Decolonising the labour law curriculum in the new world of work

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OPSOMMING

Dekolonisering van die arbeidsregkurrikulum in die nuwe wêreld van werk

Dekolonisering van die kurrikulum het onlangs by verskeie hoër onderwysinstellings onder die vergrootglas gekom en dit het 'n realiteit vir academici, bestuurstrukture en studente geword. Bewegings soos "#Rhodesmoetval" en "#fooiemoetval" het talle onderliggende aangeleenthede in die soeke na die dekolonisering van kurrikula na vore gebring.

Een van die velde wat onder die loep geplaas is, is arbeidsreg. Daar word aangedui dat die dienskontrak, die reg van toepassing op meester en slawe asook ander eienskappe wat van kolonialisme geërf is en waarvan die invloed steeds relevant is in die roepe na dekolonisering van arbeidsreg, vanself gedekoloniseer is by wyse van, onder andere, die insluiting van billike arbeidspraktyke, erkenning van diversiteit, die toepassing van die beginsels van billikheid, regverdigheid en sosiale geregtigheid en die beskerming teen seksuele teistering.

1 INTRODUCTION

Decolonisation of the curricula at higher education institutions is not only topical, but has also become a reality faced by many academics, management structures and students. Movements such as "#Rhodesmustfall" and "#feesmustfall" have brought underlying issues, such as a call for decolonising the curricula, under the spotlight. One such subject area that has been put under the spotlight is labour law. The history of labour law has been narrated often with its main purpose or goal being the compensation of employees for the inequality of bargaining power their experience. Employees are now recognised as stakeholders in the employer's enterprise and are owed not only the duty of fair dealing, but are also entitled to a fair wage, safe working conditions and consultation and negotiation on variation and improvement of working conditions.

The call for decolonisation necessitates a more radical rethinking of not only the hidden assumptions that underlie the subject, but also the way it is taught. Constitutional rights, labour rights and human rights are important considerations to take into account in the bid for decolonising labour law and the curriculum.

Labour law may be distinguished from other branches of the law. Arthurs[1] describes it as follows:

> "[L]abour law is different from other legal fields because it is so often promulgated through non-legal (ie political, social and cultural) processes, expressed in the form of 'non-legal' (ie non-state) norms and administered through "non-legal" (ie non-crucial) forums operating with non-legal processes (ie those not normally employed by conventional courts)."[2]

The purpose of the article is to explore whether, and if so, labour law has decolonised itself in the new world of work, and whether there is a need to further decolonise the labour law curriculum against the backdrop of these changes.

2 CONCEPT OF DECOLONISATION

> "The call for 'free, quality, decolonised' tertiary education is one that has been made consistently and assertively in the last two years in South African universities. As to what constitutes decolonisation there is much debate. Decolonisation, it has been argued, goes beyond a tinkering with the syllabus; it is more than inserting a few new insights and may require a more radical rethinking of how a subject is taught and the hidden assumptions behind it . . . Beyond the syllabus is the societal context of what is being taught."[3]

It is clear from the quote that the debate around decolonisation and what decolonisation of curricula entails is far from settled. Some argue that not much has changed since 1994. The university's identity has changed little but for its admission policy, which now allows Africans to be admitted. Therefore, the university remains unchanged.[4] It is argued that much of the curriculum in South African universities

> "is still unashamedly culturally chauvinistic and not even as might arguably be the case with other parts of the world, a locally derived cultural chauvinism but the most classical and unapologetic Eurocentrism with a bias against and condescension towards non-European thought and even more especially against the African perspective and experience".[5]

It likewise has been pointed out that as part of the structural transformation and the merger which took place in tertiary education, universities changed their vision and mission statements "to appear more politically correct" with the intention of providing an "intellectual focus and a sense of a 'new' identity" to, for example, "premier university of African scholarship", "first class African university" and "world class African university".[6] It is further argued that despite these self-descriptors which imply that there is a relationship between universities and the African continent, there "has been no visible transformation of institutional cultures to reflect such a relationship" because the mergers between universities did not lead to a recasting of institutional cultures of programmes, but rather had the effect of a physical combination of two or more former entities or the

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1 "Labour law after labour" in Davidov and Langille (eds) *The idea of labour law* (2011) 16.

2 See also Benjamin and Theron "Costing, comparing and competing: The World Bank's Doing Business Survey and the benchmarking of labour regulation" 2009 *ActJur* 207–208.

3 Rycroft and Le Roux "Decolonising the labour law curriculum" 2017 *ILJ* 1473.

4 Dladla "Decolonising the university in South Africa" in Nabudere (ed) *Afrikology and transdisciplinarity: A restorative epistemology* (2012) 163.

5 *Idem* 164.

6 Lebakeng *et al* "Epistemicide, institutional cultures and the imperative for the Africanisation of universities in South Africa" 2006 *Alternation* 71.

disappearance of at least one of them.[7] It appears that the modern university has developed from a tension between two poles. On the one hand "a universalism based on a singular notion of the human", and on the other, "nationalist responses to it".[8] This requires a rethinking of the relationship between the national state and universities which bring us to our "own understanding of modern and the possibility of a time after colonialism".[9]

Many views exist regarding exactly what decolonisation in an African legal context entails. One definition of decolonisation in a legal context is as follows:

> "[W]hile indigenous approaches should, in our view, be central to the decolonisation of law, this is not a call for the unconditional indigenisation of law in which an anti-colonial discourse, which is frequently trapped within the same colonial epistemology, is advanced uncritically. Instead, we suggest that a more meaningful point of departure in the decolonisation of law is the defining of law from a 'non-colonial' position and from alternative legal epistemologies. In this respect, decolonisation draws from different sources of law and normative agencies to promote the transformative potential of law in achieving more social and economic justice."[10]

