

What is the Future of Collective Bargaining (And Labour Law) in South Africa? (2007) 28 ILJ 1405 *

2007 ILJ p1405
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Collective bargaining has a long history. The term is said to have been coined around 1890 by the British labour movement pioneer, Beatrice Webb.¹ By then the practice of wage negotiations between trade unions and employers was already well-established in Britain and a number of other countries. In the decades that followed it became a key instrument of labour market regulation throughout the industrialized and industrializing world, including South Africa.

The importance of collective bargaining can be explained by the fact that it has value for employers as well as workers - for employers, as a means of maintaining 'industrial peace'; for workers, primarily as a means of maintaining 'certain standards of distribution of work, of rewards and of stability of employment'.² The qualifier 'primarily' is important: power built up in the bargaining arena enables trade unions also to engage with broader issues and exert political pressure.³ While

2007 ILJ p1406

not ignoring this fact, this article concentrates on collective bargaining in its primary role as an instrument of labour market regulation.

As such, its fortunes have waxed and waned. Closely associated with democracy and the struggle for social justice, trade unions and collective bargaining have periodically been suppressed by dictatorial regimes - for example, in Germany during 1933-1945; in Chile during 1973-1989 - but have always re-emerged under conditions of political democracy or as a harbinger of democracy. South Africa in the mid-1970s is but one example.

During the decades of economic upswing after World War II collective bargaining may be said to have reached a historical peak. By the 1960s it was the norm in much of the industrialized world as well as a growing number of former colonial countries. Its status was reflected in the adoption of core conventions of the International Labour Organization (ILO) upholding the right to collective bargaining and their ratification by the vast majority of ILO member states.⁴ Labour law as a modern discipline was shaped during this period.

This period, too, has ended. Structural changes in the production process and the labour market since the 1970s, generally referred to as 'globalization', have impacted severely on trade union organization and collective bargaining institutions world-wide. It would be an exaggeration to say that the survival of collective bargaining, or that of labour law, is at stake. Both are, however, faced with major challenges in adapting to fundamentally changed (and still changing) conditions. This question, viewed from a South African perspective, forms the focus of the article.

Collective Bargaining and Labour Law

Kahn-Freund, in his seminal theory of labour law developed in Britain before and after World War II, asserted a basic nexus between collective bargaining and labour law.⁵ The starting-point is the inequality of bargaining power between employer and employee. The relationship between an employer and a worker, in Kahn-Freund's famous phrase, 'is typically a relation between a bearer of power and one who is not a bearer of power'.⁶ The law itself can do little to equalize the imbalance. In general,⁷ workers can match the power of their (often corporate) employers only by acting collectively. Not only does this put them in a bargaining position; it is necessary also to

2007 ILJ p1407

enforce their rights in practice. 'Legal norms', as Kahn-Freund put it, 'cannot often be effective unless they are backed by ... the countervailing power of trade unions and of the organised workers'.⁸

From this perspective, the 'central purpose of labour law is that of maintaining an equilibrium between employers and workers by ensuring the effective operation of a voluntary system of collective bargaining'.⁹ The law, in other words, should protect the institutions of collective bargaining but maintain a hands-off attitude towards the bargaining process itself. That process, and its outcomes, should be determined by the interests and the power of organized labour and employers. For this reason the term 'legal abstentionism' is often associated with Kahn-Freund's approach.¹⁰ Collective bargaining, thus conceived, was characterized as 'collective *laissez-faire*'; its 'autonomy' was and continues to be seen as a 'fundamental principle'.¹¹

The picture has become more complicated since then. In its classical sense, perhaps, 'collective *laissez-faire*' could only ever have existed under the conditions of relative stability and sustained economic growth experienced in the industrialized countries during the 1950s and 1960s. As economic growth faltered, the picture began to change. In one sense, the impact of collective agreements on labour markets and increasingly fragile economies was simply too great to be left entirely to the self-interest of trade unions and employers. Starting with the battle to contain inflation and government spending amidst growing international competition,¹² the autonomy of collective bargaining became increasingly circumscribed by incomes policies, social

2007 ILJ p1408

pacts, tripartite institutions and other devices aimed at bringing bargaining outcomes into line with broader policy objectives.¹³

Even greater pressures have emanated from the processes collectively referred to as 'globalization' from the early 1980s onwards. Dicken explains it as follows:

'Until recently, the production process itself took place primarily within national boundaries. Today the picture is very different: national boundaries no longer act as 'watertight' containers of the production process [F]ewer and fewer activities are oriented towards local - or even national - markets. More and more have meaning only in a regional or global context These developments signify the emergence of a *new global division of labour*, a transformation of the old geographical pattern of specialisation, in which the industrialised countries produced manufactured goods and the non-industrialised countries supplied raw materials and agricultural products to the industrialised countries and acted as a market for some manufactured goods The straightforward exchange between core and peripheral areas has been transformed into a highly complex, kaleidoscopic structure involving the *fragmentation* of many production processes and their *geographical relocation* on a global scale in ways that slice through national boundaries. Both old and new economic activities are involved in this resorting of the global jigsaw puzzle in ways that also reflect the development of [new] technologies of transportation and communications, of corporate organization and of the production process

itself. Technologies of production are undergoing substantial and far-reaching change as the emphasis on large-scale, mass production assembly-line techniques has shifted towards more flexible methods.' ¹⁴

The implications for organized labour and collective bargaining were, and are, profound. 'Large-scale, mass production assembly-line techniques', employing large numbers of workers under relatively uniform conditions, were the historical basis of trade unions and collective bargaining. A union's bargaining power depended on its ability to control a (I) labour market by recruiting a significant number of its participants as members. That power is dissipated by the dispersal of the production process, and with it the labour market, across national boundaries. At the same time, employers find themselves competing with rivals around the world and encountering new limits to the bargaining agenda. These developments pose a serious dilemma for trade unions, whose efforts to extend their own reach internationally lag far behind the international mobility of capital. ¹⁵

Having said that, the autonomy of the bargaining process remains its most durable core. Effective workplace governance requires a process

2007 ILJ p1405

whereby employers and workers can collectively articulate their vital but competing interests and translate these into mutually acceptable rules. This, in turn, cannot happen without joint negotiation in some shape or form. Arguably, collective bargaining is the best mechanism thus far developed for this purpose. ¹⁶ At one level it is an alternative to the dictatorship of capital or permanent industrial war, neither of which is sustainable. Its vitality, however, is bound up with the fact that it requires neither side to lay down their weapons. On the contrary, it is accepted that each side operates as a check on the other, and a balance of power between them is the best guarantor of stability.

This inherent connection between work, collective organization and the use of power is captured in the often-cited words of former Canadian Chief Justice Dickson:

'Work is one of the most fundamental aspects of a person's life, and the role of the association has always been vital as a means of protecting the essential needs and interests of individual working people by overcoming their vulnerability to the strength of their employers. The capacity to bargain collectively has long been recognized as an integral and primary function of associations of working people, and closely related to the right to strike. Accordingly, effective constitutional protection of the associational interests of employees in the collective bargaining process requires concomitant protection of their freedom to withdraw their services.' ¹⁷

Similarly, a European research report stresses the role of collective bargaining as 'a complement to legislation' that offers -

'a more flexible and tailored (and more acceptable and workable) approach in the promotion of equality; developing positive measures to promote equality rather than simply measures to counter discrimination; and giving women and men a voice in shaping their own working conditions, enabling them to define their own needs and interests and to set their own priorities'. ¹⁸

For all these reasons it may be argued that legal regulation and protection of collective bargaining remains a social imperative.

