

¹³¹ See King Report II par 18.

¹³² Par 18.1.

¹³³ “King II Report – The Expectation Gap: Corporate Governance” 2002 *Enterprise* Issue 68, 63.

manifest. The King Report II also refers to a “license to operate”.¹³⁴ This means that a company needs to do more than what is legally required of it. It needs to win the approval of all stakeholders and thereby be ‘legitimised’ by them.¹³⁵ Amongst the stakeholders from whom a company must earn its license to operate are employees. Effective communication with all stakeholders including employees is the way to achieve this. Employees should be provided with *inter alia* information concerning employment, retrenchments, training and affirmative action.¹³⁶

4.3 Transparency

The Report defines ‘transparency’ as follows: “Transparency is the ease with which an outsider is able to make meaningful analysis of a company’s actions, its economic fundamentals and the non-financial aspects pertinent to that business. This is a measure of how good management is at making necessary information available in a candid, accurate and timely manner – not only the audit data but also general reports and press releases. It reflects whether or not investors obtain a true picture of what is happening inside the company.” It will no longer suffice for a company to provide information on an ad hoc need to know basis. Directors will be held accountable for the accuracy of the content of the information provided to outsiders.¹³⁷ The King Report stresses the importance of reporting as it is “the real measure of organizational integrity – and the basis of sound relationships with stakeholders.”¹³⁸ In fact transparency has been described as the cornerstone of corporate governance.¹³⁹ The Report provides guidelines for both financial and non-financial reporting.¹⁴⁰ It states that a company should be guided by the

¹³⁴ King Report II 8 par 5.2.

¹³⁵ Rossouw *op cit* 411.

¹³⁶ Rigby “Tell It All” February 1997 *Enterprise* 72.

¹³⁷ S 251 of Companies Act 61 of 1973 states: “Every director or officer of a company who makes, circulates or publishes or concurs in making, circulating or publishing any certificate, written statement, report or financial statement in relation to any property or affairs of the company which is false in any material respect shall be guilty of an offence.”

¹³⁸ 99 par 11.

¹³⁹ Khoza “Corporate Governance: Integrated Sustainability Reporting the Key Principle” May 2003 *Management Today* 18 at 21.

¹⁴⁰ 99-100.

principles of “reliability, relevance, clarity, comparability and verifiability.”¹⁴¹ Secondly the Report states that in order for reporting to be effective there must be an integrated approach.¹⁴² It suggests that one way of achieving such integrated approach would be to “categorise issues into different levels.”¹⁴³ The suggested levels are: Firstly the disclosure of company principles and codes of practice. The second level would concern itself with the disclosure of information concerning the practical implementation of these codes and principles. “This will involve a review of whether the company has taken steps to encourage adherence to those principles as may be evidenced in the form of board directives, designated policies and communiqués, supported by appropriate non-financial accounting mechanisms.”¹⁴⁴ The final level would include the investigation and reporting or demonstration of changes and benefits as a result of the implementation of these codes of conduct and principles.¹⁴⁵ Not only the Companies Act¹⁴⁶ but also the King Reports are relevant to the principle of transparency. One of the objectives of the Promotion of Access to Information Act¹⁴⁷ is the promotion of “transparency, accountability and effective governance of all public and private bodies.”

The value of transparency has also been acknowledged by the OECD¹⁴⁸ when it stated: “The disclosure of the corporation’s contractual and governance structures may reduce uncertainties for investors and help lower capital costs by decreasing related risk premiums. Such transparency may also encourage a common understanding of the ‘rules of the game’, and provide employees with information that may help reduce labour friction.”¹⁴⁹

¹⁴¹ 99 par 12.

¹⁴² 99 par 14.

¹⁴³ *Idem.*

¹⁴⁴ *Idem.*

¹⁴⁵ *Ibid.*

¹⁴⁶ 61 of 1973.

¹⁴⁷ 2 of 2000.

¹⁴⁸ Organisation for Economic Cooperation and Development.

¹⁴⁹ 1998b.

