CHAPTER 5

DECENTRALIZATION OF COLLECTIVE BARGAINING

ABRIDGED CONTENTS

A Introduction

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

(i) Decentralisation of collective bargaining, i.e. a movement from centralised collective bargaining to plant or local level collective bargaining;[1]

(ii) individualisation of employment relations at the expense of collective bargaining, i.e. a system where conditions of employment are determined by the employer and individual employees.[2]

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

B Reasons for Trade Union Decline

1 Introduction

The decline of trade unions in general is evident throughout the industrialised world[3]. Various reasons including government and management animosity towards trade unions, poor public images of unions, the impact of global competition and

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

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

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

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

(i) Changes in the industrial structure resulting in a decline of "big, mass production, predominantly blue collar factories", and an increase in the number of much smaller and less capital intensive enterprises;

(ii) an increase in the number of atypical employees ("peripheral, non-permanent workforce, including women");

(iii) a move toward individualism as a result of improved education and higher living standards amongst workers, "combined with strong tendencies towards the individualization of work leading to increased emphasis on employees as individuals and employee mobility as well as lower levels of employee identification with the enterprise";

(iv) the belief that unions have "fulfilled their mission";

(v) difficulties in unionising employees at small and medium sized enterprises *inter alia* because of employer resistance and lack of union interest; and

(vi) the general rise in living standards and “secured full and stable" employment in industrialised economies in the post-war period. [6] In short, trade unions have generally declined as a result of the changing world of work.

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4 *Ibid* par 3.02.

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

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

2 Government Policy

It has been suggested that government policy is a determining factor of union membership and collective bargaining[7]. Adams suggests this possible conclusion on the basis of the data set out in the table below which contains international and historical data with reference the growth or retreat of trade unions during times of encouragement or discouragement of trade unions by the various governments. [8]

NOTABLE PERIODS OF GOVERNMENT ENCOURAGEMENT AND DISCOURAGEMENT

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

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

8 *Idem.*

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

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

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

10 See Table *supra.*

11 See ch 4 subsection B 3 *infra.*

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

13 *Idem.*

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

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

Where legislation provides trade unions with a monopoly once such legislation is repealed, trade unions will suffer a decline, especially where the major motivation for joining the trade union was legal compulsion. This is what happened in Israel. Israel's union membership declined by 77% from 1995 to 1997. [18] As explained by Raday[19], one of the reasons for such decline was legislation. Until 1995 membership of the General Sick Fund was dependent on union membership. In other words in order to have access to national health benefits, one had to be a trade union member. This is a form of compulsion which resulted in the union (Histadrat General Federation of Employees) acquiring monopoly power. A similar

14 *Op cit* par 3.02.
15 See Adams *op cit* 293.
16 *Idem.*
17 See Raday "The Decline of Union Power" in Conaghan *et al Labour Law in an Era of Globalization* (2002) 361. The author discusses the recent Israeli experience of union decline to support his argument that government policy is a major determinant of union strength. He attributes the recent 77% decline in union membership to legislation.
18 International Labour Office *1997-1998 World Labour Report* (General ILO, K98) 239-240.
19 Raday *op cit* 356.

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

Trade union monopolies created by socio-economic compulsion[22] or legal compulsion[23] result in extremely high union membership. Where a major motivating factor for such membership is compulsion, it follows that the removal of the compulsion will result in drastic decline of union membership. In such cases legislation and government policy create an artificial *raison d'etre* for trade unions. Once such *raison d'etre* is removed, unless the unions have a relevant socio-economic contribution to make, decline and even demise will inevitably be the result. Where trade union membership is not a result of any form of compulsion, legislative policy and laws will have a diminished effect on union membership.

Since democratic governments strive to remain in power, policies and legislation will often be influenced and moulded by socio-economic circumstances. Adams[24] focuses his research on identifying the factors and conditions which influence governments in adopting policies towards trade unions which range from suppression, to tolerance, to encouragement. In doing this he comes to the conclusion that the linear progression of government policy towards trade unions from repression to tolerance to encouragement is an oversimplification. He contends that there is instead a 'zigzag pattern' that can be observed over the last

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

21 *Ibid* 49.

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

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

24 *Idem.*

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

Socio-economic circumstances are also influenced by politico- legal choices.[29] This will more often be the case in one-party state systems. In democracies and free market economies it is more likely that socio-economic circumstances will determine political legal policy choices. This is because legislation which is contrary to the existent socio-economic forces cannot be effective. This is not to suggest that legislation and government policy have no part to play with reference to union membership. However it is submitted that in democratic states the effect of legislation on trade union strength is minor in comparison to economic and political factors. Evidence of such assertion is to be found in the fact that no industrialised economy experienced a growth in union membership in the 1980's when the era of Fordism came to an end and the new age of technology began.[30] Even industrialised countries that adopted policies and legislation that encouraged unions such as France experienced union decline[31].

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25 *Op cit* 275.
26 *Op cit* 276.
27 *Op cit* 296.
28 *Op cit* 296-297.
29 See ch 2 *supra* where the function of labour law is discussed.
30 See Table *supra.*
31 *Idem.*

3 Employer Animosity Towards Trade Unions

Employer opposition toward trade unions has often been cited as one of the factors contributing to union decline.[32] As is generally known, the period of greatest union growth in South Africa was experienced during the most vehement employer opposition.[33] The same can be said for the United States of America.[34] Whatever effect employer opposition has on trade unions is dependent to a large extent on the relative strength of employers versus trade unions. Such strength is in turn very much dependent on the state of the economy.[35] For example during times of high rates of unemployment employer strength vis-à-vis unions will be increased and vice versa. In the same way as legislation and state policy are usually determined by socio-economic reality, so too is the effect of management opposition to trade unions. Employer opposition to trade unions is also dependent on the system of collective bargaining which exists in a particular country. As discussed by Penceval[36] and Summers,[37] antagonistic systems of collective bargaining such as those prevalent in the USA are more likely to engender employer opposition to unions than a co-operative system such as in Japan.

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

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

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

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

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

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

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

4 Departure of Oligarchic Industries

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

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

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

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

40 *Idem.*

41 See ch 2 *infra.*

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

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

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

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

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

The reasons why these industries lost their status are:[47]

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

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

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

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

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

so escape burdensome tax and labour laws, which is not the case with an industrial giant of the industrial era such as General Motors;[50]

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

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

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

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

53 See Baskin *loc cit*.

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

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

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54 Davidson and Rees-Mogg *op cit* 154 estimate that in the United States in 1996 reported that as many as 30 million people worked alone in their own firms. Gladstone op cit153 states: "The growth of atypical, and often precarious, employment and work relationships -whether induced by lack of 'normal' employment possibilities, by individual preferences based on workers' needs, attitudes and expectations, or by a desire for increased flexibility on the part of the enterprises - has presented trade unions with substantial organizing problems. The workers involved often represent a non-stable element of the workforce, changing employers, and frequently, industries, and sometimes, as in the case of certain temporary, home-based and 'independent' contractees, not even being a party to an employment relationship. In the words of Blanpain "Work in the 21st Century 1997 *ILJ* 194: "The hierarchical enterprise, the pyramid with the MD and the board atop the descending ranks of the managers, the middle managers, the foremen and the white- and blue- collar workers at the bottom of the pile, organized like an army or a governmental organization, belongs to the glorious years of Fordism, i.e. to the past. Labour relations in those enterprises were subordinate, tended to be more uniform, collective, controllable and controlled, including by way of collective bargaining."

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

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

(iv) the lowering of capital costs for entry into an industry has facilitated competition and entrepreneurship thus increasing the number of persons working independently as 'atypical employees'.[57] Activities and networks have become dispersed. In an increasing number of activities the possibility of people working together as a team without ever having come into physical contact with one another is not remote.[58] This fact also acts to reduce and even extinguish trade union power of coercion by means of strikes. Atypical workers have a lower propensity to unionise and most industrialised market economies have experienced union decline coincidental with increased workplace flexibility;[59]

(v) with Fordist style assembly lines everyone using the same machine and tools would produce the same output. Work was standardized. Micro technology has individualised work. Output varies from individual to individual. A natural consequence of this is that income will vary

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

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

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

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

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

5 Unemployment

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

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

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

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

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

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

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

6 Conclusion

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

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

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

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

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

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

C Decline of Industry Level Collective Bargaining

1 Introduction

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

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

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

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

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

72 Brown *op cit* 980.

These developments are not a result of labour legislation but as Brown says:
"It is to developments in the world economy as a whole that we must look for an explanation. The benefits of industry-wide agreements to their participants depend very much upon those agreements covering all the employers in a given product market. But industry-wide agreements are unavoidably confined to individual countries. Transnational collective bargaining is doomed both by the volatility of currencies and by the insurmountable organizational problems it poses for trade unions. Clearly, then, the advantages of an agreement constrained by national frontiers diminish rapidly when international trade obliges firms to compete in international product markets." [73]

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

2 Advantages of Industry Level Collective Bargaining

According to Brown[76] the following are important advantages of industry level collective bargaining:

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73 *Ibid* 983.

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

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

76 *Idem.*

(i) The cost of wages can be passed on to the consumer by increasing prices. Since every competitor is subject to the same labour costs, all competitors will be obliged to increase prices. This is referred to as taking 'wages out of competition'. This argument is not really acceptable because taking wages out of competition is not an option in the light of globalisation. In fact this has been described as "one of the historical functions of European Trade unions".[77] It is essential to remain competitive and a policy of autarky is unthinkable.

(ii) Brown finds the idea of 'rate for the job' attractive. This may have been so when jobs were standardised and industries comprised large economies of scale. Standardised 'rates for the job' are inappropriate in small and medium sized enterprises where jobs are not standardised and one individual may perform a number of different jobs.[78]

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

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

(iii) According to Brown small firms are protected from unions demanding better conditions and higher wages at enterprise level where there are industry level collective agreements in place. Experience in South Africa does not bear this out. Despite the LRA strongly encouraging industry level collective bargaining, many employers are still engaging in collective bargaining at enterprise level. Bezuidenhout[79] states: "In terms of industry relations at a meso-level, it seems that the trend towards centralization has come to an end. Only 32 per cent of the non-agricultural private sector workforce is covered by bargaining council agreements, and firm level bargaining, according to recognition agreements, still forms the foundation of collective bargaining."[80]

(iv) Brown further argues that industry level collective agreements reduce the influence of trade unions at the workplace, which in turn results in increased productivity. This sentiment seems contrary to the perception of the legislature. The LRA provides for workplace forums in order to increase productivity. In order to create a workplace forum we need a representative trade union at the workplace. The object of democratisation of the workplace by means of workplace forums cannot be achieved without trade union influence at the workplace. In stark contrast to Brown it seems that the South African legislature perceived the influence of trade unions at the workplace as a positive thing.[81]

(v) Brown also argues that standardisation of job descriptions facilitates industry wide management of training. The advantage of spreading the costs of training across an industry, so the argument goes, will prevent

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

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

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

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

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

(vi) Furthermore, the Skills Development Act[84] makes provision for training across industries thus removing the need for industry level collective bargaining to fulfil this function.