At the same time, a different view has gained ground in recent decades. If collective bargaining fulfils a social need, it is asked, why does it need legal protection? The alternative, from this standpoint, is not necessarily to dismantle its structures but merely to withdraw legal protection - in other words, to abandon the 'central purpose of labour law' according to Kahn-Freund - and leave the institution to find its own level of real social support. At its most extreme, this view (often termed 'neo-liberal' or 'free market') assumes that trade unions and collective bargaining are obstructive to the flexibility demanded

by global markets; remove 'artificial' regulation, it is implied, and the problem will go away.
[19](#)

Ironically, it is the growing domination of world markets by big corporations that lends most force to the 'free market' perspective. The relationship between the multinational employer and the national trade union has become, to a significant extent, 'a relation between a bearer of power and one who is not a bearer of power'. Under these circumstances, legal regulation may be critical to the operation of trade unions and the collective bargaining process. Labour market 'deregulation', however, has emerged as a widely perceived imperative for countries seeking to attract investment. [20](#) Deregulation has been described as 'a global phenomenon, borne on the rapidly rising tide of technological innovation and consequent globalisation of markets'. [21](#) Excluding 'collectively-based regulatory strategies' from the workplace, however, 'privileges the will of management over that of the worker'. [22](#) Nowhere has this been demonstrated more clearly than in Australia where a series of statutory amendments since 1996 have brought 'a concerted push away from collective bargaining, towards individual bargaining'. [23](#)

This is not to suggest that law is the ultimate guarantor of collective bargaining. According to Kahn-Freund, 'the effectiveness of the law depends on the unions more than the unions depend on the effectiveness of the law'. [24](#) From this standpoint, the role of the law is to create space for collective bargaining to evolve. The courts should therefore show 'a degree of deference' to the institutions of collective bargaining, recognizing 'the complexity and delicacy of the balance sought to be struck by legislation among the interests of labour, management, and the public'. [25](#) As Justice McIntyre of the Canadian Supreme Court observed:

'Labour law ... is a fundamentally important as well as an extremely sensitive subject. It is based upon a political and economic compromise between organized labour - a very powerful socio-economic force - on the one hand, and the employers of labour - an equally powerful socio-economic force - on the other. The balance between the two forces is delicate and the public-at-large depends for its security and welfare upon the maintenance of that balance. One group concedes certain interests in exchange for concessions from the other. There is clearly no correct balance which may be struck giving permanent satisfaction to the two groups, as well as securing the public interest. The whole process is inherently dynamic and unstable. Care must be taken then in considering whether constitutional protection should be given to one aspect of this dynamic and evolving process while leaving the others subject to the social pressures of the day.' [26](#)

If the law plays an enabling role in the evolution of collective bargaining, it is the interaction of employers and organized labour that will ultimately determine its content and effect. More particularly, effective trade union organization is crucial.

This is so because employers in general (as 'bearers of power') can do without collective bargaining while workers in general cannot; and, for workers to engage in collective bargaining, organization is essential. Today, however, the structural changes produced by globalization have impacted severely on the preconditions for trade union organization. This process (which adds to the pressure for 'deregulation' of the labour market) is examined next.

The Effects of Globalization

The impact of globalization on collective bargaining can be broken down into two facets: its impact on (a) trade union membership and (b) collective bargaining coverage.

(a) Trade union membership

A study conducted for the ILO in 2000 revealed that trade union membership in many countries had peaked in the mid-1980s and thereafter gone into decline. Out of 58 countries for which the ILO had sufficient data, 'union density levels fell in 42, were relatively stable in four and rose in 12 . Most of the countries where membership increased were developing countries experiencing major democratic reforms'. ²⁷

It cannot, of course, simply be assumed that this decline is due to 'globalization'. In fact, the ILO study suggests three reasons: 'cyclical', 'structural' and 'institutional' factors. Though this is not the place to

2007 ILJ p1412

examine these phenomena in detail, even a brief overview indicates their connection with processes of globalization.

'Cyclical factors' refers essentially to pressure on trade union membership caused by rising unemployment. ²⁸ Unemployment has been described as 'a major constraint on union growth and bargaining power'. ²⁹ In one sense the reason is obvious: unemployed persons are unlikely to remain trade union members, even if they are eligible to do so. The trend is, however, subject to a number of variables. An important variable in some countries is the so-called 'Ghent system' ³⁰ which may even result in increasing trade union density in periods of high unemployment. ³¹ Another is bargaining levels:

'In countries where unions participate in higher-level or multi-employer systems of collective bargaining, unionisation rates tend to be less prone to decline than in countries where bargaining is conducted at the company level.' ³²

Under conditions of globalization, however, unemployment (or under-employment) is not only cyclical. This becomes apparent from what the ILO report refers to as the 'structural' factors impacting on union membership. It goes on to explain:

'Where employment is shifting from sectors with high rates of union organization to the less organized service sectors, union density levels fall. The downsizing of large and often organized plants and the growth of smaller and harder to organize units of employment probably compound this effect. Public sector employment growth compensates in part for this effect, but the earlier period of expansion in this generally highly organized sector came to an end in many countries in the 1980s. Increased part-time employment, where union presence is weak, is a further factor, although a pronounced trend towards increased women's membership of unions has worked in the opposite direction in a number of countries. In general, workers with less secure employment status are less likely to join unions and the trend

2007 ILJ p1413

towards short-term contracts and the 'informalization' of employment relationships may explain part of the decline in union density in some countries.' ³³

The reality, in other words, is that many full-time jobs in unionized sectors have disappeared and many trade unionists have joined the ranks of the unemployed or have been relocated to 'atypical' and non-unionized forms of employment. Few would question the observation that -

'[t]he decline of trade-union membership has accompanied massive - and largely unacknowledged - increases in unemployment Official figures are notoriously 'massaged'. They claim that in Canada, the UK and the US unemployment actually fell. Many 'new jobs' here are, however, poorly paid, part-time or casual - and many people are excluded from official unemployment registers.' ³⁴

The third set of factors impacting on trade union membership is termed 'institutional'. ³⁵ This refers to regulatory provisions such as 'tax deduction of union membership dues, acceptance and protection of the check-off system, works councils and union access to the workplace, unemployment insurance, legal basis for closed shop and secondary pickets, legal protection for union organisers and union members', ³⁶ etc. As noted already, where bargaining is centralized union density is less likely to decline. It has also been noted that the institutional framework of collective bargaining has become a focal point of the 'deregulationist' agenda. In this context the ILO report makes the following observation:

'One of the factors driving globalization and the liberalization and mobility of capital has fundamentally changed the bargaining power of firms vis-à-vis governments and workers. The implicit, and sometimes explicit, threat of relocation and the transnational nature of firms in some sectors have changed the political economy of industrial relations, weakening the bargaining position of workers. Some governments, keen to attract or retain investment (foreign and domestic), offer 'discounts' on labour protection, further undermining the ability of workers to bargain over decent work.' ³⁷

While it may be true that 'union density is just one facet of union influence' ³⁸ and declining union membership is not in itself decisive, within a voluntary bargaining system it is undoubtedly of great

2007 ILJ p1414

importance. ³⁹ For example, as has been demonstrated in the United States, employer opposition to collective bargaining can be a formidable obstacle which, in practice, can only be overcome by union pressure. For this to happen a relatively high degree of unionization is necessary; without it, the principal benefit of collective bargaining from an employer's standpoint - the maintenance of industrial peace - is removed from the equation. Thus, while declining union density may not necessarily rule out continued union involvement in labour market institutions, ⁴⁰ it does suggest that the outcomes emanating from those institutions will be shaped by the interests of business rather than labour.

(b) Collective bargaining coverage

From what has been said, a correlation between trade union density and collective bargaining coverage (that is, the percentage of employees and employers subject to collective agreements) is to be expected. In fact, the picture is not entirely clear-cut. Firstly, bargaining coverage varies greatly from country to country. In most of the 'old' European Union member states, for instance, more than two-thirds of employees are covered by collective agreements as compared with fewer than half in most of the 'new' EU member states. ⁴¹ Secondly, collective bargaining coverage is not always consistent with trade union density. The OECD provides the following statistics for 25 countries in the year 2000:

	<i>Union density</i>	<i>Collective bargaining coverage</i>
Australia	24.5	82.5
Austria	36.5	97.5
Belgium	55.6	92.5
Canada	28.1	32.0
Czech Republic	27.0	27.5
Denmark	74.4	82.5
Finland	76.2	92.5
France	9.7	92.5
Germany	25.0	68.0

Hungary	19.9	32.5
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2007 ILJ p1405

Italy	34.9	82.5
Japan	21.5	17.5
Korea	11.4	12.5
Luxembourg	33.6	62.5
Netherlands	23.2	82.5
New Zealand	22.7	27.5
Norway	54.3	72.5
Poland	14.7	42.5
Portugal	24.3	82.5
Slovak Republic	36.1	52.5
Spain	14.9	82.5
Sweden	81.1	92.5
Switzerland	42.5	17.8
United Kingdom	31.2	32.5
United States	12.8	14.0

Source: OECD Economic Outlook 2005; available at <http://www.oecd.org/dataoecd/8/24/31781139.xls>.