Transparency is of paramount importance for investor confidence and corporate governance rating systems include transparency and disclosure as important aspects of scoring for investor confidence.¹⁵⁰

4.4 *Independence*

The King Report provides “that measures should be put in place so as to avoid possible conflicts of interest such as dominance by a large shareholder or strong chief executive.”¹⁵¹

4.5 *Accountability*

Individuals or groups who make decisions and take action on behalf of the company must be accountable for these actions and decisions. Furthermore mechanisms must be put in place to allow for “effective accountability”.¹⁵² A distinction is made between ‘accountability’ and ‘responsibility’. “One is liable to render an account when one is accountable and one is liable to be called to account when one is responsible.”¹⁵³ In other words, when one is accountable there is an obligation to explain the reasonableness and appropriateness of one’s actions if called upon to do so.¹⁵⁴ Being accountable to employees as stakeholders renders company decisions and actions that affect employees open to question. This also emphasizes the need for transparency and effective communication with employees.

4.6 *Responsibility and Social Responsibility*

If management does not conduct itself in a responsible manner with regard to stakeholders’ penalties and corrective action will be enforced.¹⁵⁵ Responsible behaviour does not only entail abiding by laws, refraining from acting in a discriminatory manner and respecting human rights, but requires companies to be

¹⁵⁰ Editorial: “The Relationship between Corporate Governance, Transparency and Financial Disclosure” October 2002 *Corporate Governance* 253.

¹⁵¹ 12 par 18.3.

¹⁵² King Report II ch 12 par 18.4.

¹⁵³ King Report II ch7 par 5.

¹⁵⁴ Saxena Taxmann *Politics Ethics and Social Responsibility* (2005) 91.

¹⁵⁵ King Report II ch12 par 18.5.

pro active and to take positive steps in becoming involved in developmental issues.¹⁵⁶ Within the South African context three areas of social responsibility relevant to employees as stakeholders are Black economic empowerment, the health of employees particularly with reference to HIV/Aids and human development.¹⁵⁷ As seen the King Report II considers the development of human development of paramount importance not only because of our legacy of apartheid but also because of the intrinsic value of well trained and skilled employees for companies. The result of implementation of social responsibility is increased productivity and a good reputation or public image, which in turn have economic benefits.¹⁵⁸

4.7 Fairness

Fairness is not a concept that can easily be defined. In articulating the principle of fairness the report refers to taking into account the interests of all those who have an interest in the company in a balanced way.¹⁵⁹ The Report goes on to state: “The rights various groups have to be acknowledged and respected.”¹⁶⁰ Amongst these groups are employees. There should be more balanced relations between the organization and its employees so that fairness is acquired. Even though a company may be acting in a lawful manner such conduct may not necessarily be fair. The adoption of the principle of fairness is therefore important. With reference to employees it is in line with everyone’s constitutional right to fair labour practices.¹⁶¹

¹⁵⁶ Rossouw “Business Ethics and Corporate Governance in the Second King Report: Farsighted or Futile?” 2002 *Koers* 412.

¹⁵⁷ *Idem*.

¹⁵⁸ As King “Corporate Governance: Adopting an Inclusive Approach” May 2002 *Management Today* 28 states: “When investors scan the market to establish where they need to make their next investment, they now look first at corporate governance practices in their target market and only thereafter investigate the financial situation.”

¹⁵⁹ King Report II ch12 par 18.6.

¹⁶⁰ *Idem*.

¹⁶¹ S 23(1) of the Constitution provides that everyone has the right to fair labour practices.

4.8 *Ubuntu*

This is an African value system which the King Report II suggests should be used as a guideline by companies for the application of the ethical principles outlined in the King Report II in order to achieve sustainability. It signifies “a commitment to co-existence, consensus and consultation.”¹⁶² It is encompassed in the phrase ‘*ubuntu nguumuntu ngabantu*’ which means: “I am because you are, you are because we are”. In other words the interdependence of humanity and community of society is the basis of this principle.¹⁶³ In terms of the King II Report “*Ubuntu* has formed the basis of relationships in the past and there is no reason why it could not be extended to the corporate world. International experience, which reveals a growing tendency towards an emphasis on non-financial issues, is a wake-up call to all Africans not to abandon their cultures when they become part of the business sector, but to import and infuse these practices into the corporate world.”¹⁶⁴ Khoza has identified the following characteristics of African values and hence *Ubuntu*:

- (i) humility;
- (ii) respect (social obligation, personal dignity, ancestral value and essence of a person);
- (iii) community and sense of belonging;
- (iv) responsibility and concern for others;
- (v) generational responsibilities; respect for the social obligation/ contract;
- (vi) respect for personal dignity;
- (vii) neighbourliness; and
- (viii) spirit of inclusion and general consensus.¹⁶⁵

Application of these values by companies is a guarantee that the inherent imbalance of power between employers and employees will not be exploited by employers. Since investors are increasingly placing more importance on a

¹⁶² Rossouw *op cit* 413.