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

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

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

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

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

84 Act 97 of 1998.

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

86 *Idem.*

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

Although industry level collective bargaining may provide some protection for some non-unionised or weakly organised employees, as seen above,[88] many employees are not covered by industry level collective agreements. Secondly legislation such as the Basic Conditions of Employment Act[89] was enacted to protect these employees and create minimum standards and conditions of work.[90] Larger coverage however might be at the expense of the economy and might be beyond the capacity of smaller enterprises thus hindering job creation.

(ii) *Efficient use of union negotiators:*

There seems to be no reason why enterprise level collective bargaining cannot result in efficient use of union negotiators. Trade unions can train more officials in the art of negotiation and their top negotiators can negotiate at various enterprises on behalf of the members.[91]

(iii) *Levelling the playing fields:*

Industry level collective bargaining does indeed have the potential of levelling the playing fields. However, legislation providing minimum standards has the same effect. The danger, however, arises when collective agreements at industry level provide for something more than minimum standards and wages. As Bendix observes: "The original purpose of extending agreements was to prevent the exploitation of non-unionised employees. This presupposed that councils established only minimum-level wages and conditions of service…It is to be doubted that wage levels set by councils (particularly those dominated by large employers) are minimum-level wages." [92]

(iv) *Large employers favour extension of agreements:*

The fact that large employers may favour extension of agreements does not necessarily mean that this is advantageous. Interestingly, it is mainly the larger employers that have been applying for exemptions. The South

88 See Bezuidenhout at web address *http://www.ilo.org/public/english/bureau/inst/papers/2000/dp115/index.htm*.
89 Act 75 of 1997.
90 Thompson and Benjamin *South African Labour Law* (1997) vol 1 B1-2.
91 See Supiot *op cit* 125-128.
92 *Industrial Relations in the New South Africa* (1998) 287.

African Enterprise Labour Flexibility Survey found that larger companies – between 150 and 400 workers – generally apply for exemptions.[93]

(v) *Formulation of industry-wide responses to increased competition*:
Due to the global trends of enterprises downsizing, the emergence of small and medium enterprises, and the existence of a multi-tier wage systems,[94] this industry-wide response will be very difficult if not impossible to orchestrate in practice.

There are however important policy arguments in favour of industry-level collective bargaining as stated by Cheadle:[95]

(i) "industry-level bargaining is low on transactional costs for employers and trade unions. The negotiations are conducted by representative organisations in respect of the industry or parts of an industry;

(ii) industry-level bargaining shifts collective bargaining on the major issues out of the workplace with the effect that workplace relations are generally less strained;

(iii) bargaining outcomes at industry level tend to be general in nature allowing variation at the level of the workplace. Most agreements at industry level set minimum standard and the best agreements are in the nature of framework agreements combining both basic protections and flexibility;

(iv) industry-level bargaining sets a social floor for competition. By setting reasonable standards applicable to all employers in a local market, competition between those employers is based on productivity rather than the socially undesirable reduction of wages or an extension of hours;

(v) strikes and lock-outs occur less often in an industry-level bargaining system and are generally less damaging to individual employers because the latter's competitors in the local market are also subject to the strike or lock-out;

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93 Information available on website with address http://www.ilo.org/public/english/bureau/inst/papers/2000/dp115/indexhtm

94 See Baskin "South Africa's Quest for Jobs, Growth and Equity in a Global Context" 1998 *ILJ* 994-995 for a discussion on our multi-tier wage system.

95 Cheadle, Davis and Haysom *South African Constitutional Law: The Bill of Rights* (2002) 395.

(vi) industry-level benefit schemes permit a greater degree of labour mobility within the industry; and

(vii) precisely because industry-level bargaining is a voluntary system of collective bargaining, it is more legitimate in a context where legitimacy is paramount."

3 Advantages of Enterprise Level Collective Bargaining

Wages can be linked to productivity. One of the best ways to encourage productivity is monetary reward. South Africa has amongst the lowest productivity levels in the world.[96] Enterprise level collective bargaining allows for a more individualistic treatment of employees and the acquisition of skills, productivity, promotion and wages can all be linked. Enterprise level collective bargaining enables enterprises to react more appropriately and more speedily to the pressures and competition resulting from the global economy.[97]

Team building and the democratisation of the workplace are facilitated by enterprise level collective bargaining.[98] It allows for a more co-operative as opposed to antagonistic relationship between the employer and its employees. A more hands on approach is clearly more suitable with the increase in the number of small enterprises and the downsizing and shrinking of economies of scale. Employees can exert a more direct influence at enterprise level. The lower the levels of negotiations the greater the opportunity for direct employee participation.

In short, enterprise level collective bargaining is at times better equipped than industry level collective bargaining to synchronise wages and productivity thus

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96 The individualisation of contracts of employment is the topic of discussion in the next chapter. The low rates of productivity are discussed infra at paragraph heading 4.

97 Supiot *Beyond Employment Changes in Work and the Future of Labour Law in Europe* (2000) 133-135.

98 Hence the machinery for the creation of workplace forums in terms of s 80 of the LRA.

enabling the enterprise to remain globally competitive and consequently to maintain employment.[99]

4 The Present Situation

The Department of Labour has identified a trend in establishing trade unions more for the purpose of being represented during dispute hearings than for collective bargaining.[100]

At the end of 1998 there were 76 bargaining councils.[101] The total number of bargaining councils in the private sector at the end of October 1999 was 73.[102] Only 32% of non-agricultural employees were covered by bargaining council agreements in 1997, and a number of bargaining councils have deregistered since 1995.[103]

The Department of Labour has reported that despite a continued rise in the number of trade unions, trade union membership has decreased from 3.8 million in 1998 to 3.35 million in 1999.[104] This amounts to a decrease of approximately 11.84%. Registered union membership comprises approximately 30.8% of the estimated economically active population.[105]

Wage settlements and the inflation rate 1985-98 excluding the agricultural and domestic sectors:

	Year	Average level of wage settlements	Inflation rate
Nominal surveyed wage increases	1985	13.7%	16.6%

99 Supiot *op cit* 95-96.
100 Republic of South Africa Department of Labour *Annual Report* (1999) 53.
101 Institute for South African Race Relations *2000 South Africa Survey Millennium Edition* (1999) 33.
102 *Ibid* 54.
103 Information available at internet site with address http://www.ilo.org/public/english/bureau/inst/papers/2000/dp115/indexhtm accessed 29 April 2002.
104 *Op cit* 54-55.
105 *Idem.*

reached at centralised bargaining level averaged 8.6% in 1998.	1986	15.5%	18.4%
	1987	17.2%	16.1%
	1988	17.4%	12.9%
	1989	17.4%	14.8%
	1990	17.4%	14.2%
	1991	16.1%	15.4%
	1992	12.0%	13.9%
	1993	10.0%	9.7%
	1994	10.0%	8.9%
	1995	11.5%	8.7%
	1996	9.9%	7.4%
	1997	9.7%	8.6%
	1998	8.6%	6.9%

Source: Andrew Levy and Associates Statistics South Africa (2000)

5 High Wages and Low Levels of Productivity

Not only are labour costs increasing at a more rapid rate than the rate of inflation, but labour costs are also increasing much faster than the rate of productivity.[106] Despite a recent increase in labour productivity this can be ascribed more to the replacement of labour with machines than to the better utilisation of labour. [107] This was re-iterated in the *Government Gazette*:

"Over the past decade there have been periods when overall wage growth (including salaries) outstripped productivity growth, and periods when the opposite has been true. Where real wage rate growth outstrips productivity growth there would be cause for concern since higher unit labour costs could affect international competitiveness, contribute to inflationary pressures and cause job losses. The most recent figures suggest that on an economy wide level, excluding agriculture, the growth in labour productivity has exceeded annual growth in real earnings per worker and has been associated with a decline in the growth of unit labour costs, at least in recent years. Unfortunately there are also indications that some productivity improvements may be artificial and may have arisen simply through the shedding of labour. Productivity gains are important and must be associated both with improved wages and with increases in employment levels." [108]

106 *Idem.*
107 2002 *GG* No 19040 9.
108 *Idem.*

There are studies that indicate that a 10% increase in wages could lead to a 7.1% decline in black employment.[109] This demonstrates that unrealistically high wages could result in an increase in unemployment.

Despite this the Labour Relations Amendment Act[110] further extends the powers of bargaining councils by the addition of the following functions:

(i) to provide industrial support services within the sector,[111] and

(ii) to extend the service and functions of the bargaining council to workers in the informal sector and home workers.[112]

The Amendments make provision for the monitoring, promotion and enforcement of bargaining council agreements[113] by the appointment of agents who can:

(i) publicize contents of agreements;

(ii) conduct inspections; and

(iii) investigate complaints.

(iv) Furthermore, agents are now empowered to adopt any other means to enforce their collective agreements and may perform any other function conferred or imposed by the council.[114]

Bargaining Councils are also in terms of these amendments able to enforce bargaining council agreements by means of agents ordering compliance orders.[115]

6 Segmentation and Flexibility of Labour Markets

The fact that our labour market is segmented and multi-tiered has been acknowledged.[116] The result is a huge gap between the formal and the informal sectors. The gap in the building industry, (which is regulated by a bargaining

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109 See Baskin "South Africa's Quest for Jobs, Growth and Equity in a Global Context" 1998 *ILJ* 986, 999; Grawitzky (1997) "High wages not only Cause of Unemployment - Bank Study" *Business Day* 18 November 1997 6.

110 Act 12 of 2002.

111 S 28 (1) (K).

112 S 28 (1) (L).

113 S 33 (1A) (a).

114 S 33 (1A) (b).

115 S 33A.

116 2002 *GG* No 19040 at 21.

council), is between 50-60%.[117] It appears that while formal employment in the building industry has declined, the number of persons informally employed by the industry has increased through outsourcing and the use of unregistered workers and independent contractors. Other sectors or industries seem to have resorted to similar tactics in order to avoid paying wages that are above the market rate. Large numbers of employees have been retrenched in the forestry industry in Bethlehem and the work subsequently outsourced to them at between 50-70% of the rate.[118] According to Sachs,[119] Director of the Harvard Institute for International Development, the wages of South African formal sector employees is approximately three times that of the wages of those who are informally employed. It seems that the result of industry level collective agreements which have been imposed on non parties by sector, may be a loss of formal jobs. The unfortunate thing is that workers in the informal sector as well as the unemployed are not represented by anyone.