One key variable that may account for much of the divergence between union density and bargaining coverage is the operation of centralized bargaining institutions. Centralized bargaining is often accompanied by the extension of collective agreements to non-parties, thus enabling trade unions to achieve collective bargaining coverage far exceeding their membership. Within Europe, for example, 17 out of 26 countries covered by a recent study make provision - as in South Africa - for the extension of collective agreements while only nine do not. ⁴² The importance of this factor is vividly illustrated by the experience of Britain, where the abolition of wage councils saw a decline in bargaining coverage from a peak of 84-86% in 1975 to less than 50% in 1995. ⁴³ In general, thus, low rates of unionization in the absence of institutional support tend to translate into low rates of bargaining coverage. ⁴⁴

2007 ILJ p1416

Against this background, the 'fragmentation' of large-scale mass production in the era of globalization, to the extent that it undermines centralized bargaining, threatens a further erosion of collective bargaining coverage. The ILO report explains:

'Along with shifting the balance of power in industrial relations, globalization has led to a change in the nature of the employment (and bargaining) relationship. Much greater attention is given to issues of productivity and performance when determining wages. In order to achieve greater internal flexibility, stronger emphasis is placed on negotiating issues such as the reorganization of work, flexible working hours, and pay for performance and skills within the context of employment relations at the enterprise level. This general tendency to negotiate certain issues at an enterprise level has in some countries led to the decentralization of industrial relations systems.' ⁴⁵

The picture, as noted above, is not uniform. Even so, research suggests that local (plant level or single employer) bargaining is gaining ground at the expense of centralized bargaining. Schulten explains:

'There has been a more or less strong tendency towards decentralisation of collective bargaining in almost all countries that still have a dominance of intersectoral or sectoral bargaining. In many countries, such as Austria, Denmark, Finland, Germany, Italy, the Netherlands, Norway or Sweden, the higher-level agreements have widened the scope for additional bargaining at company level and/or have introduced opening clauses that

allow companies to diverge from certain collectively agreed standards. Following this process of organized or controlled decentralisation, many countries have seen the emergence of rather differentiated and flexible multi-level bargaining systems.' u ⁴⁶

Even under the relatively sheltered conditions of Western Europe, it is suggested, the trend towards decentralization of collective bargaining may ultimately translate into a declining degree of collective bargaining coverage. ⁴⁷ Schulten offers the following perspective:

'Considering the ongoing debates and further pressures for decentralisation, coming in particular from the employers' side, it remains an open question whether or not the process of organized decentralisation might lead at a certain point to a more fundamental change in bargaining systems. If this were to happen, multi-employer agreements might increasingly become empty frameworks, or even be abolished, while bargaining coverage would decline significantly.' ⁴⁸

To sum up: pressure for decentralized bargaining tends to come from the side of employers while trade unions, not surprisingly, tend to resist it. ⁴⁹ To this extent, the trend towards decentralized bargaining may be seen as an assertion of employers' ascendancy in a context of declining union power.

2007 ILJ p1417

Reformulating the Question

If collective bargaining depends on effective worker organization, and trade unions have historically emerged as the main form of worker organization, it may seem to follow that the decline of trade union density, reflected in declining bargaining coverage, spells the demise of collective bargaining. If so, it might seem that labour law should shift its focus to new forms of worker organization and new forms of collective interaction.

In fact, the issue is not so simple. To begin with, the term 'trade union' is usually a misnomer in that it suggests an organization based on craft. In practice unions take many forms, from company based to industry based to multi-industry. The LRA itself defines 'trade union' in the broadest possible way as 'an association of employees whose principal purpose is to regulate relations between employees and employers'. ⁵⁰ 'Trade unions' as such, in other words, are not the problem; trade unions are infinitely flexible and in no way incapable of adapting to changing circumstances. The real issue, Bogg suggests, is rather more stark:

'The regulatory vacuum left by the recession of collective bargaining has not been filled by the emergence of other forms of voluntary collective regulation to take its place. Joint consultation committees are much more likely to be found in unionized than non-unionized workplaces. As such, consultative committees seem to operate as adjuncts to rather than substitutes for collective bargaining. This confirms the thesis that a regulatory implication of the decline in collective bargaining is the increasing 'procedural individualization' of the employment relation, involving a power shift to employers unilaterally determining contractual relationships on a standardized basis.' ⁵¹

The question, thus, is whether 'collective pay-setting' remains viable in a 'fragmented' global market place in any shape or form, or whether we are seeing a reversion to individualized employment relationships between workers with less power and employers with more power than ever before in history. Or can trade unions reinvent themselves in such a way as to represent workers in different parts of complex networks of production or across transnational industries?

This question is considered below from a South African perspective.

The Position in South Africa

At first glance there is little question about the status of collective bargaining in South Africa. The principle of collective bargaining has become embedded in labour relations over the last three decades, and even more so in the law. The Constitution, having entrenched the right of workers and employers to form trade unions and employers' organizations, guarantees the right of '[e]very trade union, employers'

2007 ILJ p1418

organization and employer ... to engage in collective bargaining'.⁵² The Constitutional Court (CC) has explained the rationale as follows:

'Collective bargaining is based on the recognition of the fact that employers enjoy greater social and economic power than individual workers. Workers therefore need to act in concert to provide them collectively with sufficient power to bargain effectively with employers.'⁵³

Labour law must therefore create conditions for workers to 'act in concert' in order to 'bargain effectively with employers'. The Labour Relations Act (LRA)⁵⁴ was enacted inter alia for this purpose. The way in which it did so caused some controversy. On the one hand it did away with the 'duty to bargain' which the Industrial Court had placed on employers in certain circumstances⁵⁵ and adopted an essentially voluntarist framework.⁵⁶ The drafters of the Act were satisfied that the constitutional right '[did] not require Parliament to create a legally enforceable right to bargain in the statute'.⁵⁷ At the same time the Act set out to 'unashamedly [promote] collective bargaining', inter alia by providing trade unions with a series of organizational rights and regulating the right to strike.⁵⁸ This model, its authors explained, 'is one which allows the parties, through the exercise of power,

2007 ILJ p1419

to determine their own [bargaining] arrangements'.⁵⁹ Thus, a union could no longer go to court for an order requiring an employer to bargain with it. It had to rely on its own strength - if needs be, expressed through industrial action - to compel a reluctant employer to do so.

With hindsight, this marked the end of an era in which collective bargaining in South Africa had a truly unique character: it could be compelled by order of the Industrial Court where it was deemed 'fair', without any formal preconditions (unlike, for example, the statutory circumscription of the 'duty to bargain' in the USA).⁶⁰ The Constitution abolished this regime and replaced it with a 'freedom' rather than an right to engage in collective bargaining⁶¹ - but, in doing so, brought collective bargaining in South Africa in line with the principles prevailing in most of the industrialized world.

Even so, it may seem anomalous that a constitutionally guaranteed right should be capable of enforcement only by means of self-help. Labour rights in the Constitution, however, are classified as socio-economic rights, and it is the exception rather than the rule for such rights to be directly enforceable.⁶² In the context of collective bargaining the absence of

enforceability is even less remarkable. Collective bargaining ultimately depends on the power of the parties to compel acceptance of their demands, starting with the demand to enter into a bargaining relationship. ⁶³ In this respect South African labour law faithfully embraces the 'central purpose' of the Kahn-Freundian paradigm; that is, seeking to ensure 'the effective operation of a voluntary system of collective bargaining'.