In this regard, Mamdani succinctly summarises the fact that decolonisation has changed over time – from political, to economic to discursive (epistemological):[11]

> "The *political* understanding of decolonization has moved from one limited to political independence, independence from external domination, to a broader transformation of institutions, especially those critical to the reproduction of racial and ethnic subjectivities legally enforced under colonialism. The *economic* understanding has also broadened from one of local ownership over local resources to the transformation of both internal and external institutions that sustain unequal colonial-type economic relations. The *epistemological* dimension of decolonization has focused on the categories with which we make, unmake and remake, and thereby apprehend the world. It is intimately tied to our notions of what is human, what is particular and what is universal . . . The challenge of epistemological decolonization is not the same as that of political and economic decolonization. If decolonization in the political and economic realms not only lends itself to broad public mobilization but also calls for it, it is otherwise with epistemological decolonization, which is removed from the world of practice and daily routine by more than just one step. Yet it is not detached from this world. This is why epistemological labor radically challenges the boundary between the public intellectual and the scholar, calling on each to take on the standpoint of the other."[12]

Himonga and Diallo add that decolonisation entails "a move from a hegemonic or Eurocentric conception of law connected to legal cultures historically rooted in colonialism (and apartheid) in Africa to more inclusive legal cultures" and refers to "locating the paradigmatic and theoretical shifts that are required for the teaching of law".[13] It has likewise been said that a decolonised university "explores

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7 *Ibid.*

8 Mamdani "Between the public intellectual and the scholar: Decolonization and some post-independence initiatives in African higher education" 2016 *Inter-Asia Cultural Studies* 68.

9 *Idem* 69. See also Himonga and Diallo "Decolonisation and teaching law in Africa with special reference to living customary law" 2017 *PER/PELJ* 5 and Mamdani 2016 *Inter-Asia Cultural Studies* 79.

10 Himonga and Diallo "Decolonisation and teaching law in Africa with special reference to living customary law" 2017 *PER/PELJ* 5.

11 Mamdani 2016 *Inter-Asia Cultural Studies* 79.

12 *Ibid.*

13 2017 *PER/PELJ* 5.

the linkages between what is globally recognised as academic knowledge in relation to the everyday experiences of black people in the university, and the everyday experiences of the vast majority of people in this country and continent".[14] Himonga and Diallo add that three elements are essential for decolonising law and legal education. They are: the inclusion of living customary law in legal education, a shift in theoretical paradigm within which law is taught and the interdisciplinary study of law.[15]

3 HAS LABOUR LAW BEEN DECOLONISED?

It is evident the purpose of labour law should be re-evaluated in light of this discussion. Van Niekerk and Smit point out that labour law has been described as "less of a concept than a 'dimension of life'" which is concerned with "the world of work and people's engagement in it".[16] They add that while the focus of labour law is the workplace, its subject matter is a complex and intertwined body of law drawn from a number of diverse legal sources such as contract, delict, criminal law, administrative law, company law, constitutional law and international law with which labour law "to a greater or lesser degree intersects".[17]

Currently the function and future of labour law are debated, and labour law faces a crisis. Davidov[18] argues that the real crisis that labour law faces lies in the discrepancies between goals and means. He states that the "regulation that we use – the legal instruments and techniques – have lost their harmonization with the goal they are supposed to advance".[19]

He accurately describes this unsuitable alliance as a twofold problem: first, the increasing number of workers that do not enjoy labour and social protection,[20] for example informal economy workers, and that are often excluded because of conceptual challenges. Secondly, labour law does not reflect the changes in the world of work and is often based on the traditional employment relationship.[21] These disparities between goals and means may be ascribed to a number of reasons, including the erosion of standard contract of employment, globalisation, changing cultural and social norms,[22] and lack of support from governments in these challenges.[23]

There are two main philosophical positions concerning the function of labour law: the market and protective views.[24] The market view is based on the principle

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14 Rycroft and Le Roux 2017 *ILJ* 1474 where they refer to Shose Kessi "Time to decolonise our universities" (2015), available at https://bit.ly/2ywCPEE (accessed on 1 October 2018).
15 Himonga and Diallo 2017 *PER/PELJ* 7.
16 Van Niekerk and Smit (eds) *Law@work* (2018) 3.
17 *Ibid*.
18 *A purposive approach to labour law* (2016) 2.
19 *Ibid*.
20 *Idem* 3.
21 *Ibid*.
22 Davidov 2–3 explains that this entails a more individualistic approach as opposed to a notion of solidarity that does not denounce the circumvention attempts by employers in respect of labour laws. However, in many instances it is the unchanged social and cultural norms in society that contribute to the precarious position of women in the informal economy and often the concept of solidarity is unfamiliar to these workers as a result of patriarchal societies.
23 *Idem* 3.
24 Creighton and Stewart *Labour law: An introduction* (2002) 2–3.

that government intervention plays a role in the attainment of prosperity and economic growth, but that excessive government intervention leads to economic decline if market forces are not left to attain economic growth and prosperity. Thus, the function of labour law is not to interfere in market forces but to assist them to ensure economic growth and the well-being of employees and employers.[25] When a successful partnership exists between employers and employees they not only have a mutual understanding of one another's needs, but they also have the shared goal of developing a winning business.[26] In terms of the protective view, an imbalance of power places the employee at a disadvantage when it comes to bargaining power and resources and, due to this imbalance, the function of labour law is to protect employees and assist them in redressing the imbalance.[27] Thus, the overriding concern of labour law is the protection of employment and employees.[28] Labour law seeks to ensure the protection of employees, but labour law also contributes to organising the production of goods or services in firms: in spelling out the rules that govern the master-servant relationship in terms of the individual employment contract, it is also concerned with the centre of power and is governed by labour relations.[29] Van Niekerk and Smit point out that labour law has sought to serve as a countervailing force in two ways:

> "The first is intervention in a substantive sense, by imposing minimum standards below which an employer and employee may not contract. In South Africa, the Basic Conditions of Employment Act (BCEA)[30] adopts this mechanism by fixing statutory basic conditions of employment that constitute a term of any contract of employment, unless more favourable terms are either agreed or imposed by another regulatory measure. The Labour Relations Act (LRA)[31] establishes protection for individual employees against employer action in the form of unfair dismissal and unfair labour practices.
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> The second and more procedural form of intervention is to improve the bargaining position of employees by creating rights, institutions and structures (for example, the rights to freedom of association and to bargain collectively) to act as a countervailing force to the employer's economic power. Thus, the LRA guarantees employees the right to join trade unions and participate in their activities, affords representative trade unions a set of organisational rights, establishes collective bargaining structures, recognises and gives effect to collective agreements, and upholds the right to strike."[32]

In addressing the principle "labour is not a commodity", labour law faces a paradox: it regulates employment relationships for two principal purposes, namely, "to ensure that they function successfully as market transactions and, at the same time, to protect workers against the economic logic of the commodification of labour".[33] "Labour is not a commodity"[34] is a widely recognised international

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25 *Idem* 5–6.
26 Wedderburn "Employees, partnership and company law" 2002 *ILJ* (UK) 99 where he refers to *The partnership at work fund: Open for applications* (DTI 2002 Application Form).
27 Creighton and Stewart *Labour law* 2–3.
28 Zumbansen "The parallel worlds of corporate governance and labor law" 2006 *Ind J Global Legal Studies* 277.
29 Morin "Labour law and new forms of corporate organization" 2005 *Int'l Lab Rev* 7.
30 Basic Conditions of Employment Act 75 of 1997 (BCEA).
31 Labour Relations Act 66 of 1995 (LRA).
32 Van Niekerk and Smit (eds) 3.
33 Collins *Employment law* (2010) 3.
34 See O'Higgins "Labour is not a commodity – An Irish contribution to international labour law" 1997 *ILJ* (UK) 230 and Langille "Labour is not a commodity" 1998 *ILJ* 1011.

labour principle as proclaimed by the International Labour Organisation (ILO). Despite radical, socialist and traditional economists endorsing this principle, it presents a paradox because it "asserts as the truth what seems to be false".[35] In this regard, Collins[36] states:

> "Employers buy labour rather like other commodities. The owner of a factory purchases the premises, raw materials, machinery, and labour, and combines these factors of production to produce goods. A business does not own the worker in the same way as it owns the plant, machinery, and raw materials. As a separate legal person, the worker is free to take a job or not, subject of course to what Marx called 'the dull compulsion of economic necessity'. Without that freedom, workers would be slaves. Yet the employer certainly buys or hires the worker's labour for a period of time or for a piece of work to be completed. Workers sell their labour power – their time, effort, and skill – in return for a wage. As with other market transactions dealing with commodities, the legal expression of this relation between an employer and employee is a type of contract. The contract of employment, like other contracts, confers legally enforceable rights and obligations. It seems that labour is in fact regarded much like a commodity in a market society and its laws."

Here labour may still be regarded as a "commodity", but it does not necessarily have to be the case. The "wage-work bargain" is an unequal one. For the business, the position is as explained above, but for the worker the unequal nature of the bargain affects his status and livelihood. The inequality exists because the employer can accumulate material and human resources, whereas the individual employee mostly has very little bargaining power.[37] In essence, labour law is about power-relations: first, it is concerned with the relations between the employer on the one hand and trade unions on the other and, secondly, it is concerned with the decision-making power of the employer in the enterprise, which is met by the employees' countervailing power.[38] The main goal of labour, it appears, "always has been to compensate [for] the inequality of the bargaining power".[39]

In *Naptosa v Minister of Education, Western Cape*[40] the court observed that labour law is fundamentally an important, as well as extremely sensitive subject, which is based on a political and economic compromise between organised labour and the employers of labour. These parties are very powerful socio-economic forces, which makes the balance between the two forces a delicate one.

Social justice plays a central role in our law and labour law. The Constitution,[41] as well as enabling legislation such as the LRA, BCEA and Employment Equity Act,[42] plays an important role not only in the protection of the right to fair labour practices, but also with regard to rights to freedom of association, freedom of expression, privacy and equality. Section 1 of the LRA, *inter alia*, provides as one of its purposes the advancement of social justice. According to the social justice perspective, trade unions are regarded as primary vehicles through which

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35 *Employment law* 3.
36 *Ibid.*
37 *Ibid.*
38 *Idem* 4.
39 Davidov and Langille *Labour law* 71.
40 2001 *ILJ* 889 (C) 897.
41 Constitution of the Republic of South Africa, 1996.
42 Employment Equity Act 55 of 1998 (EEA).