Sachs has the following to say with reference to our industry level collective bargaining system:[120]

"Let me turn finally to one of the main issues of this house – labour market flexibility – which evidence suggests is very important. All of the fast-growing economies of the world have flexible labour markets. By fast growing economies I mean those eight developing countries which achieved 5 per cent or more per capita growth per year between 1986 and 1994: namely Hong Kong, Singapore, Korea, Taiwan, Malaysia, Chile, Mauritius and Thailand. In all these middle-income countries wage setting is at the enterprise level. This, I believe is of tremendous significance. None of these countries have industry-wide, region-wide or national-level negotiation. Many of them have active trade union negotiations but they are enterprise-by-enterprise negotiations rather than industry-wide negotiations. I

117 Baskin *op cit* 992-993.
118 *Ibid* 994.
119 Sachs "Globalization and Employment: A Public Lecture," 24 October 2001, available on web address http://www.ilo.org/public/english/bureau/inst/papers/publecs/sachs/ch2.htm accessed 12 October 2001.
120 *Ibid*.

believe that the evidence shows that this is very important for the start-up of new businesses and for creating the conditions, not so much for existing enterprises, but for the growth of new enterprises. While I know that this is a controversial statement and I hope that we may discuss it, I do believe that the evidence shows that problems arise when collective agreements are extended across the board to a sector or a region thereby preventing market forces from operating to facilitate the start-up of new enterprises. This is probably the key to the real flexibility of these economies which are characterised by enterprise-level negotiation and low labour market taxation – that is low rates of payroll taxation, value-added taxation and personal income taxation which together represent a gap between the cost of labour to the firm and the real take-home pay of employees."[121]

However where rates of unemployment are high the risk of exploitation of workers by the unilateral determination of wage rates by employers is real.[122] Since a state-imposed minimum wage would result in inflexibility,[123] collective bargaining seems to be the better option. Collective bargaining has "of necessity evolved into a wage-setting instrument of greater sensitivity to market realities."[124] Although it may not be impossible to achieve this sensitivity at central level, it certainly is a formidable task. After having researched the bargaining council agreements in the South African clothing industry Anstey concludes: "The carefully crafted character of its early agreements reflects a joint, if uncomfortable, search for wage coherence in an industry under siege in a global economy. SACTWU has managed to strengthen union influence over wages and conditions for employees across the clothing manufacturing industry in South Africa, but market realities will dictate the negotiation of detailed agreements with a range of flexibilities reflecting the fragmented nature of the industry in the modern era if jobs are to be created and decent work preserved. Where multi-employer collective bargaining in the old century was centred in a concept of market control based in 'levelling' labour costs

121 *Ibid* 6.
122 Anstey "National Bargaining in South Africa's Clothing Manufacturing Industry" 2004 *ILJ* 1829, 1862.
123 *Idem.*
124 *Idem.*

across industries, in the new century its test will be the extent to which it can become a market sensitive mechanism for wage setting in industries reflecting increasingly diverse conditions as a consequence of variable levels of enterprise integration into the global economy."[125]

7 Conclusion

In the light of globalisation and international competition, the argument for labour flexibility and against autarky becomes stronger. A refusal to accept the changes caused by globalisation and information technology and to react appropriately can only mean disaster for any state. This is not an argument in favour of complete deregulation, particularly given our history. However, such regulation must be sensitive to any negative impact on employment. The Comprehensive Labour Market Commission recommended the following with regard to the extension of collective agreements: "Not only should the representative position of the parties be considered prior to extension, but also the sensitivity of such agreements to both non-parties and to job creation. In practise we wish to see agreements which accommodate the difference circumstances faced by smaller business, various regions and different sub-sectors." [126] I doubt, however, given the nature of industry level collective agreements, that such flexibility is easily achieved in practice.

D South African Legislature's Response to Union Decline and Decentralisation of Collective Bargaining

1 Introduction

South Africa is no exception to worldwide trends which result in decentralisation and individualisation of employment relations.[127] The drift from industrial and

125 *Ibid* 1862-1863.

126 2002 *GG* No 19040 21.

127 Macin & Webster "Recent Developments in South African Relations and Collective Bargaining: Continuity and Change" 1998 *SAJLR* 35 ff.

manufacturing jobs to services,[128] the emergence of small and medium-sized enterprises,[129] the increase in the number of atypical employees[130] and so on are all evident in the South African labour market.

The South African legislature has adopted several strategies to maintain union strength: there appears to be an underlying, unspoken premise that any action or attitude that results in union decline is contrary to the public interest. It is presumed without question that unions perform an important welfare function. Clearly this is not necessarily true, especially in times of high unemployment.

2 Legislative Support for Union Security Arrangements

The LRA provides for both agency shop[131] and closed shop agreements[132]. This is despite the decision of the European Court of Human Rights in *Young, James and Webster United Kingdom*[133] where it was held that the freedom of association encompasses the freedom not to associate and that closed shop arrangements requiring union membership as a condition of employment constituted a violation of the freedom of association enshrined in Article 11 of the European Convention on Human Rights.

The provision of closed shop agreements is also contrary to national legislation in most countries. The right to freedom not to associate is protected in many states including Austria, France, Italy, England, Germany, Belgium, the USA, Australia and many more,[134] and closed shop agreements have been specifically outlawed

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128 Baskin "South Africa's Quest for Jobs, Growth and Equity in a Global Context" 1998 *ILJ* 986-989 and Mhone "Atypical Forms of Work and Employment and Their Policy Implications" 1998 *ILJ* 197 198-206.

129 Du Toit "Small Enterprises, Industrial Relations and the RDP" 1995 *ILJ* 544.

130 Christianson "Atypical Employment – The Law and Changes in the Organisation of Work" 1999 *Contemp LL* 65, 66; Theron "Employment is Not What it Used to be" 2003 *ILJ* 1247-1271.

131 S 25.

132 S 26.

133 1981 *IRLR* 408.

134 Olivier and Potgieter "The Right to Associate Freely and the Closed Shop" 1994 *TSAR* 443 444.

in most countries of the world.[135] In Germany closed shops and other forms of union security have been interpreted as being contrary to the freedom of association. This is because the freedom of association has been interpreted to include the freedom not to associate.[136] Union security agreements are also foreign to Belgian industrial relations because the freedom not to associate is considered part of the freedom of association. In England closed shops are specifically outlawed.[137] The position in the United States can be summarised as follows: "the right to be free not to associate enjoys extensive protection in the United States and generally equals the protection afforded to be right to be free to associate. The exception in this regard is the recognition of the agency shop which is, if not outlawed in a particular state, subject to severe limitations and qualifications, of which many relate directly to the exercise by the individual of his or her inalienable rights. In terms of statutory regulation and judicial interpretation these rights can only be infringed to the extent that collective bargaining and the position of the union as sole bargaining representative necessitate curtailment."[138]

Closed shops are also contrary to international protection afforded in terms of custom and law: Article 20(1) of the Universal Declaration of Human Rights provides that "Everyone has the right to freedom of peaceful assembly and association", and subsection (2) renders such right subject to the proviso that "no one may be compelled to belong to an additional association". The International Labour Organisation (ILO) also recognises a right not to associate.[139]

To argue against the legitimacy of closed and agency shops solely by showing that it is contrary to International law and the law in most countries[140] is not entirely

135 Davies and Freedland *Kahn-Freund's Labour and the Law* (1983) 237.
136 Olivier and Potgieter *op cit* 443.
137 *Ibid* 446-447.
138 *Ibid* 454.
139 Olivier & Potgieter *op cit* 302-303. For a comprehensive analysis of International Law, see Olivier & Potgieter 302-305.
140 In Scandinavian countries, however, the constitutional freedom of association has not been interpreted to include the freedom not to associate, Raday "The Decline of Union Power" in Conaghan *et al Labour Law in an Era of Globalization* (2002) 360. For a discussion on the constitutionality of the closed shop, see also Du Toit

convincing. However, the case against the legitimacy of closed shops and agency has been convincingly put forward by Olivier and Potgieter.[141] The simple fact that "an individual would not be able to associate freely should he/she not be able to choose not to associate with a particular union"[142] leads one to the conclusion that the freedom to associate necessarily entails the freedom not to associate. From this is follows that closed shop agreements and probably agency shop agreements are in contravention of the freedom of association as protected in terms of our Constitution,[143] the LRA[144] and the ILO.[145]

3 Legislative Support for Secondary Strikes

One of the arguments of union proponents is that the prohibition of secondary strikes is very damaging to union strength in the light of recent trends towards decentralisation of collective bargaining.[146] This is because decentralisation reduces the effectiveness of single employer strikes. Therefore the legitimisation of secondary industrial action is perceived as necessary for the survival of trade unions.[147]

The LRA provides for the legitimisation of secondary strikes.[148] Secondary strikes on the other hand are prohibited in some other states such as New Zealand[149] and

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et al Labour Relations Law (2000) 3rd ed 93-95; Landman "Statutory Inroads into a Trade Union's Right of Disassociation"1997 *ILJ* 13 and Olivier "The Right to Associate Freely and the Closed Shop" 1994 *TSAR* 289 and 1994 *TSAR* 443.

142 *Ibid* 300.

143 S 18.

144 S 54.

145 ILO Convention 87 of 1948. For a discussion on the constitutionality of the closed shop, see also Du Toit *et al Labour Relations Law: A comprehensive Guide* 4th ed (2003) 93-95.

146 Raday *op cit* 361: This view presupposes that unions are necessarily a benefit.

147 *Ibid.*

148 S 66. However certain restrictions are placed on secondary action: S 66(2) provides that 7 days written notice must be given, the primary strike must be protected; and; the nature and extent of the secondary strike is reasonable in relation to the possible direct or indirect effect that the secondary strike may have on the business of the primary employer.