The Act, however, goes further. Within the broad objective of promoting 'orderly collective bargaining' ⁶⁴ it prioritizes bargaining

2007 ILJ p1420

'at sectoral level'. ⁶⁵ Sectoral bargaining by means of bargaining councils is the core of the system created by the Act. ⁶⁶ Of critical importance is the power of bargaining councils to extend their agreements to all employers in their sector, thereby levelling the competitive playing fields on their own terms. ⁶⁷

At the same time South Africa has not been immune to 'the cold winds of economic liberalisation' that have swept the global economy since the 1980s. Indeed, 'at the very moment that democratisation enabled South Africa to rejoin the global economy, those cold winds began to blow fiercely through industry'. ⁶⁸ Trade unions have encountered all the problems that have been noted already. Increasing numbers of temporary and part-time employees in the workforce, and those disguised as 'independent contractors', have proved difficult to organize. ⁶⁹ Small businesses have remained beyond union organizers' reach. The membership of registered trade unions, having peaked at 3 939 075 in 2001, had declined to 2 935 864 in 2005. ⁷⁰

Apparently contradicting this trend is the increase in the number of employees covered by bargaining council agreements from an estimated 2 000 000 in 2002 to 2 358 012 in 2004. ⁷¹ These figures, however, reflect a more complex reality. The number of bargaining councils declined from 78 in 2000 to an effective 40 in 2004. ⁷² Reasons for the growth of their coverage may be found in a variety of factors, in particular the massive expansion of collective bargaining in the public sector where bargaining councils are compulsory. No less important has been the extension of private sector bargaining council agreements to non-parties. ⁷³

2007 ILJ p1421

Continued growth of bargaining council coverage, however, cannot be taken for granted. While the system appears to be secure in the public sector, its prospects in the private sector are less certain. Relentless pressure for market liberalization is manifested in ongoing debate about the existence or otherwise of excessive 'rigidities' in the labour market. A focal point of the debate is precisely the extension of bargaining council agreements to non-parties, which is said to obstruct job creation by small business. While this is not the place to delve into the arguments, it may be said that three broad positions have emerged: (a) that more flexibility is needed for South Africa to compete in global markets; (b) that more regulation is needed to promote collective bargaining and protect workers against exploitation; and (c) that the existing regulatory framework strikes a more or less appropriate balance between the competing objectives of labour market flexibility and employee protection. ⁷⁴

In a document produced by the ILO the position is summarized as follows:

'One of the criticisms of centralized bargaining is that it unnecessarily introduces rigidities and bureaucratisation to the industrial relations scenario, despite its provisions for exemptions. The argument is that such rigidities in the bargaining system can harm the competitiveness of South African industries on global markets Many of these sentiments were echoed in the debate about the appropriateness of labour legislation for the South African labour market. One argument was that there was insufficient labour market flexibility to link pay increases to increased productivity.... [T]he ANC government has not been immune to pressures to review certain aspects of the legislative framework which have inhibited economic growth and job creation. These pressures generally stem from the forces of globalization and the quest to secure greater flexibility in the regulation of markets and governance of the actions of agents that are active in those markets.' ⁷⁵

Taken together, all these issues pose fundamental questions about the future of collective bargaining in South Africa. For example: what will happen if the statutory system continues to decline? Does enterprise level bargaining offer a viable alternative? Are trade unions equipped to handle it in all sectors? What about the internationalization of production, moving various parts of the productive process beyond the jurisdiction of South African law? And, given all this, how should the law respond - if at all?

2007 ILJ p1422

Contextualising the Discussion

Hepple, in an article published in 1995, ⁷⁶ engaged with similar questions and developed a number of propositions which are pertinent to the present discussion. Written after 15 years of Conservative Party government, the article was set against a backdrop of declining trade union density and reduced bargaining coverage which the South African industrial relations scene has lately started to resemble. ⁷⁷ Hepple, too, takes Kahn-Freund's concept of labour law as his starting-point. In 1969, he notes:

'Kahn-Freund suggested that the law could play three different roles:

(1) supporting the autonomous and 'highly developed' system of collective bargaining ('the auxiliary function'); (2) providing a code of substantive rules to govern terms and conditions of employment, supplementing that provided by collective institutions ('the regulatory function'); and (3) providing the rules of 'what is allowed and what is forbidden in the conduct of industrial hostilities' ('the restrictive function').' ⁷⁸

By the 1990s, however, the situation was 'almost exactly the reverse' of that addressed by Kahn-Freund. Having examined the developments of the previous three decades and different theoretical models for conceptualizing it, Hepple identifies one of the problems with Kahn-Freund's approach 30 years on:

'One of the major weaknesses of a framework of labour law which depends primarily on effective collective organization by workers is that, in itself, such organization is incapable of helping the weak to organise and to articulate their interests. They are dependent upon the strength and goodwill of those who can organise, and of the welfare state. Greater legal rights to organise may be of little real value to a new labour force of temporary, part-time and 'self-employed' workers under 'personal contracts', working in the shadow of structural unemployment, the shrinkage of the welfare state, derecognition and general hostility to trade unions.' ⁷⁹

Social rights, he argues, are not 'an immanent development within capitalist society'. ⁸⁰ On the contrary, they may be in conflict with market forces and may only be sustainable through struggle. By

2007 ILJ p1423

treating such rights as 'fundamental' and entrenching them constitutionally, however, 'we shift the resolution of disputes from the political and industrial spheres to the sphere of public lawyers and the judiciary; and as Kahn-Freund observed ..., 'it is very easy for judges to read their own notions of policy into the bill of rights". ⁸¹

Against this background, Hepple revisits and reformulates the role of the law as conceived of by Kahn-Freund. The 'auxiliary function' of labour law, Hepple argues, 'now needs to assume a form which is appropriate to decentralized employment relations and a wide range of methods of participation including consultation rights'. ⁸² The 'regulatory function', too, has taken on a new significance in the globalized setting: it will 'be of major importance in providing an adequate floor of rights for the growing number of workers under 'non-standard' contracts.' ⁸³ But, perhaps most importantly, Hepple suggests that a new 'integrative function' should be added to the functions of labour law identified by Kahn-Freund. By this is meant -

'innovative 'positive welfare' measures, which would help to combat what in the language of the European Union is called the 'social exclusion' of a growing underclass of unemployed or partially employed people. These might include the right to acquire vocational skills and further education, financial inducements to employers to engage the long-term unemployed, protection against age discrimination, and child care and parental rights which would make it easier to combine work with family responsibilities'. ⁸⁴

While this approach marks a break with the notion of legal 'abstentionism' from the domain of industrial relations, it does not endorse the 'juridification' of labour disputes. Rather, the revised 'auxiliary' function of labour law (above) is envisaged as enabling employees to engage more effectively with employers in a globalized setting. Beyond this, the 'integrative' function of the law is calculated to counteract the erosive effect of market forces on the position of employees and bolster their bargaining position. The 'overriding value', Hepple concludes, 'is that of equality.... The 'special function' of labour law is to ensure some kind of substantive and not merely formal equality between employer and employee'. ⁸⁵

This situates the discussion squarely within the South African constitutional discourse. The defining source of South African labour law

2007 ILJ p1424

lies in s 23 of the Constitution, which guarantees a universal right to 'fair labour practices' as well as a right of all 'workers' to 'engage in collective bargaining' and to strike. The purpose of all fundamental rights, however, is to '[affirm] the democratic values of human dignity, equality and freedom'. ⁸⁶ 'Equality', in turn, is understood as including 'the full and equal enjoyment of all rights and freedoms'. ⁸⁷ In seeking to understand the role of labour law in this context, it is submitted, the central question must be this: how can employees effectively (e)assert their 'right to engage in collective bargaining' in the globalized production process? How can trade unions engage meaningfully with multinational employers? In short: in a world where the imbalance of power between worker and employer has taken on unprecedented dimensions, how can the law - through its 'auxiliary' and 'integrative' functions - promote substantive equality?