social justice is achieved.[43] Statutory rights, their nature and scope, and how they are implemented and enforced are important in the protection of workers' rights, but are not absolute and often need to be balanced against the competing rights of employers and third parties.[44] The acknowledgement of human rights, including fundamental labour rights, is an important corporate responsibility in South Africa, as well as for multi-national companies generally. Corporate governance and social responsibility programmes play a significant role in the establishment and enforcement of basic labour rights, "especially in host countries that have little in the way of labour market regulation, or where to attract investment or for want of resources, minimum labour standards are not enforced".[45] These developments may serve to promote collective bargaining (to the extent that basic labour rights include the rights to organise and to bargain collectively), especially in those environments where the legislative environment remains hostile.[46] It can be said that labour law originated from a focus on employment relations in order to regulate the conditions of tangible labour and to extend protection to workers' physical bodies. It evolved to protect "employment" and to organise workers collectively in the enterprise (which is the economic *locus* of decision-making) to a point where workers' interests are taken into account and workers have input in decision-making.[47] It is submitted that regardless of the view taken of the true function of labour law, the right of employees to participate in decisions affecting them and/or the enterprise today is included as a purpose and function of labour laws. It is evident that the purpose of labour law has evolved and employees are regarded as stakeholders of the organisation that they work for. Weiss articulates the move from shareholder to stakeholder capitalism.[48]

The Constitution is transformative in nature and has a direct impact on transforming labour law in South Africa. Section 23(1), for example, provides that everyone has the right to fair labour practices whereas subsections (2), (3), (4) and so forth contain specific rights pertaining to every "worker", "employer", "trade union" and "employers' organisation".[49] The Constitution has also brought values such as equality, dignity and fairness to the domain of labour law.

When we consider the function of labour law and the fact that large numbers of workers are left without protection it is important to evaluate the relationship between labour law and human rights.[50] Although the development of labour law and fundamental human rights has been distinct, and various role players have kept them separate, there is growing support for their integration.[51] Human rights

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43 This notion is based upon Sir Otto Kahn-Freund's conception of labour law, elaborated in the 1950s and 1960s as a means of counteracting the inequality of bargaining power between employers and employees. See Van Niekerk and Smit (eds) 9.
44 Van Niekerk and Smit (eds) 10.
45 *Ibid*.
46 *Ibid*.
47 Morin "Labour law and new forms of corporate organization" 2005 *Int'l Lab Rev* 11.
48 Weiss "Re-inventing labour law" in Davidov and Langille (eds) 50–51. See also Rycroft and Le Roux 2017 *ILJ* 1482.
49 See Van Niekerk and Smit (eds) 40.
50 Social and labour rights were recognised in the 1919 Weimar constitution inspired by Hugo Sinzheimer. See also Hepple "Factors influencing the making and transformation of labour law in Europe" in Davidov and Langille (eds) 32.
51 Arthurs "Labour law after labour" 23.

are afforded to all human beings and these rights are universal.[52] The argument that labour rights are not universal can be countered by the fact that these social rights are widely recognised by international and regional instruments and institutions.

Labour law has transformed in the context of recognising that cultural differences are also important when workers' rights are considered. The Supreme Court of Appeal in *Kievitskroon Country Estate (Pty) Ltd v Mmoledi*[53] acknowledged that the employee's cultural belief and failure to resume work was justifiable even in the absence of "expert evidence regarding the nature of her illness and its association with her cultural convictions". The court noted that although a traditional healers' certificate was not formally recognised as proof of illness from work, employers should take "culturally-induced" ailments seriously and that reasonableness dictates that when the appropriateness of dismissal is questioned such certificates and the employee's absenteeism should be considered.[54] The Supreme Court of Appeal confirmed that cultural belief systems "exist and are part of the culture – the customs, ideas and social behaviour – of significant sections of this country's people".[55] As well, in *National Coalition for Gay & Lesbian Equality v Minister of Justice*[56] the Constitutional Court emphasised that the term "sexual orientation" as referred to in section 9(3) of the Constitution must be given a "generous interpretation" as "[i]t applies equally to the orientation of persons who are bisexual, or transsexual and it also applies to the orientation of persons who might on a single occasion only be erotically attracted to a member of their own sex". It is evident that diversity in the workplace is important and although the EEA does not make provision for transgender people, the interpretation and protection may be extended to them. From this it is evident that labour has transformed and decolonised to extend workers' rights and protections to transgender persons.

Labour law also grants black workers who were previously disadvantaged not only a voice in the workplace but also rights such as freedom of association[57] and organisation as well as the right to strike.[58] In the past labour legislation in South Africa was based on racial categorisation and discrimination and trade unions reflected this racial divide.[59] Parallel legislation was introduced for white and black workers and black workers,[60] initially, were not allowed to join trade unions.[61] It is also evident that Critical Race Theory today plays an important role in labour law especially by facilitating processes like affirmative action and economic empowerment and recognition of discrimination protection not previously afforded to black workers. The empowerment of black South Africans became is a priority for government, and resulted in the Broad-Based Black Economic Empowerment Act.[62] An initiative to involve previously disadvantaged persons is the so-called

52 Collins "Theories of rights as justification" in Davidov and Langille (eds) 141.
53 [2014] 3 BLLR 207 (SCA).
54 Paras 22–23.
55 Para 23.
56 Para 21. See also *POPCRU v Department of Correctional Services3* [2012] 2 BLLR 110 (LAC).
57 See ss 18 and 23 of the Constitution and Chs II and III of the LRA.
58 See s 23 of the Constitution.
59 Manamela "Regulating workplace forums in South Africa" 2002 *SA Merc LJ* 729.
60 Legislation included the Labour Relations Act 28 of 1956 and the Black Labour Relations Regulations Act 48 of 1953.
61 Manamela 2002 *SA Merc LJ* 729.
62 Broad-Based Black Economic Empowerment Act 53 of 2003 (BBBEE Act).