149 Forsyth: "Deregulatory Tendencies in Australian and New Zealand Labour Law" *Working Paper No. 21* Centre for Employment and Labour Relations Law, University of Melbourne (2001) 22.

legislation in England and other countries place severe restrictions on secondary labour action.[150]

4 Employees' Rights Extended to Atypical Employees

Most forms of atypical employment such as part-time work, contract work, temporary work, home work, and leased work, do not easily lend themselves to unionisation. This is especially the case in small and medium enterprises.[151] Employers may find it attractive to classify their workers as atypical employees in order to avoid the provisions of labour legislation and collective agreements, tax payments, social security payments and the provision of fringe benefits. It has been argued therefore that "legitimization of atypical employment is a form of indirect rather than direct deterrence of collective bargaining power".[152]

South African legislation once again comes to the rescue of unions in this regard: The LRA[153] and the BCEA[154] create a rebuttable presumption that a person is an employee if one or more listed conditions exist. Section 200A of the LRA reads as follows: "Until the contrary is proved, a person who works for, or renders services to, any other person is presumed, regardless of the form of the contract, to be an *employee*, if any one or more of the following factors are present:

(i) the manner in which the person works is subject to the control or direction of another person;

(ii) the person's hours of work are subject to the control or direction of another person;

(iii) in the case of a person who works for an organisation, the person forms part of that organisation;

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150 Raday *op cit* 360.

151 Bamber and Sheldon "Collective Bargaining" in Blanpain and Engels (2002) *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* 20.

152 Raday *op cit* 363. See also Theron "Employment is not What it Used to Be" 2003 *ILJ* 1247.

153 S 200A of the LRA inserted in terms of the Labour Relations Amendment Act 12 of 2002.

154 S 83A of BCEA inserted in terms of the Basic Conditions of Employment Amendment Act 11 of 2002.

(iv) the person has worked for that other person for an average of at least 40 hours per month over the last three months;

(v) the person is economically dependent on the other person for whom he or she works or renders services;

(vi) the person is provided with tools of trade or work equipment by the other person; or

(vii) the person only works for or renders services to one person."

This does not apply to any person who earns in excess of the amount determined by the Minister in terms of section 6(3) of the Basic Conditions of Employment Act, any of the contracting parties may approach the Commission for an advisory award on whether the persons involved in the arrangement are employees.

This legislation shifts the onus of proof to the employer. The employer will have to prove that the person is not an employee.[155]

The amendments to the LRA[156] extend the functions of bargaining councils so that informal and domestic workers also enjoy coverage.[157] It appears that the main purpose of this provision is to extend the applicability of bargaining council collective agreements to atypical employees.

The BCEA[158] makes provision for sectoral determinations by the Minister to:

"Prohibit or regulate task-based work, piecework, homework and contract work;"

and to

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155 For a discussion on the approach the courts have in determining whether a person is an employee or not, see Christianson "Atypical Employment - The Law and Changes in the Organisation of Work" (1999) *Contemp LL* 65; Benjamin "Beyond Labour Law's Parochialism: A Re-envisioning of the Discourse of Redistribution" in Conaghan *et al Labour Law in an Era of Globalization (2002)* 75-92*;* and Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* (2004) pars 112-137.

156 Act 12 of 2002.

157 S 28(b) (l).

158 S 55 (4) (g) and (k).

"specify minimum conditions of employment for persons other than employees".

The BCEA[159] also gives the Minister authority to 'deem' certain vulnerable groups or workers to be 'employees' for the purposes of the basic minimum conditions of 'employment'.

The purpose of all these provisions is not only to cast the safety net of protection wider but also to increase the recruitment base of trade unions since only employees can become union members.[160] The downside is the reduction or elimination of employers' ability to create a flexible labour force in order to effectively compete on an international level and consequently and ultimately job losses and another hindrance in the creation of employment.[161]

5 Protection of Unions with the Transfers of Undertakings

In the 1980's and 1990's in most of the world there has been a significant increase in the number of employers seeking to reduce labour costs by the contracting out of business functions, the use leased labour via labour hire agencies, the engaging of contractors, privatisation and so on.[162] Such workers normally do not fall within the ambit of union protection. This can result in a further decline of unions and undermining of collective bargaining. Where a business which had recognised a union is transferred to another employer, the union runs the risk that that employer (new employer) will not recognise it and that any collective agreements entered into with the old employer will not be observed by the new employer.

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159 S 83.

160 S 213 of the LRA defines a trade union as "an association of employees whose principal purpose is to regulate relations between employees and employers, including any employers' organisations."

161 See ch 6 sub-heading F 2 entitled "The Changing Nature of Work in South Africa" where the importance of flexibility and the attempts by employers to achieve it are discussed.

162 Raday "The Decline of Union Power" in Conaghan *et al Labour Law in an Era of Globalization* (2002) 364.

The LRA remedies this and provides:[163]

unless otherwise agreed between the union and employees, the terms and conditions of collective agreements and arbitration awards are transferred to the new employer. This includes not only terms and conditions of substantive collective agreements but organisational rights and collective agreements recognising a union are also transferred to the new employer.

In addressing individual rights the LRA guarantees that unless otherwise agreed with either the union or the employees:[164]

"If a transfer of a business takes place, unless otherwise agreed in terms of subsection (6) -

(a) the new employer is automatically substituted in the place of the old employer in respect of all contracts of employment in existence immediately before the date of transfer;

(b) all the rights and obligations between the old employer and the employee at the time of the transfer continue in force as if they had been rights and obligations between the new employer and the employee;

(c) anything done before the transfer by or in relation to the old employer, including the dismissal of an employee or the commission of an unfair labour practice or act of unfair discrimination, is considered to have been done by or in relation to the new employer; and

(d) the transfer does not interrupt an employee's continuity of employment, and an employee's contract of employment continues with the new employer as if with the old employer."

Furthermore, unless otherwise agreed, the new employer is bound by:

(i) "any arbitration award made in terms of this Act, the common law or any other law;

(ii) any collective agreement binding in terms of section 23; and

(iii) any collective agreement binding in terms of section 32 unless a commissioner acting in terms of section 62 decides otherwise."[165]

163 S 197(2).
164 S 197 (2) (b).
165 S 197 (5) (b).

The new employer will comply with the above if the new terms and conditions are "on the whole not less favourable".[166] However this is not applicable where terms and conditions are covered by a collective agreement.[167] In other words where there is a collective agreement in place the new employer takes over that collective agreement as it stands and cannot alter it in any way. Provision is also made for the union's rights to information in order to enable them to "engage effectively in the negotiations".[168]

A transfer of the business is defined as a "transfer as a going concern"[169] and a business includes a part of a business. It is therefore submitted that outsourcing,[170] contracting out and privatisation would be included in this definition.[171]

166 S 197 (3) (a).

167 S 197 (3) (b).

168 S 197 (6) (b).

169 S 197 (1) (b).

170 See *National Education Health and Allied Workers Union v University of Cape town & Others* [2002] 4 *BLLR* 311 *(LAC),*2003 *ILJ 95* (CC)*;* Le Roux "Consequences Arising Out of the Sale or Transfer of a Business: Implications of the Labour Relations Amendment Act" 2002 *Contemp LL* 61; *SA Municipal Workers & Others v Rand Airport Management Co (Pty) Ltd & Others* 2002 *ILJ* 2034 (LC) par 18-19, *Schutte v Powerplus Performance (Pty) Ltd & Another* [1999] 2 *BLLR* 169 (LC); Bosch "Operational Requirements and Section 197 of the Labour Relations Act: Problems and Possibilities" 2002 *ILJ* 641.

171 For a discussion of the "transmission of business provisions" in Australia, see Forsyth "Deregulatory Tendencies in Australian and New Zealand Labour Law" (2001) *Working Paper No. 21* Centre for Employment and Labour Relations Law – University of Melbourne 13-17. It appears that the Australian Federal Court has adopted a broad approach and focuses on whether there is a substantial identity of activities in order to ascertain whether there has been a transfer as a going concern. This approach therefore includes various forms of outsourcing, contracting out and privatisation under the legislative provisions. For further discussions on some problems surrounding the application of s 197 of the LRA in the context of outsourcing in South Africa, see *National Education Health and Allied Workers Union v University of Cape Town & otherst;* Bosch "Transfers of Contracts of Employment in the Outsourcing Context" 2003 *ILJ* 840; Boraine & Van Eck "The New Insolvency and Labour Legislative Package: How Successful was the Integration?" 2003 *ILJ* 1840.

6 Corporatism

South African labour legislation is also supportive of unions in that it supports a tripartite system of labour relations. The most important role-players in the South African labour market are the state, employers associations and trade unions or trade union federations. In the words of Olivier:[172] "Government has been instrumental in developing a labour relations model based on tripartite structures and societal corporation which have become hallmarks of the new dispensation. The most important indication of this is the establishment of the National Economic, Development Labour Council (NEDLAC)".

The functions of NEDLAC include reaching consensus and concluding agreements concerning social and economic policy, labour legislation, and labour market policy. Such consensus is necessary before any social or economic policy or legislation is implemented by parliament.[173]

Such enabling legislation lends support to the legitimacy of trade unions and power to the trade union movement.[174] This is despite the fact that non-union members, the atypically employed and the unemployed are not represented at NEDLAC.

7 Co-determination

One of the stated purposes of the LRA is to "promote employee participation in decision-making in the workplace".[175] The legislature's hope was to achieve such participation via workplace forums. Many perceive mechanisms such as workplace

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172 Olivier "The Regulation of Labour Flexibility and the Employment Relationship" 1998 *TSAR* 536, 540.

173 S 5 of the National Economic, Development and Labour Council Act 35 of 1994.

174 The degree of union involvement in the administration of public labour market policies has been listed as an important factor in the determination of union density in a book by Fahlbeck on Swedish unions, see Raday "The Decline of Union Power" in Conaghan *et al Labour Law in an Era of Globalization* (2002) 370.

175 S 1(d) (iii).

forums or works councils[176] which allow for employee participation in decision making at the workplace to be supportive of union growth.[177] However, the point has been made that since it is argued that a strong union is a prerequisite for a works council to be effective, it might be more accurate to argue that works councils are dependent on unions and not vice versa.[178]

It is a well known fact that workplace forums have not been a success in South Africa.[179] The main reason for this is trade union opposition to them especially COSATU. The major fear of unions is that workplace forums will serve to usurp union power.[180]

The idea behind works councils that exist in countries like Germany, Sweden and Belgium and the South African version in the form of workplace forums is to create a dual system of negotiation between employer and employees. Bargaining over distributive issues (wages and benefits) should be left to collective bargaining with unions, while matters concerning strategic business decisions, technology, health and safety and other production issues should be dealt with in a less adversarial manner by means of consultation and joint-decision making between management and labour.[181]

In order to allay union fears the legislature enacted provisions in the LRA which render workplace forums entirely dependent on majority unions for their existence. Additionally, if they are allowed to exist at all they are in essence under union control. These provisions provide as follows:

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176 As they are referred to in Germany and other European countries.