Reference has been made to the characteristic features of the South African labour market which distinguish it from developed market economies. These characteristics are highlighted by Fenwick and Kalula in a comparative study of Southern African and East Asian labour law. ⁸⁸ Their starting-point is that labour law in both regions was 'imposed' rather than developing organically. While law operates 'according to its own discourses and traditions', it is 'interdependent' with other social discourses, leading to outcomes that may be unpredictable a priori. In general, therefore, a gap must be expected between 'imposed'

law and local practice, and 'quite deep empirical analysis' may be needed to understand whether a particular rule or concept will have its intended effect. ⁸⁹

Turning to Southern Africa, the authors note that the social dynamics with which imported labour law has interacted are very different from those of its European origins. Labour markets in Southern Africa are characterized by massive poverty, 'stark income inequality' (often coinciding with racial differences), 30 to 40% unemployment, an extremely low skills level, an HIV/AIDS pandemic, large-scale labour migration and a vast informal sector in which the majority of working people eke out a living. ⁹⁰ Labour law thus impacts on only a minority of the population while the surrounding social realities, combined with lack of effective enforcement, dilute its impact still

2007 ILJ p1425

further. ⁹¹ To be effective, it is argued, 'labour law in Southern Africa needs to take into account the region's particular socio-economic profile [and] develop an indigenous paradigm'. While emphasizing that the 'traditional concerns and goals of labour law as developed in the industrialized world are by no means irrelevant' to workers in formal employment, nor for ensuring 'flexibility and efficiency to compete in global economic markets', the authors suggest that the 'true and necessary domain of labour law' is wider: 'job creation, control of immigration, training and education of workers, and the provision of social security are all immediate concerns for the Southern African workforce'. ⁹²

These findings, it is submitted, do not contradict Hepple's analysis but supplement it - specifically, by adding substance to the notion of the 'integrative' function of labour law under Southern African conditions. The need to combat the 'social exclusion' of an 'underclass of unemployed or partially employed people' is infinitely starker in Southern Africa than in Europe. Even more clearly, labour law must be understood in the context of the labour market as a whole. ⁹³ At the same time, this 'integrative function' does not detract from the remaining functions of labour law. If anything, it may be argued that Fenwick and Kalula understate the contrast between the industrialized heartland of the South African economy and the general underdevelopment of the region as a whole. ⁹⁴ The total number of employees and self-employed persons in South Africa rose from 9,61 million in 1995 to 10,54 million in 1999, of whom some 7,28 million were employed in the formal sector. ⁹⁵ With a working population this size the 'auxiliary' function of labour law must have more than the relatively marginal influence ascribed to it in the subcontinent as a whole. A majority of the South African population depend on work in the formal sector and, faced with the power of corporate and global employers,

2007 ILJ p1426

rely critically on the protection of labour law to give substance to their right to equality. The erosion of collective bargaining can only undermine this right. The question is how the constitutional goal of substantive equality can be promoted on the uneven playing field of the workplace, swept by the winds of globalization.

Possible Roads Forward

To search for a simple solution to the problems that have been noted is likely to be futile. Rather, what is needed is to examine the actual dynamics of labour relations to see if there are lines of development along which collective bargaining and labour law might evolve into the future. Such an exercise must necessarily be complex and cannot be attempted fully within the scope of this article. Two developments, however, will be noted which offer possibilities for South African trade unions and employers to move beyond existing relationships and create new patterns of engagement that may be more attuned to the realities of the global market-place.

At workplace level

A fundamental challenge is to develop bargaining structures which, in Hepple's words, will be 'appropriate to decentralized employment relations' and may include 'a wide range of methods of participation including consultation rights'.⁹⁶ In South Africa, disappointingly, this challenge has largely been obscured by the controversy surrounding the provisions for the establishment of workplace forums in chapter V of the LRA.

Much of the controversy may be due to the fact that workplace forums were originally presented as serving an unfortunate purpose: that of facilitating 'major restructuring' of the economy by promoting a shift 'from adversarial collective bargaining on all matters to joint problem-solving and participation on certain [production-related] subjects'. This would be done by creating a 'second channel' of industrial relations, partly modelled on the works councils of Germany and the Netherlands.⁹⁷ The message thus sent to unions was ominous: restructuring and job losses that unions would fight tooth and nail in the bargaining arena were expected to find greater acceptance if negotiated with 'non-adversarial' workplace forums. Not even the fact that the LRA ultimately gave trade unions all but absolute control over workplace forums could disarm unions' suspicions or dispel the belief that workplace forums, however constituted, would inevitably serve as cats' paws for employers and sow divisions among workers.⁹⁸ Hepple's assessment of the fate of the British Industrial Relations Act,

2007 ILJ p1427

with the change of the words 'United States' and 'Britain' to 'Germany' and 'South Africa', might have applied equally to chapter V of the LRA:

'The Act failed because it tried to bring about too drastic a change in existing behaviour by means of law; it was based on the assumption (mistaken at the time) that employers would use the law and that unions would co-operate; and the transplantation of legal institutions from the United States took insufficient account of the different social and political climate in Britain.'⁹⁹

Twelve years on, the LRA's provision for workplace forums is seen as a dead letter. A recent discussion document of the African National Congress concludes that it 'does not make sense to keep this legislative provision in the labour law whilst clearly not helping - in its current form - towards worker participation in the workplace'.¹⁰⁰

Such a view may be too limited. It should not be forgotten that the resurgence of independent trade unionism in the 1970s started at workplace level. Only with the growing strength of the unions in the 1980s did the focus shift to sectoral bargaining.¹⁰¹ However, dual level bargaining has remained an abiding feature of the system, with minimum wages and conditions often negotiated at sectoral level and actual wages and conditions at workplace level.¹⁰² Moreover, despite their aversion to workplace forums, trade unions have been less averse to creating non-statutory consultative structures at workplace level by means of collective agreements.¹⁰³ Union opposition is thus directed

not so much against decentralized bargaining as against workplace forums as an institution. Strategically, however, the main focus remains on the establishment of bargaining councils.

It remains to be seen how viable this policy will be in the longer run. Since bargaining councils are voluntary, their existence depends on employers' willingness to join them or unions' ability to persuade employers to do so. If union strength declines, their ability to

2007 ILJ p1428

pressurize employers - as well as the incentive for employers to join bargaining councils - is likewise reduced. In this event, a reversion to plant-level bargaining will not automatically follow: unions lacking the strength to initiate bargaining at sectoral level may find it hard to initiate bargaining at any level.

Under these circumstances, it may be argued, the establishment of workplace forums may give unions footholds in workplaces which they might otherwise be unable to secure ¹⁰⁴ and, by creating negotiating relationships, (re-)establish a basis for collective bargaining at workplace level.

Such a radical reorientation is not on the union agenda at present. It will involve reconceptualizing workplace forums from Trojan horses of employer power to points of support for workplace bargaining and local union structures. This is unlikely to happen for as long as unions see bargaining councils as their primary focus. Change is only likely if disenchantment with sectoral bargaining (and other, more orthodox strategies) sets in. If and when such a point may be reached is impossible to predict. For example, it cannot be excluded that certain non-COSATU unions may identify tactical advantages to be gained through the establishment of workplace forums and use it to secure their position in workplaces where they have majority membership. If so, workplace forums may at last start coming into their own, albeit for purposes different from those which the drafters of the Act had suggested.

For the moment, the question remains open whether workplace forums are a dead letter or an idea ahead of its time.

At transnational level

If decentralization of production presents a major challenge to traditional bargaining structures in South Africa, the internationalization of production presents a challenge of a different order. An ILO report comments:

'One of the factors driving globalization and the liberalization and mobility of capital has fundamentally changed the bargaining power of firms vis-à-vis governments and workers. The implicit, and sometimes explicit, threat of relocation and the transnational nature of firms in some sectors have changed the political economy of industrial relations, weakening the bargaining position of workers. Some governments, keen to attract or retain investment (foreign and domestic), offer 'discounts' on labour protection, further undermining the

2007 ILJ p1429

ability of workers to bargain over decent work.... As the contours of markets are no longer limited to national boundaries, this has direct implications for the ability to bargain collectively through national labour market structures.' ¹⁰⁵

Internationally, trade unions have begun to develop new strategies to deal with this situation. Three types of responses are noted in the ILO report:

- 'International collective bargaining' between international union structures and international employers' organizations. For example, a collective agreement was

signed in 2000 between the International Transport Workers' Federation and the International Maritime Employers' Committee. [106](#)

- Coordination of bargaining activities internationally. For example, again in the transport sector, the International Transport Workers' Federation has established working parties to bring together affiliated unions from different countries to coordinate their bargaining strategies vis-à-vis international airline alliances such as Star and OneWorld. [107](#)
- International (or global) framework agreements between international trade union federations and multinational employers to regulate organizational rights. The International Transport Workers' Federation explains:

'[Global framework agreements] are usually reached between a multinational company's management and a Global Union Federation. There are about 12 of these agreements so far. Most of them include a commitment by the company to observe ILO core labour standards, to guarantee certain rights to their workers, plus a mechanism for monitoring in which unions play a major role. The commitment often extends not only to the company's own operations around the world, but puts pressure on its suppliers and sub-contractors as well. These agreements are so new that it is not yet clear how they will impact on collective bargaining by unions at a local or national level. The agreements often state explicitly that they do not replace local level industrial negotiations.' [108](#)