Black Economic Empowerment (BEE) strategy, which was introduced in order to "contribute to the formation of a non-class based economy".[63] Section 9(2) of the Constitution, for example, endorses not only legislative but also policy measures "that target particular persons or categories of persons for special measures in order to level the playing field and facilitate substantive equality".[64] A decolonised labour law acknowledges the fact that employees should be protected from unfair discrimination, provides for affirmative action and facilitates the empowerment of employees previously disadvantaged by apartheid laws. In *Leonard Dingler Employee Representative Council v Leonard Dingler (Pty) Ltd*[65] the Labour Court acknowledged that the employer's rule that restricted membership of a benefit fund to monthly paid employees discriminated on the grounds of race. The court noted that the restriction of membership of the benefit fund had excluded the black employees of the company. In *Minister of Finance v Van Heerden*[66] the Constitutional Court confirmed that affirmative action measures

> "are not in themselves a deviation from or invasive of, the right to equality guaranteed by the Constitution. They are not 'reverse discrimination' or 'positive discrimination' as argued by the claimant in this case. They are integral to the reach of our equality protection. In other words, the provisions of s 9(1) and s 9(2) are complementary; both contribute to the constitutional goal of achieving equality to ensure "full and equal enjoyment of all rights".

Labour has also transformed in the sense that it is recognises that sexual harassment in the workplace is not only a form of misconduct under the LRA[67] but also amounts to discrimination under the EEA.[68] This has been put to the fore in *Campbell Scientific Africa (Pty) Ltd v Simmers*[69] where the Labour Appeal Court confirmed that a male manager's conduct when he made a sexual proposition to a female employee of another company during a business trip constituted sexual harassment and justified dismissal. In this regard it should be noted that labour law legislation expanded "vicarious liability" into section 60 of the EEA where an employer, for example, cannot only be held liable for sexual harassment offences by one employee to another, but also for another discriminatory act where the employer fails to take steps against the perpetrator. Another example of where labour law has transformed and developed the common law may be found in *K v Minister of Safety and Security*[70] where the Constitutional Court developed the common-law doctrine of vicarious liability to be extended to so-called deviation cases where on-duty police officers raped a victim when she needed their assistance, incorporating the normative framework established by the Bill of Rights into this

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63 Banda *et al* "Black economic empowerment: Addressing socio-economic inequality in South Africa" 2003 *Epolitisca* 2.

64 Broembsen "People want to work, yet most have to labour: Towards decent work in South African supply chains" 2012 *LDD* 20. See also *Minister of Finance v Van Heerden* 2004 6 SA 121 (CC) with reference to the achievement of substantive equality.

65 1998 19 *ILJ* 285 (LC).

66 2004 6 SA 121 (CC) para 30.

67 See, in this, regard Code of Good Practice: Dismissal.

68 See, in this, regard Code of Good Practice on the Handling of Sexual Harassment Cases,

69 [2016] 1 BLLR 1 (LAC). See also *Minister of Finance v Van Heerden* para 29 and McGregor "'Do you want a lover tonight?' Do these words constitute sexual harassment? *Simmers v Campbell Scientific Africa (Pty) Ltd; Campbell Scientific Africa (Pty) Ltd & A Simmers*" 2016 *THRHR* 322.

70 [2005] 8 BLLR 749 (CC).

doctrine. This approach is in line with section 39(1)(a) and 39(2) of the Constitution.

The new world of work expands protection not only to employees but takes due cognisance of vulnerable persons such as domestic workers. Domestic workers in South Africa predominantly are women and represent a previously disadvantaged group. Before our constitutional dispensation, domestic workers in South Africa were expressly excluded from labour legislation.[71] This exclusion contributed to the fact that domestic work in South Africa was, and remains, unrecognised and undervalued. The ratification of ILO Convention 189 required South Africa to re-evaluate its labour and social protection provisions for domestic workers to ascertain compliance with its international obligations. Currently domestic workers are indeed afforded the constitutional right to fair labour practices[72] and are included in all labour legislation in South Africa, in terms of the LRA, the EEA and the BCEA, as they fall within the scope of the definition of "employee" in the various acts; however, various challenges do still persist. A sectoral determination in terms of the BCEA was issued specifically to provide for conditions of employment in this sector.[73] They are included under the scope of the Unemployment Insurance Fund (UIF),[74] but remain excluded from the Compensation of Occupational Injuries and Diseases Act 130 of 1993.

Recently, the LRA was amended by the Labour Relations Amendment Act of 2014[75] to enable the protection of vulnerable or a-typical employees,[76] such as those who work for temporary employment services[77] and fixed-term and part-time employees, has become significant policy issues.[78] Labour law usually distinguishes between employees, workers, the self-employed and independent contractors.[79] During 2002, both the LRA and BCEA were amended to introduce a rebuttable presumption of employment for those claiming to be employees.[80] The "Code of Good Practice: Who is an Employee?"[81] was also introduced to assist

71 Domestic workers were excluded from the scope of the LRA 28 of 1956, the BCEA 3 of 1983 and the Wage Act 5 of 1957.

72 See s 23(1) of the Constitution.

73 Sectoral Determination 7: Domestic Workers. Blackett and Tiemeni "Regulatory innovation in the governance of decent work for domestic workers in South Africa: Access to justice and the Commission on Conciliation, Mediation and Arbitration" 2016 Working paper *LLDRL Montréal* 11.

74 See s 3(1) of the Unemployment Insurance Act 168 of 1998 (UIA).

75 Labour Relations Amendment Act 6 of 2014 (LRAA). See ss 198A 198B 198C 198D.

76 See Fourie "Non-standard workers: The South African context, international law and regulation by the European Union" 2008 *PER/PELJ* 110–111 and Smit and Fourie "Extending protection to atypical workers, including workers in the informal economy, in developing countries" 2010 *Int J of Com Labour L and Industrial Relations* 43.