¹⁶³ De Kock and Labuschagne “Ubuntu as a conceptual directive in realising a culture of effective human rights” 1999 *THRHR* 114 at 118 par 3.1.

¹⁶⁴ 94 par 7.

¹⁶⁵ “Corporate Governance: Integrated Sustainability Reporting” May 2002 *Management Today* 2002 18. See also De Kock and Labuschagne *op cit* par 4.1.

company's ethical conduct¹⁶⁶ in their evaluation of companies, the corporate application of the concept of *ubuntu* can go a long way to achieve the primary objective of the implementation of a system of good corporate governance, namely, the attraction of foreign investment.¹⁶⁷

4.9 Conclusion

Company adherence to these principles with regard to employees, and even workers who do not necessarily qualify as employees in terms of labour legislation, such as for example independent contractors, will result in the protection and upholding of the interests of all workers (both typical and atypical employees). In summary: Unfair treatment of employees is bad for business and the best means of enforcing ethical conduct towards employees are the forces of the market.¹⁶⁸ However, the mere statement that these principles are applicable is no guarantee of a company's adherence thereto and consequently no guarantee of the fair and ethical treatment of employees by companies. Companies need to have guidelines on how to apply these principles in practice and application of these principles must be monitored. These are provided by the King Report II and are discussed below.

5 **Enforceability of Good Corporate Governance**

The Board of directors is ultimately responsible for good corporate governance. The chief executive officer has a key role to play in this regard. In terms of the King Report II, with particular reference to the management of human capital, the chief executive officer has the following responsibilities:¹⁶⁹

¹⁶⁶ According to a survey of opinions undertaken by McKinsey (see Armstrong "Corporate Governance: The Way to Govern Now" May 2003 *Management Today* 10) a premium of 22% would be paid for a well-governed South African company.

¹⁶⁷ Rossouw "Business Ethics and Corporate Governance in the Second King Report: Farsighted or Futile?" 2002 *Koers* 406.

¹⁶⁸ It is my view that the market is the best means of enforcement despite the fact that a chief executive officer can be dismissed for failure to ensure that employees are treated fairly.

¹⁶⁹ 53 par 2 and 3.

- “develop and recommend to the board a long term strategy and vision for the company that will generate satisfactory levels of shareowner value and positive, reciprocal relations with relevant stakeholders;
- ensure the company has an effective management team and to actively participate in the development of management and succession planning (including the chief executive officer’s own position);
- maintain a positive and ethical work climate that is conducive to attracting, retaining and motivating a diverse group of top-quality employees at all levels of the company. In addition, the chief executive officer is expected to foster a corporate culture that promotes ethical practices, encourages individual integrity, and fulfils the social responsibility objectives and imperatives.”

Failure to adequately perform these duties amounts to incompetence or poor work performance and since the chief executive officer is an employee of the company, this could result in a valid dismissal.¹⁷⁰ This is an indirect form of enforcing the fair treatment of employees.

South Africa like many other countries has chosen not to legislate on reporting requirements concerning good corporate governance and sustainability.¹⁷¹ Khoza argues that lack of legislative imperatives¹⁷² is not the cause of corporate collapses and the type of unethical conduct that was seen in for example the case of the highly publicized collapse of Enron.¹⁷³ Khoza’s view is that this kind of unethical conduct and consequent collapse of companies emanates from a lack of

¹⁷⁰ Schedule 8 –Item 9 of *Code of Good Practice: Dismissal* of the Labour Relations Act 66 of 1995 recognises poor work performance of an employee as a valid and acceptable reason for dismissal.

¹⁷¹ Khoza “Corporate Governance: Integrated Sustainability Reporting the Key Principle” May 2003 *Management Today* 21.

¹⁷² The discussion concerning lack of legislative imperatives referred to in this context is limited to legislation concerning the disclosure and monitoring of non-financial issues. See Konar “Legislation Reviewed as a Result of Corporate Misdemeanours” May 2003 *Management Today* 16 concerning the regulatory framework for accountants and auditors.