177 See Summers" Workplace Forums from a Comparative Perspective" 1995 *ILJ* 807, 811.

178 Raday *op cit* 371.

179 Du Toit *et al Labour Relations Law* (2003) 4th ed 42. According to the *Explanatory Memorandum to the Labour Relations Amendment Bill* of 2000 there were only 17 workplace forums in existence at the time.

180 *Ibid.*

181 See *Explanatory Memorandum to the Draft Bill* 135-136.

(i) Only a trade union or trade unions with majority membership in a workplace may apply to the CCMA for the establishment of a workplace forum.[182] .

(ii) Upon receiving such application a CCMA commissioner must seek to facilitate a collective agreement between the parties that will govern the operation of the workplace forum in its entirety and replace the provisions of chapter V. [183] The primary option, in other words, is a workplace forum created by collective agreement.

(iii) If the parties cannot arrive at a collective agreement, the commissioner must seek to facilitate agreement on the constitution of the workplace forum.[184]

(iv) If the applicant union or unions are recognized in terms of a collective agreement as collective bargaining agent(s) in respect of all employees in a workplace, such trade unions may choose the members of the workplace forum from among their elected representatives in the workplace in terms of their own constitutions.[185]

(v) If the applicant union or unions cease to be representative and another union or unions achieve majority status, the latter will be entitled to demand a new election of the workplace forum.[186]

(vi) Any registered trade union with members at the workplace may nominate candidates for election to the workplace forum.[187] The likely effect is that the applicant union or unions, given their majority membership among the workforce, will determine the composition of the workplace forum by putting forward their own nominees for election.

(vii) An applicant union or unions that nominated a member for election to a workplace forum may remove that member at any time.[188]

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182 S 80(2).
183 S 80(7-8).
184 S 80(9).
185 S 81.
186 S 82(1) (f).
187 S 82(1) (h).
188 S 82 (1) (i).

(viii) Office-bearers or officials of the applicant trade union or unions may attend any meeting of the workplace forum, including meetings with the employer or with employees.[189]

(ix) The applicant union or unions and the employer may, by agreement, change any of the provisions of the constitution of workplace forum set out in para (v) to (viii) above.[190]

(x) If any of the statutory topics of consultation or joint decision-making are regulated by a collective agreement, they are automatically excluded from the agenda of the workplace forum and will continue to be regulated by collective agreement.[191]

(xi) The applicant union or unions and the employer may by collective agreement add topics to the statutory agendas of consultation and joint decision-making (ss 84(3), 86(3) (a)) and may also remove all or any of the topics from the agenda of joint decision-making.[192] Similarly, a bargaining council may add topics to the consultative agenda of workplace forums falling within its jurisdiction.[193]

(xii) The applicant union or unions may request a ballot to dissolve a workplace forum. If more than 50% of employees taking part in the ballot vote for dissolution, the workplace forum will be dissolved.[194]

As can be seen from the above workplace forums are totally dominated and in control of unions. Their existence is dependent on the volition of majority unions, their jurisdiction is confined to matters not covered by collective agreements, and trade unions can prescribe and regulate all their activities, and can terminate their existence.[195]

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189 S 82(1) (u).
190 S 82(1) (v).
191 Ss 84(1), 86(1).
192 S 84(3) and 86(3) (a) and (b).
193 S 84(2).
194 S 93.
195 See Du Toit "Collective Bargaining and Worker Participation" 2000 *ILJ* 1544.

These provisions have been criticised for going too far in allaying union fears at the expense of meaningful worker participation that could result in increased productivity.[196] Union domination of workplace forums does not allow for co-operative consensus seeking and further entrenches adversarialism at the workplace. This is because the distinction between the collective bargaining role of trade unions and the consensus seeking role of workplace forums becomes blurred.[197] Furthermore, it appears that contrary to the position in other countries, unions may embark on strike action where agreement cannot be reached on a matter for consultation.[198] This runs contrary to the co-operative spirit intended for workplace forums. With regard to workplace forums the legislatures' over-zealous concern for the protection of trade unions has resulted in the inability of workplace forums to perform the functions that they were designed to achieve, either because they never came into existence and when they rarely did, they were deprived of any form of independence from trade unions.[199]

Union opposition to workplace forums is summarised by Du Toit *et al*: "Put simply, an ineffectual trade union presence at plant level may create a vacuum that workplace forums could fill, either by force of circumstances or with a little help from employers. The fear is that workers may transfer their loyalties from an inadequate trade union to a workplace forum that is better able to represent their interests and thus turn curable union weakness into terminal decline."[200] It appears therefore that according to union protagonists unions must continue to prosper even at the expense of employee interests.

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196 Baskin & Satgar "South Africa's New LRA – A Critical Assessment and Challenges for Labour" 1995 *Labour Bulletin* 50.

197 *Idem.*

198 Olivier "Workplace Forums: Critical Questions from a Labour Law Perspective" 1996 *ILJ* 803, 812-815; Summers "Workplace Forums from a Comparative Perspective" 1995 *ILJ* 806; Van Niekerk "Workplace Forums" 1995 *Contemp LL* 31, 32; Du Toit "Collective Bargaining and Worker Participation" 1995 *ILJ* 1544.

199 See Olivier *op cit* 803.

200 *Labour Relations Law* (2003) 4th ed 1554.

Despite initial intentions to amend the provisions relating to workplace forums[201] so as to encourage their development the 2002 amendments to the LRA have not altered these provisions at all. It is concluded that the legislature remains committed to allaying union fears, addressing union concerns and perhaps even encouraging unions at all costs.

8 Organisational Rights

As was observed *supra,*[202] South African labour legislation provides unions with extensive organisational rights in order that they might expand and gain influence. The legality of the organisational right of stop order facilities for the collection of union dues as well as agency shops have been questioned the world over.[203] Nevertheless they are provided for in terms of our legislation. These systems provide unions with huge administrative and financial benefits.

9 Right to Strike over Refusal to Bargain and Retrenchments

The right to strike is available to unions where the employer refused to bargain collectively with the union or refuses to recognise the union provided the strike is preceded by the normal procedures in addition to an advisory award having been made.[204] Despite the lack of a direct duty to bargain being placed on the employer by the LRA, it has been submitted by Du Toit *et al*[205] that section 23(5) of the Constitution which provides for the right of every trade union and every employer

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201 There were proposed amendments contained in the Labour Relations Amendment Bill of 2000, to the effect that a registered trade union would be able to apply for the establishment of a workplace forum in a workplace in which the majority of the employees were not trade union members, provided that the application was supported by non-union members and a majority of the employees in the workplace as a whole supported the application. Furthermore, the proposed amendments provided that where there was no registered trade union, the majority of employees in a workplace could apply for the establishment of a workplace forum. Finally, the proposed amendments made it possible to establish a workplace forum in workplaces where there were less than 100 employees. These proposals however were ultimately not drafted.

202 Ch 3 *supra*.

203 Raday "The Decline of Union Power" in Conaghan *et al Labour Law in an Era of Globalization* (2002) 374.

204 S 64 (2).

205 *Labour Relations Law* (2003) 4th ed 167.

and employer's organisation to engage in collective bargaining, could be interpreted as introducing a duty to bargain collectively.[206]

In the case of all but small employers or very small retrenchments, the 2002 Amendments to the LRA provide unions with a choice of either striking or going to the Labour Court over the substantive fairness of dismissals based on operational requirements.[207] Sympathy strikes are also provided for in such instances.[208]

This can result in forum shopping, it causes uncertainty for both employees and employers, and may cause disputes amongst employees. It is another instance of the prevalent emphasis on job retention as opposed to job creation in our labour legislation.[209]

10 A Legal Duty to Bargain?

10.1 Introduction

Whether there is a legal duty to bargain collectively is far from settled. Academic opinion on this issue differs.[210] In order to consider the merits of the opposing views it is necessary to consider the policies of the Labour Relations Act 66 of 1995 (hereinafter the "LRA"). As pointed out by Smit J: "The Constitutional Court in the *NEHAWU v University of Cape Town & others* case at 19 par 34, indicated that in interpreting constitutional rights guidance should be obtained from the provisions of the Labour Relations Act 66 of 1995."[211] In turn, in order to gain insight into these policies it is necessary to consider the background of the duty to

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206 This is discussed in detail under the sub-heading 10 *infra*.

207 S 189A (7)(b) and 8(b).

208 S 189A (11)(c).

209 See Baskin "South Africa's Quest for Jobs, Growth and Equity in a Global Context" 1998 *ILJ* 986; Mhone "Atypical Forms of Work and Employment and Their Policy Implications" 1998 *ILJ* 197.

210 For example compare Cheadle's view in Cheadle, Davis and Haysom *South African Constitutional Law: The Bill of Rights* (2002) 388-398 with the view of Van Jaarsveld in "Reg op Kollektiewe Bedinging – Nog Enkele Kollektiewe Gedagtes" *De Jure* 2004 349.

211 *SA National Defence Force Union & Another v Minister of Defence & Others* 2003 *ILJ* 2101 (T) 2112 A.

bargain in South Africa and the background against which the policies of the LRA were formulated.

10.2 *Development of a Duty to Bargain in South Africa*

Collective bargaining became prevalent in most modern economies as a result of the advent of industrialisation. Steenkamp, Stelzner and Badenhorst explain: "Collective bargaining in South Africa was of little significance until industrialization commenced with the discovery of diamonds in 1870 and gold in 1872. Prior to these events South Africa was mainly a rural society. Employment relationships were governed by the Master and Servants Act 1841, which was primarily aimed at setting down rules for black employees. There were no collective labour relations and no concerted attempt by workers to organize themselves against their employers. The advent of mining, however, witnessed a large-scale migration of unskilled blacks and whites to the Witwatersrand. The mining industry, in turn, quickly gave rise to the establishment of supporting industries such as the railways, engineering and building industries. As industrialization expanded the need for skilled workers increased. A large number of highly skilled European immigrants were employed at much higher rate than the rest of the workforce. With increased mechanization, however, mine owners realized that many jobs previously performed by European immigrants and skilled white workers could in fact be performed by black unskilled or semi-skilled labour at a lower rate. The threat of losing their jobs to black workers quickly gave rise to a number of strikes by white mineworkers. It was only after the violent Rand Revolt of January 1922 (when 25000 white miners went on strike to express their dissatisfaction with the contemplated retrenchment of about ten per cent of the white workforce, which they viewed as yet another attempt by mine owners to replace them with cheaper black labour), that the government decided to implement statutory machinery for collective bargaining and the resolution of disputes between employers and employees."[212]

212 "The Right to Bargain Collectively" 2004 *ILJ* 946-947.