77 The majority of the Constitutional Court recently in *Assign Services (Pty) Ltd v National Union of Metalworkers of South Africa* [2018] 11 BCLR 1309 (CC) para 65 with reference to the preamble to the LRAA observed that "it aimed to provide greater protection for workers placed in temporary employment services" and that there appears to be two offshoots of this purpose: "the first is to protect marginal workers in temporary employment; and the second is for temporary employment services to be truly temporary".

78 These employees are referred to as the so-called "non-standard" employees. See Van Niekerk and Smit (eds) 59.

79 See s 213 of the LRA; Davies *Perspectives on labour law* (2009) 77.

80 See, respectively, s 200A of the LRA and s 83A of the BCEA. See, eg, *Phaka v Bracks* (2015) 36 *ILJ* 1541 regarding the consideration of s 200A.

81 GN R1774 in *GG* 29445 of 1 December 2006.

parties in determining the existence of an employment relationship. Labour legislation such as BCEA, EEA and Skills Development Act[82] all include the definition of an employee similar to the one found in section 213 of the LRA which reads:

> "(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."

The definition of "employee" expressly excludes "independent contractors" from its ambit. The self-employed and independent contractors often are excluded, because traditionally they could fend for themselves. However, this is not the situation of many female workers in precarious positions in the informal economy, who are own-account workers, such as informal traders and waste pickers. Determining *who is an employee*[83] is not a new challenge as courts have been struggling with this perplexing question for a long time. Davidov, Freedland and Kountouris[84] state the following in this regard: "'Who is an employee' is also a question with a heavy normative baggage." The question is important because if the definition is made as wide as possible, it triggers labour protection such as protection against unfair dismissal and unfair labour practices. The answer to the question, therefore, pertains to the personal scope of labour law. If we consider the scope of labour law, we also require an understanding of its goals and justifications.[85]

An important question to consider is who should be responsible for determining employee status? Part and parcel of the labour law jurisprudence is the distinction between *locatio conductio operis* and *locatio conductio operarum*.[86] The code to the LRA accepts the following difference between an employee and an independent contractor: an employee "makes over his or her capacity to produce to another" whereas an independent contractor is someone "whose commitment is the production of a given result".[87]

At common law, the courts have developed a number of tests for distinguishing between employees and independent contractors. The most prominent of these tests are the supervision-and-control test, the organisation or integration test and the economic-dependency test and a more integrated test, namely the dominant impression test.[88] Davidov argues that the tests that courts develop to determine who is an employee must also consider the need for protection.[89] These provisions should also be interpreted purposively in line with the objectives of the statutes.[90] Van Niekerk and Smit point out that "the nature of work has changed radically,

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82 Skills Development Act 97 of 1998 (SDA).

83 Emphasis added.

84 Davidov *et al* "The subjects of labor law: 'Employees' and other workers" (2015), available at https://bit.ly/2CKlaOk (accessed 1 October 2018).

85 *Ibid.*

86 See *Colonial Mutual Life Assurance Society v MacDonald* 1931 AD 412 and *Smit v Workmen's Compensation Commissioner* 1979 1 SA 51 (A).

87 See item 34 of the code. This description was cited with approval in *Niselow v Liberty Life Association of Africa Ltd* (1998) 19 *ILJ* 752 (SCA) 753J–754A. See also Van Niekerk and Smit (eds) 65.

88 See Van Niekerk and Smit (eds) 64.

89 Davidov "Re-matching labour laws with their purpose" in Davidov and Langille (eds) 189.

90 See also Davidov "The status of Uber drivers: A purposive approach" (2016), available at https://bit.ly/2IV6Se7 (accessed 1 October 2018).

and employment in post-apartheid South Africa has been characterised by 'casualisation' and 'externalisation'" and that this entails "a process whereby employers shape employment relations to informalise working arrangements and thus deprive employees of their basic statutory rights".[91] They add that it was partly in response to these developments that the rebuttable presumption of employment was included in the LRA and BCEA in 2002. This presumption, however, applies only to persons earning below a prescribed threshold amount.[92]

Paragraph (b) of the definition of an "employee" clearly indicates that a valid contract of employment is not a requirement to enjoy protection under the LRA.[93] The court in *"Kylie" v CCMA*[94] confirmed that even when a person is engaged in unlawful activities such as sex work, the definition of "employee" in section 213 of the LRA covers him or her. Within the framework of the constitutional right to fair labour practices in section 23 of the Constitution that employee was found to have been in an employment relationship even in the absence of a valid contract between her and the employer. Consequently, their relationship fell within the scope of application of the LRA. This case dealt with illegal work as performing sex work in South Africa is still a crime in terms of the Sexual Offences Act 23 of 1957. The court stated that the purpose of the LRA to advance economic development and social justice, means that the court must protect employees who are particularly vulnerable. The 2014 amendments to the LRA removed reference to the contract of employment in the definition of dismissal, highlighting that the focus should rather be on the employment relationship, and that the existence of an employment relationship is not dependent on a valid contract of employment. Section 186(1) states that "dismissal means that– (a) an employer has terminated employment with or without notice".[95]

Technological changes have altered the work organisation dramatically as the workforce is no longer homogeneous; it is fragmented and segmented into core groups and marginal groups, less traditional employment and more and newer forms of work.[96] In this regard, it should be noted that new forms of workers have emerged, such as the "e-lancer", the "zero hour" contract worker and the "Uber driver".[97] Rycroft and Le Roux emphasise the fact that decolonisation of labour law will require "an interrogation of the boundaries of labour law, excluding as it does informal workers, including those in the digitalised service economy".[98] The emergence of the "gig economy" where services are provided on demand, and on a job-by-job basis such as Uber where technology is used as platform is a good illustration of how labour law has evolved to make provision for persons who work in such an industry.[99] Across the globe the new realities of work have

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91 Van Niekerk and Smit (eds) 65.