The CSR factor

In recent years multinational corporations have come under increasing media scrutiny and have been placed under growing pressure from an array of civil society and political organizations to acknowledge

2007 ILJ p1430

their broader responsibilities, not only to shareholders but to their employees and the communities in which they operate. [109](#) This has led to the formulation of guidelines for 'corporate social responsibility' (CSR) by various international organizations, from the United Nations to the Organization for Economic Cooperation & Development (OECD), and the adoption of CSR codes by numerous corporations. In Europe, in particular, the process has gathered considerable momentum. Following earlier initiatives, the executive of the EU in early 2006 called on European companies to -

'continue to promote CSR globally with a view to maximising the contribution of enterprises to the achievement of the UN Millennium Development Goals. The ILO Tripartite Declaration of Principles concerning MNEs and Social Policy, the OECD Guidelines for MNEs and the UN Global Compact, as well as other reference instruments and initiatives, provide international benchmarks for responsible business conduct'. [110](#)

Though lacking the force of law, these benchmarks appear to have some impact. [111](#) For present purposes it is especially interesting to note the guidelines laid down by the ILO Tripartite Declaration. [112](#) With reference to collective bargaining it requires inter alia the following:

- '50. Measures appropriate to national conditions should be taken, where necessary, to encourage and promote the full development and utilization of machinery for voluntary negotiation between employers or employers' organizations and workers' organizations, with a view to the regulation of terms and conditions of employment by means of collective agreements.
- '51. Multinational enterprises, as well as national enterprises, should provide workers' representatives with such facilities as may be necessary to assist in the development of effective collective agreements.
- '52. Multinational enterprises should enable duly authorized representatives of the workers in their employment in each of the countries in which they operate to conduct negotiations with representatives of management who are authorized to take decisions on the matters under negotiation.'

Such benchmarks, it would seem, open up room to argue that 'effective collective agreements' should, in the context of transnational operations, extend across national boundaries.

In practice, the codes of conduct adopted by multinational corporations

2007 ILJ p1431

vary enormously. ¹¹³ Commitments in the field of labour relations, however, tend to be general rather than specific. For example, Shell's General Business Principles describe its 'responsibilities to employees' as follows:

'To respect the human rights of our employees and to provide them with good and safe working conditions, and competitive terms and conditions of employment.

To promote the development and best use of the talents of our employees; to create an inclusive work environment where every employee has an equal opportunity to develop his or her skills and talents.

To encourage the involvement of employees in the planning and direction of their work; to provide them with channels to report concerns....' ¹¹⁴

But, despite their generality and lack of enforceability, there is evidence that CSR codes may have some impact on labour relations. A recent study of CSR practice concluded that '[labour] rights enjoy greater business recognition than any other human rights'. It continues:

'Some 66 percent of the companies recognize both freedom of association and the right to collective bargaining. Nearly 75 percent of European companies recognize both rights. In contrast, 63 percent of North American companies and around 50 percent of companies from each of the remaining regions recognize these rights'

Companies almost always recognize the freedom of association and the right to collective bargaining in tandem. Commitments are made using language like, 'respects', 'allows', 'recognizes', or 'does not impede' with regard to these rights. In addition, freedom of association and the right to collective bargaining are frequently recognized in broad terms, with no limitations. Several companies even commit to the freedom to organize and bargain in the presence of local laws restricting the rights:

'In situations or countries in which the rights regarding freedom of association and collective bargaining are restricted by law, parallel means of independent and free organization and bargaining shall be facilitated.'
(Quote from a German Retail Company.)

2007 ILJ p1432

'However, some companies narrow the rights. For example, some limit recognition to the scope of national law or only recognize unions that represent a certain percentage of employees.' ¹¹⁵

The perspective of 'a combination of decentralisation and transnational bargaining within transnational firms' has already been noted. This prospect is premised on 'product market integration' that will, in the absence of an adapted bargaining agenda, favour multinational employers vis-à-vis national unions. From a trade union standpoint this might translate into pursuing a strategy whereby 'decentralisation to the firm level is combined with transnational cooperation of trade unions within large transnational firms'. ¹¹⁶ Booth et al explain:

'Why might such a development occur? One answer is that it provides a way for unions to defend themselves. National trade unions engaging with transnational firms will increasingly find it natural to cooperate, in order to strengthen their bargaining position vis-à-vis the transnational firms (who can threaten relocation of production into other countries).' ¹¹⁷

Much research remains to be done about the impact of CSR in South Africa, where-in contrast to 'corporate governance' ¹¹⁸ and 'corporate social investment' ¹¹⁹ - the concept enjoys little currency. That this will remain so, however, cannot be assumed. In

general, increasing public exposure places corporations under more pressure to be seen to comply with public policy. Commitment on the part of an employer to 'respect the human rights of employees', in turn, may provide a relatively conducive environment for exercising the right to freedom of association and the right to engage in collective bargaining. By the same token, a commitment to provide employees with 'good and safe working conditions, and competitive terms and conditions of employment' may create a potential framework for a bargaining agenda.

Given their voluntary nature, the pressure exerted by CSR norms may be described as political rather than legal. Political pressure, however,

2007 ILJ p1433

may nonetheless be significant in a country where the right to engage in collective bargaining is constitutionally entrenched and legally promoted. In addition, the constitutional duty to 'respect, protect, promote and fulfil' the fundamental values of human dignity, equality and freedom - reflected in the purpose of the LRA to advance 'social justice, labour peace and the democratisation of the workplace' ¹²⁰ - is binding also on employers. ¹²¹ Taken together, these various factors may add significantly to the pressure that trade unions could mobilize in their efforts to secure or maintain bargaining relationships, not only within South Africa but within transnational companies.

Conclusion

The discussion has by no means been exhaustive. Several important issues have hardly been touched on. For example:

- The question of trade union organization and collective bargaining in small and medium enterprises, which has generated a major literature in itself, ¹²² is clearly significant in the context of decentralization of production. The extent to which national and international framework agreements may seek to regulate supply chains of large corporations, which are likely to include many small and medium enterprises, is one of the questions remaining to be examined.
- Administrative wage-regulating mechanisms, such as ministerial determinations and sectoral determinations in terms of the Basic Conditions of Employment Act, ¹²³ are intended to establish minimum conditions of employment in sectors where collective bargaining is absent. An obvious question is the extent to which the interests of employers and workers are necessarily reflected in such instruments. A possible answer is the degree to which the investigation which must precede a sectoral determination ¹²⁴ may allow the Department of Labour to facilitate de facto negotiation between employers and employee representatives as a means of identifying appropriate terms and conditions of employment. ¹²⁵

2007 ILJ p1434

- Recent decisions of the Supreme Court of Appeal and Labour Appeal Court in labour disputes have resurrected common-law remedies over issues where statutory remedies have been created. ¹²⁶ The full significance of this development remains to be seen. It is, however, interesting that the courts are showing an unprecedented willingness to revert to the common-law roots of employment law at a time when the

allegedly restrictive nature of the statutory dispensation has been placed in issue. The questions arises whether decisions such as these may be seen as straws in the wind for the (e)assertion of common-law rights also in the area of collective bargaining, to the detriment of the model created by the LRA.

- Concern has been also been raised by the decision of the Supreme Court of Appeal in *NUMSA & others v Fry's Metals (Pty) Ltd* that employees may fairly be dismissed following bargaining deadlock about proposed changes to working practices, provided those changes serve genuine operational requirements and dismissal is not conditional. In one sense the decision is unexceptionable, in that the mere fact that the proposed changes had been subject to collective bargaining says nothing about the presence or absence of genuine operational reasons for dismissal. The changes themselves, however, may also be seen as a manifestation of insidious global market forces compelling restructuring on pain of dismissal. Viewed thus, it amounts to a fundamental curtailing of the bargaining process by transferring classic bargaining topics to the ultimately non-negotiable sphere of managerial decision making.

