CHAPTER 2

THE FUNCTION OF LABOUR LAW

ABRIDGED CONTENTS

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 Act[1] (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.

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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

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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.

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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 Stewart[16] 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 o*p 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 organisation[20]

(ii) substantial powers for trade unions and organisational rights[21]

(iii) the right to strike[22]

(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

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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 below[26], 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]

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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 Fordism[33] (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

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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

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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

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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 proprietal relationship of master and servant. Only later in the industrial era was this relationship transformed to a contractual relationship between employer and employee.

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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

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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 production[56] 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

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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

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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

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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.

Blanpain[68] 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

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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 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 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 labour[71]. 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

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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

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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 Era[78] (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]

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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 this [85] 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.

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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 earlier[108] 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 binding[111] 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

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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]

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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 summary[119] 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 Act[127] 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 Act[130] and the Trespass Act[131] 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]

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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

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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.

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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 Act[147]specifically includes labour peace[148] 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 Act[151] 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