¹⁷³ See King “Corporate Governance: Creating Profit with Integrity” May 2003 *Management Today* 8.

commitment to good corporate governance practices rather than from a lack of rules.¹⁷⁴ He explains his preference for voluntarism as follows: “It is my view that this is a particularly difficult area to legislate and the promulgation of legislation will only contribute to a tick box approach to compliance rather than to instil a sense of *ubuntu* amongst leaders in the corporate sector. It is my belief that we should continue to rely on voluntary mechanisms to lift the standard of corporate behaviour in this regard. These voluntary mechanisms, I might add are not without teeth. If one takes the community or the market as an arbiter...any company that is engaged in undesirable practices will find that this negatively impacts its bottom line through consumer and market power...Guidelines that enjoy some measure of moral authority and wide support – from peers, customers or other stakeholders – will become difficult to ignore.”¹⁷⁵ In line with this view it is clear that inappropriate and unfair treatment of employees will not only result in loss of support from consumers and possibly the community at large but will also result in lack of commitment from employees which in turn translates into a loss of productivity.¹⁷⁶

Although the King Report II does not provide for enforcement legislation it provides guidelines for the implementation of good corporate governance.¹⁷⁷ In terms thereof the following core ethical principles should be adopted: fairness, transparency, honesty, non-discrimination, accountability and responsibility and respect for human dignity, human rights and social justice. The report then goes on to state that the formulation of these core principles is meaningless without “demonstrable adherence”.¹⁷⁸ It therefore suggests the following measures to ensure adherence:

- “regular formal identification of ethical risk area;
- development and strengthening of monitoring and compliance policies, procedures and systems;

¹⁷⁴ *Op cit* 21.

¹⁷⁵ *Idem*.

¹⁷⁶ See in general Rossouw “Unlocking Human Potential with Ethics” February 2005 *Management Today* 28.

¹⁷⁷ 103 par 7 and 8.

¹⁷⁸ 103 par 8.

- establishment of easily accessible safe reporting (e.g. “whistle-blowing”) channels;
- alignment of the company’s disciplinary code of ethical practice, to reinforce zero-tolerance for unethical behaviour;
- integrity assessment as part of selection and promotion procedures;
- induction of new appointees;
- training on ethical principles, standards and decision-making;
- regular monitoring of compliance with ethical principles and standards, e.g. using the internal audit function;
- reporting to stakeholders on compliance; and
- independent verification of conformance to established principles and standards of ethical behaviour.”¹⁷⁹

F Directors’ Fiduciary Duties Towards Employees in Terms of Entrepreneurial Law

1 Introduction

For the purpose of this thesis the duties of directors in terms of entrepreneurial law¹⁸⁰ are treated separately from their other “duties” such as in terms of the King Report II. The King Report is a voluntary code and is consequently not legally enforceable. Its provisions are only negatively enforced under certain circumstances. This negative enforcement is achieved in terms of the the JSE Securities Exchange listing requirements which provide that a company must report in its annual financial statements as to the extent of compliance with the King Report II, the extent of non-compliance and, explain the reasons for such non-compliance.¹⁸¹

As has been discussed above,¹⁸² many employees do not enjoy representation by trade unions, and consequently their interests are not represented on a collective

¹⁷⁹ *Idem.*

¹⁸⁰ Entrepreneurial law is the law that governs business organisations.

¹⁸¹ *JSE Securities Exchange Listing Requirements* (2003) par 8.63.

¹⁸² See ch 6 sub-section F *supra*.

basis either at plant level or at industrial level.¹⁸³ From their perspective the possibility of the extension of directors' fiduciary duties to them as employees becomes most relevant. The possibility of extending directors' fiduciary duties to employees will be discussed in this section. Since these fiduciary duties, if so extended, unlike the King Report II, will be legally enforceable in terms of entrepreneurial law, they can potentially play a very important role in the protection and promotion of employee interests.