What is certain is that the future of collective bargaining and that of labour law are intertwined and that they face common challenges. Labour law in South Africa, as in many other countries, has been premised on the principle that its 'central purpose', alongside individual employee protection, is the regulation of collective bargaining. Any erosion of collective bargaining must call into question that purpose. The law can do little or nothing to reverse the trends undermining existing forms of trade union organization and collective bargaining. Widespread pressure from employers for greater liberalization of labour markets makes it all the more unlikely that a legal solution will be sought. The great imponderable is the new-found ascendancy enjoyed by employers in many sectors and the ends to which it will be turned. Democratic society cannot function without machinery to regulate collective terms and conditions of employment by means of representative institutions. The question is how collective

2007 ILJ p1435

bargaining, in responding to broader socio-economic pressures, may need to evolve in order to continue performing that function.

Possible lines of development at both workplace and transnational levels have been noted. From an international standpoint, according to one study, 'a combination of decentralisation and transnational bargaining within transnational firms' is the most likely perspective in the longer term. Booth et al explain:

'It may over time become natural for unions in production units in different countries within large transnational firms to cooperate, in order to strengthen their bargaining position towards the employer. The motivation would be to counter the threat of the employer to move production to the most low-cost unit. The European Works Councils may serve as vehicles for transnational bargaining of this type by creating standardised and institutionalised networks of employees across borders, which reduce coordination costs. This could add a force, this time on the union side, working towards disintegrating national industry agreements and against norms of national solidarity.' [127](#)

Given the expansion and increasing heterogeneity of the EU, it is becoming less far-fetched to transpose arguments from the European context to the broader international context. This should not obscure specific challenges facing trade unions locally in developing transnational structures. On the other hand, globalization has created a setting where purely national institutions will increasingly become the exception and transnational arrangements increasingly the rule. In this context it is possible that the momentum favouring the development of transnational bargaining structures will tend to increase and the barriers will tend to diminish.

What does this say about the future of labour law? As always, it is submitted, the law is likely to respond to and regulate that which employers and labour bring about in practice. In formulating that response the various developments touched on above will need to be studied more carefully; any amendment of the legal framework of collective bargaining should be informed by a thorough understanding of emerging trends which are capable of carrying the institution into the future. Anything else is likely to be ineffective or, at worst, disrupt the 'delicate balance' between the socio-economic forces of capital and labour on which the 'security and welfare' of people in society at any given moment continue to depend. ¹²⁸

* I am indebted to the outstanding original research on the operation of the bargaining council system carried out by Shane Godfrey, Johann Maree and Jan Theron under the auspices of the Labour & Enterprise Policy Research Group at the University of Cape Town, as yet unpublished, as well as to comment offered by Craig Bosch on an earlier draft of this text.

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¹ In Potter [Webb] *The Cooperative Movement in Great Britain* (Swan Sonnenschein & Co 1891).

² Davies & Freedland *Kahn-Freund's Labour and the Law* (3 ed) (Stevens & Sons 1983) at 69.

³ The traditional alliance between the British Trades Union Congress and the Labour Party, and that of the Congress of SA Trade Unions (COSATU) with the SA Communist Party and African National Congress, offer two examples of this process.

⁴ Convention 87 of 1948 on Freedom of Association and the Right to Organize has been ratified by 147 ILO member states and Convention 98 of 1949 on the Right to Organize and Collective Bargaining by 156 member states.

⁵ Kahn-Freund 'Legal Framework' in Flanders & Clegg (eds) *The System of Industrial Relations in Great Britain* (Basil Blackwell & Mott Ltd 1954).

⁶ Davies & Freedland at 18.

⁷ With the exception, that is, of highly skilled or sought-after individuals who command personal bargaining power.

⁸ *ibid* at 20.

⁹ *ibid* at 2.

¹⁰ See Bogg 'Representation of Employees in Collective Bargaining within the Firm: Voluntarism in the UK' (Report to the XVIIth International Congress of Comparative Law July 2006) *Electronic Journal of Comparative Law* vol 10.3 (December 2006) available at www.ejcl.org/103/art103-3.pdf.

¹¹ 'When regulating collective agreements the source of the law itself is derived from the freedom and independence of the social partners and the process of negotiating, concluding and enforcing an agreement. This . . . meaning of the fundamental principle is described by classical concepts like "collective *laissez-faire*" in Britain, "*tarifautonomie*" in Germany or "*l'autonomie collective*" in France': Bruun 'The Autonomy of Collective Agreement' in Blanpain (ed) *Collective Bargaining, Discrimination, Social Security and European Integration* (Kluwer Law International 2003) at 1.

¹² Manifested, perhaps most dramatically, in the British 'Winter of Discontent' of 1978 - 79 when, in response to inflation that reached 26% in 1975, the Labour government sought to limit wage increases to 6 per week. The result was the biggest strike movement in 50 years, the fall of the government and the election of Thatcher's Conservative government which proceeded to implement stringent 'monetarist' policies that led to the decimation of many of Britain's traditional industries and, with it, the main basis of trade union membership. See, for example, Aspden '1978-1979: Winter of Discontent' at <http://libcom.org/history/1978-1979-winter-of-discontent>; 'Monetarist Economic Policy' at <http://cepa.newschool.edu/het/essays/monetarism/mpolicy.htm>.

¹³ See Working Party on the Social Dimensions of Globalization *Organization, Bargaining and Dialogue for Development in a Globalizing World* GB.279/WP/SDG/2 (Geneva November 2000) (hereafter 'ILO study') table 3, listing 29 agreements of this nature entered into in 14 European countries between 1982 and 2000. For discussion of this period from the vantage point of the early 1980s, see Davies & Freedland 'Introduction'.

¹⁴ Dicken *Global Shift: Reshaping the Global Economic Map in the 21st Century* (4 ed Sage Publications 2003) at 8-9. On the implications for labour, see Standing *Global Labour Flexibility: Seeking Distributive Justice*

(MacMillan Press 1999); Bamber & Lansbury (eds) *International and Comparative Employment Relations* (4 ed Sage Publications 2004).

- ¹⁵ Cf ILO report paras 32 - 34, discussed below.
- ¹⁶ Davies & Freedland point out that Kahn-Freund's emphasis on collective bargaining represented 'a statement of values' which, until the 1960s, tended to be shared by parties across the political spectrum: at 2.
- ¹⁷ *Reference re Public Service Employees Relations Act (Alta)* [1987] 1 SCR 313.
- ¹⁸ European Foundation for the Improvement in Living and Working Conditions *Equal Opportunities, Collective Bargaining and the European Employment Strategy* summarized and discussed at <http://www.eurofound.europa.eu/eiro/2000/05/study/tn0005402s.html>. See also article II-88 of the Charter of Fundamental Rights of the European Union.
- ¹⁹ The ILO report notes: 'The intensification of international competition has induced the search for more flexibility in production methods and work organization. While in some countries this internal flexibility has been achieved within the context of relatively stable labour markets and employment relationships, in others the search for flexibility has led to the increasing informalization of the employment relationship. There are two ways in which these changes are occurring. The first is the growing number of temporary and part-time workers as a percentage of the workforce. The second is the growing numbers of workers in indirect employment': at paras 32 - 33. Undoubtedly, trade unions tend to resist these 'changes' in their efforts to maintain workers' living standards.
- ²⁰ 'Deregulation', in this context, refers to the 'displacement of collectively-based regulatory strategies in favour of individual mechanisms of worker and employer redress': Riley *Employee Protection at Common Law* (The Federation Press 2005) at 3, citing Conaghan 'Labour Law and the "New Economy" Discourse' 16 *Australian Journal of Labour Law* 9 at 18.
- ²¹ *ibid.*
- ²² *Dunmore v Ontario (Attorney General)* [2001] 3 SCR 1016; 2001 SCC 94 at para 46.
- ²³ Riley at 8.
- ²⁴ Davies & Freedland at 21.
- ²⁵ *Delisle v Canada (Deputy Attorney General)* [1999] 2 SCR 989 at para 126.
- ²⁶ *Reference re Public Service Employee Relations Act (Alta)* [1987] 1 SCR 313 at 414.
- ²⁷ ILO report at para 22. Thus, trade union membership in Chile rose from 11,6% of the workforce in 1985 to 15,9% in 1995, and in South Africa from 27,6% to 54,1%: at para 22. Another variable is the so-called 'Ghent system': see notes 30 and 31 below.
- ²⁸ ILO study.
- ²⁹ Booth, Burda, Calmfors, Checchi, Naylor & Visser *What Do Unions Do in Europe? Prospects and Challenges for Union Presence and Union Influence* Report for the Fondazione Rodolfo De Benedetti (undated) available at www.frdbo.org/images/customer/report1_17giugno00.pdf at 14.
- ³⁰ Whereby 'trade unions administer government-subsidized unemployment insurance funds. Membership of an unemployment insurance fund is required in order to obtain access to earnings-related unemployment benefits, which are considerably above the level of the state-guaranteed basic unemployment allowance': Kuusisto 'Independent Unemployment Insurance Fund "Undermining Unions"' European Industrial Relations Observatory Online (24 October 2005) available at <http://www.eurofound.europa.eu/eiro/2005/10/feature/fi0510202f.html>. In practice, union membership and membership of a union administered fund are inseparable.
- ³¹ Vandaele 'A Half Century of Trade Union Membership. The Cyclical Macro-Determinants of Postwar Union Growth in Belgium' *World Political Science Review* (2005) vol 1 issue 2 article 3 available at <http://www.bepress.com/wpsr/vol1/iss2/art3>; Clasen & Viebrock *Voluntary Unemployment Insurance and Trade Union Membership* Paper presented to 5th International Research Conference on Social Security (Warsaw 5-7 March 2007) available at www.issa.int/pdf/warsaw07/2clasen.pdf.
- ³² Visser *Trends in Unionisation and Collective Bargaining* (International Labour Office September 2000) at 6, available at www.ilo.org/public/english/bureau/exrel/global/ilopub/tucb.pdf. For more detailed discussion see Booth et al at 72ff.
- ³³ ILO report para 22. See also Visser at 3 - 4. On trends in Japan, see Gottfried 'Stability and Change: Typifying "Atypical" Employment in Japan' *ASIEN* (Juli 2002) 84 s 31-33 available at www.asienkunde.de/articles/comgottfried84.pdf.
- ³⁴ 'Trade Unions: The Facts' December 2001 *New Internationalist* 341 available at <http://www.newint.org/issue341/facts.htm>.