92 Currently, the threshold stands at R205 433.30 per annum. Workers earning more will be able to use these factors as guidelines when establishing their status as employees.

93 The scope of the second part of the definition is wider and will include workers who are in an employment relationship without a contract of employment. Employees without a valid contract may also enjoy protection under the LRA in terms of this definition.

94 [2007] 4 BALR 338 (CCMA).

95 See, eg, *State Information Technology Agency (SITA) (Pty) Ltd* [2008] 7 BLLR 611 (LAC) where the Labour Appeal Court confirmed that the focus has shifted from the formal contract of employment to the existence of an employment relationship.

96 Weiss "Re-inventing labour law" 46.

97 See Van Niekerk and Smit (eds) 59.

98 Rycroft and Le Roux 2017 *ILJ* 1483.

99 See Van Niekerk and Smit (eds) 5–6.

forced courts purposively to consider the definition of employee and the scope and meaning of workers, often to extend protection to vulnerable workers and prevent exploitation from employers trying to evade labour laws. Certainly, Uber as an innovative business form illustrates this, and as these workers are often without adequate labour and social protection, principles can be distilled from this example that may be useful when determining the employment status of many women workers in the informal economy. In an employment tribunal decision in the UK it was found that Uber drivers are not self-employed.[100] In respect of the tests to determine who is an employee in terms of a contract of employment, three factors were highlighted, namely, personal service;[101] control;[102] and mutuality of obligation.[103] The court was just not prepared to accept the written terms of the relationship between Uber and the driver, but consideration was given to the realities of this relationship. The submission that the driver enters into a contract with the passenger was declared "pure fiction".[104] The court stated: Uber runs a transportation business. The drivers provide the skilled labour through which the organisation delivers its services and earns its profits.[105] In the UK, the courts moved from a narrow interpretation of who is a worker under a strict test to a more purposive approach as is illustrated by the above judgment, by considering the true realities of the relationship.[106] In analysing these considerations, it is clear that control was a deciding factor and that the courts investigated the true nature of the relationship, regardless of the label placed on it; substance is thus preferred over form.

In the *in limine* matter of *Uber South Africa Technological Services (Pty) Ltd and NUPSAW*,[107] Uber challenged the jurisdiction of the CCMA to arbitrate unfair dismissal disputes between Uber and a number of drivers and partner drivers. Uber claimed that these drivers were not employees. The commissioner recognised that section 213(b) is wider in scope and may include these workers and that a single test to determine the nature of the employment relationship cannot be decisive.[108] The *Code of Good Practice: Who is an employee?* (the Code), according to the commissioner, introduces a "reality of the relationship test" that

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100 See *Y Aslam, Farrar J v Uber* BV 2202550/2015. In this case, s 230(3)(b) of the Employment Rights Act of 1996 extended limited protection to a new class of worker. In November 2017, Uber's appeal against the abovementioned decision was dismissed, but they have indicated that they will once again appeal against the Employment Appeal Tribunal's decision. This case may have a major impact on the growing gig economy in the United Kingdom (*Uber BV v Aslam* 2017 WL 05195010 (2017)). See also *Byrne Brothers (Formwork) Ltd v Baird* [2002] ICR Lawson 667.

101 This refers to the aspect of the employee rendering service him- or herself and not through a substitute: Lawson "Is 'worker' status something to get worked up about?" (2018), available at https://bit.ly/2OnKQXh (accessed 1 October 2018).

102 *Ibid*. This refers to the control the employer exercises over the employee, including the manner in which the work is performed.

103 *Ibid* This refers to the reciprocal nature of the relationship where the employee avails him- or herself to work and the employer provides work.

104 *Y Aslam, Farrar J v Uber BV* 2202550/2015 paras 90–92.

105 Para 92.

106 Lawson fn 101 above. See *Autoclenz Ltd v Belcher* [2011] ICR 1157 paras 34–35; cf *Y Aslam, Farrar J v Uber BV* 2202550/2015 paras 77–78.

107 7 July 2017. See also *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW)* Case no 449/17(LC) 2018/01/12 (*Uber South Africa*).

108 *Uber South Africa* para 39.

integrates all past tests. This refers to the consideration of substance rather than form. The commissioner found that by applying the Code there were sufficient grounds to indicate that these drivers were employees and that this interpretation was in line with the objects of the LRA and with the Constitution.[109] This jurisdictional ruling of the commissioner was taken on review and Van Niekerk J found that the respondents did not discharge the onus to establish that they were employees of Uber SA and that the commissioner's decision to refuse to join Uber BV was incorrect and reviewable.[110] The judgment does not reflect a principled exclusion of Uber drivers as employees as it was based on a number of technical issues and the question whether the respondents are employees of Uber BV remains open.