Thus in 1924 the Industrial Conciliation Act[213] was passed. This Act was testimony to the recognition of the fact that industrial conflict had to be institutionalised through a system of collective bargaining in order to contain conflict and strive towards industrial peace. A statutory system of centralised collective bargaining was introduced. Unfortunately blacks were excluded from participation in this statutory system of collective bargaining. Consequently, a dualistic system of labour relations developed, with trade unions representing white employees taking part in a statutory, centralised system of collective bargaining and trade unions representing black employees negotiating with individual employers at plant or organisational level.[214] In 1979 the Wiehahn Commission of Enquiry recommended that the statutory system of collective bargaining should be made available to trade unions representing black employees and that an industrial court with a broad and flexible unfair labour practice jurisdiction should be created.[215] The industrial court looked to its unfair labour practice jurisdiction to impose a duty to bargain.[216]

A judicially imposed duty to bargain was first introduced in the United States, and this system was adopted in Canada and Japan.[217] Cheadle makes the point that the duty to bargain "is not just a right: it is a policy regime that involves fundamental choices as to the form and level of collective bargaining and the nature of its regulation. It commits a society to a collective bargaining regime centred on the workplace rather than on the industry. It requires a regulatory regime that provides for state or third- party determination of:

- Who must bargain with whom-threshold issues of representativeness;

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213 11 of 1924.

214 See Cameron, Cheadle and Thompson *The New Labour Relations Act* (1989) 21-29.

215 See Steenkamp, Stelzner and Badenhorst *op cit* 949-951.

216 *UAMAWU v Fodens (SA) (Pty) Ltd* 1983 *ILJ* 212 (IC); *East Rand Gold and Uranium Co Ltd v NUM* 1989 *ILJ* 683 (LAC); *NUM v East Rand Gold and Uranium Co Ltd* 1991 *ILJ* 1221 (A); *MAWU v Hart* 1985 *ILJ* 478 (IC); *FAWU v Spekenham Supreme* 1988 *ILJ* 627 (IC).

217 Cheadle, Davis and Haysom *op cit* 390.

- Who is represented by the trade union in the negotiations (the 'bargaining unit');
- What may be placed on the bargaining agenda (the 'subject matter of bargaining'); and
- The manner in which bargaining takes place (the 'duty to bargain in good faith').

In a nutshell, the positive duty to bargain carries with it a policy choice as to the form and level of collective bargaining and the regulatory regime that is necessary to govern and maintain it." [218]This would therefore in Cheadle's view impinge on the philosophy of voluntarism which underpinned the LRA's predecessors.[219]Thompson and Benjamin are of the view that the LRA has an even stronger underlying philosophy of voluntarism when it comes to collective bargaining.[220]

In the light of this and the fact that Canada, the United States and Japan all have plant level collective bargaining systems as opposed to the centralised systems of some European countries, it is not surprising that in these countries there exists a positive duty to bargain in the sense that it can be judicially imposed.[221] When the industrial court in South Africa was imposing a duty to bargain plant level collective bargaining was prevalent. This is despite the fact that a statutory system of

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218 *Idem.*

219 See Davis "Voluntarism and South African Labour Law-are the Queensbury Rules an Anachronism?" 1990 *AJ 45, 52-55.*

220 See *South African Labour Law* (1997) vol 1 AA1-5 where the authors state:" The approach of the 1995 Act is quite different from that of its predecessor. Under the unfair labour practice provisions of the repealed Act, employers were saddled with a legal duty to bargain with trade unions. Most presiding officers held that only sufficiently representative unions held rights in this regard, but some went so far as to extend entitlements to unions with insignificant strength. The collective dimension of the unfair labour practice jurisdiction has now been effectively abolished, and with it the duty to bargain. However, the institution of collective bargaining is unequivocally fostered, albeit down a different path. The objective has been to create a statutory framework conducive to bargaining, whilst preventing the judicial appropriation of politically sensitive terrain. A sub-text has been to deny legal leverage to unrepresentative unions."

221 *Ibid 390*.

collective bargaining at central level was in place. The reason for this state of affairs is historical: As mentioned above unions representing black employees were excluded from the statutory system of centralised collective bargaining until the Wiehahn recommendations were put in place in 1979.[222] During the 1980s, despite being able to participate in the statutory system of central collective bargaining (industrial councils), most trade unions representing black employees continued to bargain with employers at plant level. Cameron, Cheadle and Thompson explain: "The introduction of the industrial court in 1979 represented a major philosophical break with the past. It coincided with the deracialisation of the statute, a step which meant that henceforth the aspirations and frustrations of the entire industrial workforce would require accommodation within a single, uniform code. It would have been quite beyond the capacity of the existing system of industrial councils and conciliation boards to deal successfully with the sudden arrival of a phalanx of unions representing predominantly black workers. The legacy of past exclusion from this statute entailed that the emerging unions were not registered and in fact had never sought to organize along lines consistent with the registration process. They were, in the main, incipient industrial unions which had learnt the art of survival through factory-based recruitment programs. Their major quests were for recognition for themselves and job security for their largely unskilled and semi-skilled members. To the extent that they relied upon legal forms at all, they sought to fix their right in contract (in the shape of recognition agreements), not through legislation. A statutory formula was called for which could reconcile the old traditions with the new. The unfair labour practice jurisdiction was the legislative response to that demand." [223]

Not surprisingly, black trade unions were less than enthusiastic about the fact that they could partake in the officially sanctioned system of collective bargaining. Initially most of the unions representing black employees were distrustful of their inclusion in the system and perceived it as another form of government control. Another reason for their failure to partake in the system was simply as a matter of

222 See Bendix *Industrial Relations in the New South Africa* (1988) 81-82.
223 *The New Labour Relations Act* (1988) 21.

principle in protest of their previous exclusion. Smaller unions felt that their power base would be diluted if they were to partake in a system of centralised collective bargaining and preferred to bargain at plant level.[224] The result was an entrenched system of plant level collective bargaining in South Africa.

Towards the mid 1980s resistance to registration by unions representing black employees began to wane and according to the Department of Manpower's report for 1990 "total union membership discounting the unregistered unions, had increased by one and a half million since 1980."[225] Steenkamp, Stelzner and Badenhorst observe: "The initial divergence between statutory and non-statutory bargaining changed during the 1980s. When the rapidly expanding Metal & Allied Workers Union (MAWU) decided to join the industrial council for the metal industry in 1984, many trade unions followed suit." [226] Black trade unions began to see the advantages of central level collective bargaining. As these unions gained strength they became the representatives of the black working class and since blacks were disenfranchised these trade unions "found themselves in a politically prominent position."[227] Labour and political rights of black employees became the major issues for central level collective bargaining. Despite the acceptance of the statutory system of central collective bargaining by many trade unions representing black employees from the mid 1980s, there "was also a proliferation of recognition agreements between individual employers and unions representing black employee."[228] In other words, plant level collective bargaining continued to flourish and the industrial court made use of its unfair labour practice jurisdiction to impose a duty on employers to bargain.[229] This duty necessitates that the court prescribes:

(i) what constitutes bargaining in bad faith i.e. a duty to bargain in good faith;[230]

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224 Bendix *op cit* 97.
225 *Ibid* 98.
226 "The Right to Bargain Collectively" 2004 *ILJ* 950.
227 Bendix *op cit* 99.
228 *Ibid* 100.
229 See *inter alia FAWU v Spekenham Supreme* (1988) *ILJ* 627 (IC).
230 See Van Jaarsveld, Fourie and Olivier *Principles and Practice of Labour Law* (2004) par 546.

(ii) what may and may not be put on the bargaining table;[231]

(iii) at what level the parties should bargain;[232] and

(iv) with whom the employer should bargain.[233]

In short, although trade unions representing black employees increasingly took part in central level collective bargaining from the mid 1980s to the early 1990s, plant level collective bargaining continued and the industrial court therefore made use of its broad unfair labour practice jurisdiction to impose a duty to bargain.[234]

Du Toit *et al* criticize the industrial court's jurisprudence concerning the duty to bargain: "Inevitably, the resulting rules and principles were formulated on an *ad hoc* basis which gave rise to a number of problematical features. These included-

- Uneven often subjective, rulings which left litigants uncertain as to when, with whom and in respect of which topics the duty to bargain would arise;
- a proliferation of eligible agents with rights to bargain at plant level;
- a duality between centralized and plant-level bargaining;
- a vague and often subjective concept of good faith bargaining; and
- an overall lack of consistency, undermining bargaining relationships and impacting unfavourably on the legitimacy of the system.

As a consequence, collective bargaining developed in a context of legalism at the expense of voluntarism, innovation and industry level organization. The result, according to the drafters of the current Act, was 'a confused jurisprudence in which neither party is certain of its rights and in which economic outcomes are imposed on parties which often bear little, if any, relation to the needs of the parties or the power they are capable of exercising'." [235]

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231 *Ibid* par 546 A.

232 *MAWU v Hart* 1985 *ILJ* 478 (IC); *PPAWU v SA Printing & Industries Federation* 1990 *ILJ* 345 (IC); *UAMAWU v Thomsons (Pty) Ltd* 1988 *ILJ* 266 (IC).

233 See Van Jaarsveld, Fourie and Olivier *op cit* par 156.

234 See *SASBO v Standard Bank* 1998 *BLLR* 208 (A).

235 *Labour Relations Law* (2003) 4th ed 228-229.

These problems coupled with a preference for central level collective bargaining by COSATU[236] set the scene for the drafting of the Labour Relations Act 66 of 1995.