2 Directors' Duty to Act in the Best Interests of the Company

As seen,¹⁸⁴ directors have a duty to act in the interests of the company.¹⁸⁵ The question as to what constitutes "the interests of the company" is far from settled.¹⁸⁶ Traditionally, this duty has been limited to a duty towards shareholders.¹⁸⁷ However, the notion that directors should also act in the interests of other stakeholders (aside from shareholders), including employees, has gained relevance since the late 1980's and early 1990's on a worldwide scale.¹⁸⁸ Since the intricacies of this debate are beyond the scope of this thesis, suffice it to say that the latter view is supported by a "considerable body of opinion."¹⁸⁹ This view can take two forms:¹⁹⁰

- (i) In terms of the "enlightened shareholder value approach" directors should consider the interests of other stakeholders apart from shareholders where this would be for the long-run benefit shareholders. In short therefore,

¹⁸³ See Du Plessis "Werksdeelname in die Bestuursorgane van 'n Maatskappy" 1981 *THRHR* 380 where the possibility of worker's participation in the management of a company is discussed. At the time of writing the LRA had not yet been drafted. As discussed in ch 5 sub-section D 7 the LRA has provisions in place for such worker participation at plant level which unfortunately have not been successful.

¹⁸⁴ Subsection D 3 *supra*.

¹⁸⁵ See Naudé *Die Regsposisie van die Maatskappydirekteur met Besondere Verwysing na die Interne Maatskappyverband* (1969) doctoral thesis 154-158 for a detailed discussion of what this duty entails.

¹⁸⁶ GG No 26493 23 June 2004 19-24.

¹⁸⁷ *Ibid* 20.

¹⁸⁸ *Ibid* 21.

¹⁸⁹ *Idem*.

¹⁹⁰ See UK's DTI Consultation Paper 2001 entitled "Modern Law for Competitive Economy: The Strategic Framework".

shareholder interests retain primacy even though due regard to the interests of other stakeholders is not prohibited.

- (ii) In terms of the “pluralist” approach the interests of shareholders do not retain primacy over the interests of other stakeholders. The interests of other stakeholders have independent value to the extent that, where appropriate, they can take precedence over shareholder interests.¹⁹¹

It has been proposed that South African entrepreneurial law be amended to reflect the “pluralist” approach.¹⁹² In fact “employee welfare” has been identified as an “end in itself”.¹⁹³

3 Conclusion

Should these proposals be included in new legislation, employees will have another legally enforceable means (aside from those discussed in ch 7 and 8 *infra*) of ensuring that their legitimate interests are protected.

¹⁹¹ See GG 26493 23 June 2004 23.

¹⁹² *Ibid* 26.

¹⁹³ *Op cit* 25-26 it is stated: “This means that unlike the traditional company law position, under the constitutional framework, stakeholder interests in addition to those of shareholders, have independent value in certain instances. Directors may, in certain situations, have a specific duty to promote the stakeholders’ interests as ends in themselves. For example, a company may find itself forced to provide access to information to an employee in accordance with the legislation, which advances the Constitutional right of access to information, even though this may be prejudicial to shareholder value maximisation. Further, promoting employee welfare (in certain situations) may be an end in itself, and not only a means to promoting shareholder welfare. Expressed differently, advancing the interests of other stakeholders is not invariably a subordinate consideration to the primary goal of directors to act in the best interests of the shareholders as a body.”

G Conclusion

Most socially responsible behaviour is also for the benefit of the company. Market forces have been the driving impetus for the advent and growth of corporate social responsibility and good corporate governance. Amongst these market forces have been the inability of governments to provide adequate social security, moves towards privatisation, growing public concerns for the environment, the positive effects to the company of a good corporate image and so on. The judicial trend toward allowing companies to benefit society and other stakeholders such as employees is merely an illustration of how the common law will adapt to suit the current socio-economic environment within which it operates.

The code of conduct provided for in the King Report II provides useful and practical guidelines for employers to benchmark their conduct. Adoption of these guidelines will ensure the fair treatment of employees in respect of their conditions of employment when they are not in a position to rectify it by way of consultation or collective bargaining.

As far as enforcement of good corporate governance is concerned Mervyn King, the author of the King Report II is quoted as saying “The report is a set of guidelines and I would resist any attempt to have these recommendations legislated. Global market forces will sort out those companies that do not have sound corporate governance”.¹⁹⁴ However, even if King is wrong about the effectiveness of market forces in forcing companies to adhere to the King Report II guidelines, if the proposals for the amendment of South Africa’s entrepreneurial laws are accepted,¹⁹⁵ the law will force employers to consider employee interests.

¹⁹⁴ *Sunday Times Business Times* 18 August 2002 14.

¹⁹⁵ See subsection F *supra*.

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.

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