Technology not only plays an important role in modern labour law, but it also is of importance when it comes to recognising new forms of work in the gig economy and on how employers' risks have changed since the introduction social media platforms. This is evident in *Dagane v SSBC*[111] where the Labour Court confirmed that the employee not only used disgraceful and racist language constituting hate speech, but he also did so in his capacity as a police officer, and he did so on "a quasi-public forum accessible to potentially thousands of Facebook users".[112] The court added that there was no altercation between two individuals; it was at a racial group generally and, therefore, there can be no doubt that dismissal was a fair sanction.[113]

Determining who the employer is can, similarly, be a challenge. Home workers form a category of vulnerable workers who often work in supply chains and who are excluded from adequate labour and social protection, and it can be problematic to identify the true employer in such cases. In respect of vulnerable women workers in the informal economy, specifically home workers in the garment industry, the concept of joint employment as recognised in the US can be helpful when these workers are exploited.[114] In developing a test to determine joint employment, the courts have decided on a number of factors, such as the use of premises and equipment; the ability of the business to move from one putative joint employer to another; whether the workers performed a line-job that is essential to the employer's process of production; supervision of the work; whether the employees work only or predominantly for one employer and whether the contracts can be transferred from one subcontractor to another without material changes.[115]

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109 Paras 52–55.

110 *Uber South Africa Technology Services (Pty) Ltd v National Union of Public Service and Allied Workers (NUPSAW)* (2018) 39 *ILJ* 903 (LC). Van Niekerk J found that the commissioner erred in failing to distinguish between Uber SA and Uber BV as separate legal entities and that there was no dispute of fact with reference to the delineation of functions as between the two entities (para 97).

111 [2018] ZALCJHB 114.

112 Para 49.

113 *Ibid*.

114 *Lian v J Crew Group Inc* 2001 54 OR (3rd) 329 Ontario Superior Court of Justice; *Doe v Wall Mart Stores* INC 527 F 3d (9th Circ 2009) US Court of Appeal; *Zheng v Liberty Appeal Co* 355 F3d 61 (2d Circ 2003).

115 *Zheng v Liberty Appeal Co* 355 F3d 61 (2d Cir 2003) para 7.

Another approach to consider is that of Freedland and Kountouris,[116] who in their endeavours to widen the scope of labour law subscribe to the following definition of "personal work":

> "The personal work relation is a connection or a set of connections, between a person – the worker – and another person or persons or an organization or organizations, arising from an engagement or arrangement or set of arrangements for the carrying out of work or the rendering of services by the worker personally, that is to say wholly or primarily by the worker himself or herself."

This definition contains interesting elements and the use of words such as "worker", "engagement" and "arrangement" certainly widens the scope of coverage and should cover home workers in production chain networks. Although this definition was designed for the European context, its use will certainly cover a number of workers in the informal economy. The focus should be on the *worker*[117] as opposed to a traditional focus on an employee who works in a traditional employment relationship for the same employer(s) until retirement.[118] This new concept of worker should include "a person who moves between employment and unemployment, other forms of paid work and unpaid work" and the worker who moves between the formal and informal economy should be covered in both cases.[119] Policy-makers engaged with reform in this regard must have a clear understanding of the goals that they must achieve.[120] An important aim for labour law scholars should include the purpose of influencing policy-makers and law-makers through the provision of knowledge.[121]

4 CONCLUDING REMARKS

Labour law is criticised because a large number of vulnerable workers are without adequate labour and social protection. Often, this is a result of a narrow definition of the notions of employee and employer in national legislative provisions. Various countries have extended protection through statutory presumptions or the inclusion and adoption of the notion of worker to extend protection to vulnerable workers and, in certain instances, it has been left to the courts to extend protection.[122] In South Africa, the importance attached to the contract of employment as a key indicator to determine the nature of the employment relationship has certainly diminished and the courts will consider substance rather than form. This is important, for example, for female workers in the informal economy as they often work without the existence of an employment contract and the nature of the employment relationship with reference to various *indicia* should be scrutinised to extend labour and social protection to them. The discussion illustrates that globally courts will purposively interpret legislative provisions to extend protection to workers in precarious employment relationships. However, it cannot

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116 *The legal construction of personal work relations* (2011) 31.
117 Emphasis added.
118 Howe "The broad idea of labour law" in Davidov and Langille (eds) 299.
119 *Ibid.*
120 Davidov *A purposive approach to labour law* (2016) 15.
121 Dukes *The labour constitution: The enduring idea of labour law* (2014) 198.
122 See, eg, Seattle.gov "A voice for drivers: A complex solution" (2015), available at https://bit.ly/2yAJvlo (accessed 1 October 2018) and Hollrah "Four states enact laws affecting the definition of 'independent contractor'" (2015), available at https://bit.ly/2EjDNKD (accessed 1 October 2018).

yet be stated that labour law's personal scope has been extended to include all workers rather than just employees.

Although labour law as a subject has, to a certain extent, decolonised itself, lecturers still need to engage with the subject content and initiate debates of how injustices of the past can be overcome. It is of the utmost importance that the transformative nature of our Constitution is integrated into any labour law curriculum. It is an interdisciplinary field and can no longer be seen in isolation. From the above discussion it is evident that fundamental rights such as human dignity, equality and freedom of association are integral when we discuss the decolonisation and labour law.

The 2014 amendments to the LRA prove that there has been a shift in South African labour law to expand protection to workers who are more vulnerable. These amendments are a move to decolonise labour law. Other examples include the removal of reference to the contract of employment in the definition of dismissal, highlighting that the focus should rather be on the employment relationship and not depend on a valid contract of employment. Section 197 of the LRA correspondingly amended the common law when it comes to transfers of business undertakings, harassment is specifically mentioned in section 6 of the EEA when it comes to discrimination, and vulnerable workers who earn less than R205 433.30 per annum are regulated in section 198A of the LRA. It should further be noted that the new world of work expands protection not only to employees but also takes due cognisance of vulnerable workers such as domestic workers.

It is thus evident that South African labour law has, to some extent, already decolonised itself by, among other things, the introduction of fair labour practices, diversity, equity, fairness, social justice and protection against sexual harassment.

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