10.3 The Labour Relations Act 66 of 1995 (hereinafter LRA)

The LRA abolished the broadly formulated unfair labour practice which accorded the industrial court the ability to create a judicially enforceable duty to bargain.[237] Nevertheless the LRA encourages collective bargaining especially at central or sectoral level.[238] The objects clause of the LRA specifically provides for this.[239] The LRA provides a number of motivations for the encouragement of central or sectoral level collective bargaining:

(i) by collective agreement parties to a bargaining council may establish the thresholds of representativity necessary for the acquisition of organisational rights;[240]

(ii) trade unions that are party to a bargaining council are automatically entitled to the organizational rights of access to the workplace and stop order facilities in all workplaces within the council's registered scope;[241]

(iii) councils can by means of collective agreement determine which matters may not be an issue in dispute for the purpose of a strike or lock-out at the workplace;[242]

(iv) a bargaining council may add to the list of issues over which it is compulsory to consult with a workplace forum.[243]

The LRA has a strong theme of majoritarianism running through it and the creation of large majority representative unions is encouraged. Various motivations have

236 Bendix *op cit* 103.
237 Benjamin and Thompson *South African Labour Law* (1997) vol 1 AA1-5.
238 Steenkamp, Stelzner and Badenhorst "The Right to Bargain Collectively" 2004 *ILJ* 954.
239 S 1(d) (ii).
240 S 18(1).
241 S 19.
242 S 28(1) (i).
243 S 84(2) and s 28 (1) (j).

been put in place to encourage unions that represent a majority of the workforce either alone or by joining forces with other unions. Only these unions enjoy the following rights:

(i) The organisational rights of the election of trade union representatives[244] and the organisational right of access to information[245] are only available to union(s) that represent a majority of the employees at the workplace;

(ii) the right to enter into closed[246] and agency shop[247] agreements with the employer;

(iii) the right to apply for the establishment of a workplace forum;[248]

(iv) the right to enter into collective agreements that are binding on non members;[249] and

(v) the right to enter into a collective agreement that establishes the threshold of representativity applicable for the acquisition of organizational rights of access to the workplace, stop – order facilities and trade union leave rights.[250] In considering whether or not a trade union is sufficiently representative, the commissioner 'must seek to minimise the proliferation of trade union representation in a single workplace and, where possible, to encourage a system of a representative trade union in the workplace'.[251]

The LRA encourages collective bargaining by providing machinery for the creation of bargaining forums such as workplace forums,[252] bargaining councils[253] and statutory councils,[254] and by providing for the acquisition of organisational rights.[255] The *Explanatory Memorandum* that accompanied the Draft Bill states: "The fundamental danger in the imposition of a legally enforced duty to bargain and the

244 S 14.
245 S 16.
246 S 26.
247 S 25.
248 S 80.
249 S 23(1) (d) (iii).
250 S 18.
251 S 21(8); s 27.
252 S 80.
253 S 27.
254 S 39.
255 Ch III part A of the LRA.

consequent determination by the judiciary of levels of bargaining, bargaining partners and bargaining topics, is the rigidity which is introduced into a labour market that needs to respond to a changing economic environment. The ability of the South African economy to adapt to the changing requirements of a competitive international market is ensured only where the bargaining parties are able to determine the nature and the structure of bargaining institutions and the economic outcomes that should bind them, and, where necessary, to renegotiate both the structures within which agreements are reached and the terms of these agreements…While giving legislative expression to a system in which bargaining is not compelled by law, the draft Bill does not adopt a neutral stance. It unashamedly promotes collective bargaining. It does so by providing a series of organisational rights for unions and by fully protecting the right to strike." [256]

This preference for majority representative trade unions and an abhorrence of a proliferation of unions is further testimony to the LRA's preference for and encouragement of central or sectoral level collective bargaining instead of plant level collective bargaining.[257] The previous dispensation displayed no such bias in favour of central level collective bargaining. A legally enforceable duty to bargain "commits a society to a collective-bargaining regime centred on the workplace rather than on the industry."[258] Clearly, such a plant level collective bargaining system was not what the legislature intended in drafting the LRA 66 of 1995. This *inter alia* is why the legally imposed duty to bargain was abolished.[259] However, the preference for collective bargaining for the ultimate purpose of attaining labour peace remained.[260] What has changed in this respect is the means used to encourage, perhaps even enforce, collective bargaining. Instead of a broadly formulated unfair labour practice jurisdiction, organisational rights for

256 GN 97 "Draft Negotiating Document in the Form of a Labour Relations Bill" 10 Feb 1995 *GG* 16259 22.

257 Basson, Christianson & Garbers *Essential Labour Law* (2000) vol 2 74.

258 Cheadle, Davis and Haysom *South African Constitutional Law: The Bill of Rights* (2002) 391.

259 See Thompson and Benjamin *South African Labour Law* (1997) vol 1 AA1-5.

260 S 1 (c) (i); s 1 (d) (i) (ii).

representative trade unions coupled with the right to strike[261] provide the key for the encouragement or even enforcement (given certain circumstances) of participation in collective bargaining. Brassey explains: "In seeking to promote a framework within which employees and employers can collectively bargain, the Act adopts an unashamedly voluntarist approach: it does not prescribe to the parties whom they should bargain with, what they should bargain about, or whether they should at all. In this regime the courts have no right to intervene and influence collectively bargained outcomes. These actions must depend on the relative power of each party to the bargaining process." [262]

Aside from the provision for the establishment of closed shops and agency shops and statutory provision for organisational rights, the introduction of the right to strike without fear of dismissal under certain prescribed circumstances is one of the most significant changes brought about by the LRA.[263] In short, statutory provision of organisational rights, a marked bias towards majority representative trade unions and central or sectoral collective bargaining, combined with a right to strike all point to a system where collective bargaining is left to be determined by the power-play between the parties. Judicial interference in the sphere of collective bargaining is inappropriate and unwarranted in these kinds of systems.[264] Cheadle cites the following[265] in support of this view: "I believe our current system of collective bargaining regulating relations between workers and employers is too complicated and sophisticated a field to be put under the scrutiny of a judge in a contest between two litigants arguing vague notions such as 'reasonable' and 'justifiable in a free democratic society'. I have no confidence that our adversary court system is capable of arriving at a proper balance between the competing political, democratic and economic interests that are the stuff of labour legislation.

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261 *In re Certification of the Constitution of the Republic of South Africa* 1996 *ILJ* 821 (CC) par 64; *NUMSA v Bader Bop (Pty) Ltd* 2003 *ILJ* 305 (CC).

262 *Employment and Labour Law* (2000) vol 3 A 1: 8.

263 Bendix *Industrial Relations in the New South Africa* (1998) 102.

264 See Brassey and Cooper in Chaskalson and others *Constitutional Law of South Africa* (1998) 30.

265 Cheadle,Davis and Haysom *South African Constitutional Law: The Bill of Rights* (2002) 395.

When we consider that labour law is poly-centric in nature, adjustments to the delicate industrial relations balance in one part of the system might have unanticipated and unfortunate effects in another. The lessons of the evolution of our labour law regime in the past 50 years display very clearly that the legislatures are far better equipped than the courts to strike the appropriate balance between the interests of the individual employee, the union, the employer and the public." [266]

Although the LRA does not provide for a duty to bargain, it renders the imposition of such duty possible by the use of economic or industrial muscle: In terms of the LRA, a trade union is entitled to strike where an employer refuses to bargain, provided an advisory (not binding) arbitration award on whether bargaining should take place is first obtained.[267] This provision re- iterates the LRA's unwillingness to allow courts or other tribunals to impose a duty to bargain. Clearly the legislature perceived the use of industrial muscle in the form of a strike as the most suitable or appropriate means of forcing the employer to bargain collectively.

The fact that the LRA does not explicitly provide for a duty to bargain collectively has led many to describe the Act as 'voluntaristic'.[268] From the perspective that there is no judicially enforceable duty to bargain this description might be accurate. Van Jaarsveld[269] on the other hand, argues that what is 'voluntaristic' about the Act is not the fact that the LRA does not impose a duty to bargain, but rather the mechanisms that the LRA provides for collective bargaining. The parties are free to determine the outcomes, parties and subjects for collective bargaining. For

266 *Op cit* 388.See too Weiler "The Regulation of Strikes and Picketing under the Charter" in Weiler and Elliot (eds) *Litigating the Values of a Nation: The Canadian Charter of Rights and Freedom* (1986) 235.

267 S 64(2).

268 See for example Steenkamp, Stelzner and Badenhorst "The Duty to Bargain Collectively" 2004 *ILJ* 953; *NPSU v National Negotiating Forum* 1999 *ILJ* 170 (LC); Brassey *Employment Law and Labour Law* 2nd ed (1999) vol 3 A 1:8.

269 "Reg op Kollektiewe Bedinging - Nog Enkele Kollektiewe Gedagtes" 2004 *De Jure* 353.

example, there is no compulsion to establish a bargaining council,[270] or a workplace forum,[271] nor does the LRA prevent the parties from entering into a recognition agreement and bargaining at plant level despite the LRA's preference for central or sectoral level bargaining. However there are some instances where the LRA is not voluntaristic at all: The Minister can force parties to become members of a statutory council[272] and in this manner force the parties to bargain with each other. Another instance of where the LRA is not voluntaristic is where an employer is obliged to grant a 'representative' trade union certain organisational rights.[273] In the words of Du Toit *et al.:* "The end product is a hybrid of voluntarism, inducement and compulsion." [274]

10.4 The Constitutional Duty to Bargain

The interim Constitution[275] provided for the "right to bargain collectively",[276] while the final Constitution (hereinafter "the Constitution"[277]) provides for "the right to engage in collective bargaining".[278] Some are of the opinion that this difference in wording between the interim Constitution and the final Constitution is insignificant.[279] In other words, in terms of this view, the right to collective bargaining is the same as the right to engage in collective bargaining. This entails a direct or positive right in the sense that the other party has a "correlative duty" to bargain collectively.[280]

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270 S 27.
271 S 80.
272 S 41.
273 Ss 12-16.
274 *Labour Relations Law* (2003)4th ed 227.
275 Act 200 of 1993.
276 S 27(3).
277 Act 108 of 1996.
278 S 23(5).
279 Smit J in *SA National Defence Force Union & Another v Minister of Defence & Others* 2003 *ILJ* 2101 (T) at 2112; Van Jaarsveld *op cit*.
280 *SA National Defence Force Union & Another v Minister of Defence & Others loc cit.*

Others believe that the difference in wording between the interim and the final constitution was deliberate and that the meaning differs.[281] According to this view section 23(5) of the Constitution does not provide for a right in the sense that it imposes a correlative, positive duty to bargain, but it merely provides for a freedom to bargain collectively. A 'freedom' as opposed to a 'right' does not entail a positive duty to act, but only an absence of interference with that protected freedom, hence a negative duty. In short, a right to bargain would entail a correlative duty to bargain, whereas a freedom to bargain merely prohibits an interference or hindrance with the exercise of that freedom.

Van Jaarsveld[282] discusses some of the reasons for the view that the difference is insignificant. Firstly the argument that collective bargaining is of such integral importance to the very fibre of our industrial relations system that the absence of a direct duty to bargain would negate the importance of collective bargaining is put forward. According to this interpretation, organisational rights, which form the foundation of effective collective bargaining, would make no sense unless an enforceable, fundamental right to collective bargaining exists.[283] It appears that the author is referring to a judicially enforceable right. I agree with this sentiment with the reservation that the right to collective bargaining need not necessarily be enforced by the courts. This right can also be compelled by the use of economic forces or industrial muscle in the form of a strike as provided for in terms of the LRA. I concede that in order to exert such industrial muscle, the employee party will have to be sufficiently representative. But this is in accordance with the policies of majoratarianism and the preference for sectoral or central level collective bargaining provided for in the LRA.[284] As pointed out by Cheadle: "The establishment of a compulsory system of collective bargaining is almost

281 See the views of Van der Westhuizen J in *SA National Defence Union & Another v Minister of Defence & Others op cit* at 1507-1510; Brassey and Cooper in Chaskalson *et al Constitutional Law of South Africa* (1998) 30; and Cheadle in Cheadle, Davis and Haysom *South African Constitutional Law: The Bill of Rights* (2002) 390-394.

282 *Op cit* 349.

283 *Ibid* 355.

284 As discussed under heading 2 *supra*.

impossible at industry level. On the other hand, a duty to bargain is readily enforceable at the level of the employer. The combination of both a voluntarist industry – level system and a compulsory system of workplace bargaining will lead ultimately to the dismantling of industry-level structures of bargaining. Once the constitutional text is held to include a duty to bargain, it commits itself and the society to a workplace-level system of collective bargaining. The fact that there is no judicial enforcement of a duty to bargain does not mean that the Labour Relations Act does not provide a remedy. Firstly, much of the critical content of a recognition agreement – namely the entrenchment of the trade union at the workplace - is enforceable. Secondly, there is a procedure for an advisory award on disputes concerning a duty to bargain. Such an award is not legally enforceable but can be enforced by a trade union through the union's exercising its right to strike." [285]

Smit J [286] decided that if there is no positive, judicially enforceable right to bargain collectively, the State would not be fulfilling its constitutional mandate to "respect, protect, promote and fulfil the rights of the Bill of Rights."[287] My view is that in promulgating the LRA which unashamedly encourages collective bargaining and provides the framework for its practical achievement, the State has indeed fulfilled its mandate to "respect, protect, promote and fulfil" the right to bargain collectively.

Another argument in favour of a duty to bargain is that if the drafters of the Constitution wanted to create only a freedom as opposed to a positive, judicially enforceable right, they would have used the word 'freedom' instead of the word 'right' as they have done for example in s 15 - the freedom of religion, belief and opinion, s16 - the freedom of expression and s 21 - the freedom of movement and residence.[288] But the difference between these 'freedoms' and the 'right' to

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285 Cheadle, Davis and Haysom *op cit* 395-396.

286 *SA National Defence Force Union & Another v Minister of Defence & Others* 2003 *ILJ* 2101 at 2113.

287 S 7(2).

288 Smit J's judgement in *SA National Defence Force Union & Another v Minister of Defence & Others op cit* 2113*;* and Van Jaarsveld *op cit* 356.

collective bargaining is that these freedoms can be exercised without the participation of another party. All that is required of other parties is that they refrain from interfering with the exercise of that freedom. On the other hand, in order to bargain collectively, the active participation and even cooperation of another party is required. This is not the same as refraining from doing something. It follows that to speak of a 'freedom' to bargain collectively would make no sense. Since the participation of another party is required the use of the word 'right' is more appropriate. As alluded to earlier this does not necessarily mean a legally enforceable right. In the light of the fact that the LRA has created other mechanisms for its enforcement, judicial enforcement is not necessary. Secondly, the use of the word 'right' in the Constitution does not necessarily entail a right that is enforceable by the courts.[289]

Finally the argument that South Africa is obliged to enforce collective bargaining in terms of its international law obligations[290] is countered by Cheadle's view : "….the duty to bargain is not an aspect of the right to bargain collectively in the manner articulated in international instruments. The ILO Convention on the Right to Organise and to Bargain Collectively records the ratifying member's obligations as follows:

> *Measures appropriate to national conditions shall be taken, where necessary, to encourage and promote full development and utilisation of machinery for voluntary negotiation between employers and employers' organizations and workers' organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.*

This obligation has been glossed by the Committee on Freedom of Association. The committee states, in its digest of decisions, that 'Collective bargaining if it is to

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289 See Beatty "Constitutional Labour Rights: Pro's and Cons" 1993 *ILJ* 1; De Vos "Pious Wishes or Directly Enforceable Human Rights? 1997 *SAJHR* 67; *Sabroomoney v Minister of Health Kwa Zulu Natal* 1997 12 *BLLR* (CC), 1998 1 SA 765 (CC); *Treatment Action Campaign & Others v Minister of Health & Another* [2002] 4 *BLLR* 356 (T); and *Grootboom v Oostenberg Municipality* [2000] 3 *BLLR* 277 (C).

290 Van Jaarsveld *op cit* 349.

be effective, must assume a voluntary character and not entail recourse to measures of compulsion which would alter the voluntary nature of such bargaining'. It is evident from the text of the Convention and the commentary on it that it is the negative form of the right that is internationally entrenched and not its positive form."[291]

The European Charter, and other international instruments, as Cheadle[292] demonstrates, take the same approach in that governments are required to take steps to "encourage and promote the full development and utilisation of machinery for voluntary negotiation." (Text of the International Labour Organisation Convention on the Right to Organise and Bargain Collectively).

These international instruments impose a freedom and not a right to bargain collectively and emphasize that the bargaining should take on a voluntary nature, for example, the International Labour Organisation's Committee on Freedom of Association 1996 in discussing the various Articles of Convention 98 (which deals with the right to organize and bargain collectively) says:

"Nothing in Article 4 places a duty on the government to enforce collective bargaining by compulsory means with a given organization; such intervention would clearly alter the nature of bargaining." [293] [294]

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291 Cheadle, Davis and Haysom *South African Constitutional Law: The Bill of Rights* (2002) 389-390.

292 *Idem*.

293 Par 846.

294 See also Brassey and Cooper in Chaskalson *et al Constitutional Law of South Africa* (1998) 30, footnote 1 in this regard.

10.5 Conclusion

Precisely what the constitutional right to "engage in collective bargaining" entails is still unclear. In addition to this there appears to be confusion with regard to whether the LRA provides for a duty to bargain. In a recent arbitration award,[295] the commissioner identified the following issues for decision: whether the employer was obliged to enter into a recognition agreement; and whether the employer was obliged to negotiate with TAWUSA over certain issues. The commissioner found that since the union represented only 23.5% of the workforce, the employer was not obliged to bargain collectively with the union. Since the LRA does not provide for a judicially enforceable duty to bargain, the commissioner was not in a position to decide these issues.

For the reasons set out above, I hold the view that the constitutional duty to "engage in collective bargaining" does not entail a correlative duty to bargain. However, in circumstances where a specific group of employees is not entitled to take part in a strike,[296] it may be possible to construe such failure to bargain collectively as an unfair labour practice in terms of section 23(1) of the Constitution. As Smit J observed: "The obligation to engage in collective bargaining is of particular importance in the present context since members of the SANDF are unable to secure their right to bargain collectively by strike action. If the minister is not burdened with an obligation to negotiate in good faith, SANDU will be deprived of any method of enforcing their 'right to engage in collective bargaining'. A right without a remedy is meaningless."[297]

The old Industrial Court decisions dealing with the duty to bargain under its unfair labour practice jurisdiction (in terms of the 1956 Labour Relations Act), could be useful in interpreting the constitutional right to fair labour practices in this context.

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295 *Structural Applications (Pty) Ltd v TAWUSA* [2003] 10 *BALR* 1203 (CCMA).

296 S 65(d) of the LRA.

297 *SA National Defence Force Union & Another v Minister of Defence & Others op cit* 2113 G-H.

E Conclusion

Given that there are so many arguments in favour of and against any particular form, level and approach to collective bargaining it is not surprising that there have been "moves towards the diversification of bargaining levels".[298] Social security benefits and national incomes policy are topics that might be better suited for national negotiations. Work schedules, productivity and payments by results on the other hand are topics which might be better resolved by enterprise level negotiations or consultations. Consequently new forms of enterprise level collective bargaining have been devised not only in South Africa in the form of workplace forums, but also in France, Ireland, Italy, the Netherlands, Sweden, Australia, New Zealand and England.[299]

Works Councils or the European equivalent of our workplace forums have been very successful in *inter alia* Germany, Belgium, Sweden and the Netherlands.[300] A tendency in the last few years, of works councils concerning themselves with wages and working conditions has been identified.[301] Even though this is usually a task for trade unions where there is no collective agreement in place, enterprise consensus-seeking prevents the unilateral imposition of terms by employers. Also, centrally agreed conditions cannot be too specific so enterprise consultations have served to fill in the gaps.

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298 Bamber and Sheldon "Collective Bargaining" in Blanpain and Engels *Comparative Labour Law and Industrial Relations in Industrialized Market Economies* (2002) 34.

299 *Idem* 33.

300 Summers "Comparison of Collective Bargaining Systems: The Shaping of Plant Relationships and National Economic Policy" 1995 *Comparative Labour Law Journal* 808; Du Toit "Collective Bargaining and Worker Participation" 1995 *ILJ* 1544; Basson and Strydom "Draft Negotiating Document on Labour Relations in Bill Form: Some Thoughts" 1995 *THRHR* 265; Delport "Korporatiewe Reg en Werkplekforums" 1995 *De Jure* 409; Benjamin and Cooper "Innovation and Continuity: Responding to the Labour Relations Bill" 1995 *ILJ* 265; Olivier "Workplace Forums; Critical Questions From a Labour Law Perspective" 1996 *ILJ* 803.

301 Du Toit *op cit* 1574.

The move away from Taylorist modes of production to 'Gatesism' has altered socio-economic conditions within world labour markets. The increasing growth in the number of atypical employees, higher rates of unemployment, the greatly diminished costs of entry into industries, the increase in the number of small enterprises and so on have all contributed to a worldwide trend of union decline. All this has resulted in collective bargaining becoming less centralised. South Africa's response to these global developments as far as labour legislation is concerned is to continue to encourage trade unions (especially large trade unions) and central level collective bargaining. This insistence on a system which is more suitable to conditions prevalent during the golden era of Fordism is out of kilter with reality and not necessarily effective. Legislation cannot alter reality. It should rather be moulded and dictated by such reality.