- ³⁵ ILO report para 22.
- ³⁶ Visser at 6. Possibly also relevant is the emphasis placed by many employers on human resource development, which may tend to reduce the pressure on employees to join trade unions: see ILO report para 26. In the case of South Africa, the extension of sectoral collective agreements to non-parties is a critical 'institutional' factor: see below.
- ³⁷ at para 32.
- ³⁸ Booth et al at 165.
- ³⁹ The link between trade union density and collective bargaining coverage is considered immediately below.
- ⁴⁰ Four different scenarios for the future of collective bargaining in Europe, viewed from the vantage point of the turn of the century, are discussed in Booth et al at 165ff.
- ⁴¹ Schulten at 32. See also table 4.
- ⁴² Schulten *Changes in National Collective Bargaining Systems since 1990* (European Industrial Relations Observatory On-Line 17 May 2005) table 2; available at www.eurofound.europa.eu/eiro/2005/03/study/tn0503102s.html.
- ⁴³ Hepple 'The Future of Labour Law' (1995) 24 ILJ (UK) 303; reprinted in 1996 *Comparative Labor Law & Policy Journal* 626 at 631. '[C]ollective pay-setting', Hepple comments, 'now affects fewer workers than at any time since 1935.'
- ⁴⁴ For example, in the USA. In general, see Gould *Agenda for Reform: The Future of Employment Relationships and the Law* (MIT Press 1993).
- ⁴⁵ ILO report para 35.
- ⁴⁶ at 20. See also Booth et al table 5.2.
- ⁴⁷ See, for example, Fitzenberger, Kohn & Wang *The Erosion of Union Membership in Germany: Determinants, Densities, Decompositions* (Forschungsinstitut zur Zukunft der Arbeit DP No 2193 July 2006) ftp.iza.org/dp2193.pdf.
- ⁴⁸ at 33.
- ⁴⁹ For a summary of the situation in Europe, see Schulten table 7. See also at 33.
- ⁵⁰ s 213 of the LRA.
- ⁵¹ Bogg at 3.
- ⁵² s 23(5) of the Constitution of the Republic of SA.
- ⁵³ *In re Certification of the Constitution of the Republic of SA, 1996* (1996) 17 ILJ 821 (CC) para 66.
- ⁵⁴ 66 of 1995 (LRA). The LRA, it has been said, 'codifies the fundamental philosophy of the old [Labour Relations] Act that collective bargaining is the means preferred by the legislature for the maintenance of good labour relations and for the resolution of labour disputes': *Food & Allied Workers Union & another v Pets Products (Pty) Ltd* (2000) 21 ILJ 1100 (LC) para 14.
- ⁵⁵ In general, where a union was 'representative' and where bargaining did not take place at any other level. See Rycroft & Jordaan *A Guide to SA Labour Law* (2 ed Juta 1992) chapter 2.
- ⁵⁶ See Du Toit et al *Labour Relations Law: A Comprehensive Guide* (5 ed LexisNexis Butterworths 2006) at 240 - 5.
- ⁵⁷ Explanatory Memorandum to the Draft Labour Relations Bill prepared by the Ministerial Task Team, January 1995, published in (1995) 16 ILJ 278 at 293. Amongst other reasons, international law (in compliance with which the Bill of Rights must be interpreted) does not require an enforceable duty to bargain collectively. The ILO Convention on the Right to Organize and to Bargain Collectively requires ratifying member states to take measures to promote 'voluntary negotiation between employers or employers' organizations and workers' organizations' with a view to regulating terms and conditions of employment by means of collective agreements: art 4 of Convention 87 of 1948.
- ⁵⁸ Explanatory Memorandum (fn 58 above) at 293. The LRA, the Supreme Court of Appeal has recognized, 'is at pains to erect a system that scrupulously protects and encourages collective bargaining between workers and employers, so as to facilitate the conclusion of collective agreements': *NUMSA & others v Fry's Metals (Pty) Ltd* (2005) 26 ILJ 689 (SCA) para 52. In addition, advisory arbitration is required before industrial action may be resorted to in a dispute about a refusal to bargain: s 64(2) of the LRA.
- ⁵⁹ Explanatory Memorandum (fn 58 above) at 292. See, in general, Cheadle 'Regulated Flexibility: Revisiting the LRA and the BCEA' (2006) 27 ILJ 663 paras 97ff; Cheadle et al *SA Constitutional Law: The Bill of Rights* at

18-23ff; Steenkamp Stelzner & Badenhorst 'The Right to Bargain Collectively' (2004) 25 ILJ 943; Brassey & Cooper 'Labour Relations' in Chaskalson et al (eds) *Constitutional Law of SA* at 30-1.

- ⁶⁰ For an outline of the position in the USA, see 'The Duty to Bargain' in *Encyclopedia of Everyday Law* at <http://law.enotes.com/everyday-law-encyclopedia/labor-unions-strikes>.
- ⁶¹ As confirmed by the Supreme Court of Appeal in *SANDU v Minister of Defence & others; Minister of Defence & others v SANDU & others* (2006) 27 ILJ 2276 (SCA). On appeal the Constitutional Court, while finding it unnecessary to pronounce on the issue, showed an inclination to accept the 'voluntarist' interpretation of s 23(5): *SA National Defence Union v Minister of Defence & others* (Case CCT 65/06 decided on 30 May 2007; unreported) paras 55 - 56.
- ⁶² Other socio-economic rights include those of access to housing, health care and education: see ss 26 - 29 of the Constitution. On the enforceability of such rights, see in particular *Government of the RSA v Grootboom* 2000 (11) BCLR 1169; 2001 (1) SA 46 (CC); *Soooramoney v Minister of Health, KwaZulu-Natal* 1997 (12) BCLR 1696 (CC).
- ⁶³ The Constitutional Court has affirmed that, '[o]nce a right to bargain collectively is recognized, implicit within it will be the right to exercise some economic power against partners in collective bargaining': *In re Certification of the Constitution of the Republic of SA, 1996* para 64.
- ⁶⁴ s 1(d)(i) of the LRA.
- ⁶⁵ s 1(d)(ii) of the LRA.
- ⁶⁶ Bargaining councils are voluntary structures established by registered trade unions and employers' organizations within a demarcated sector. To encourage their establishment, significant powers are conferred on them: see ss 27 and 28 of the LRA; Du Toit et al at 249 - 50.
- ⁶⁷ s 32 of the LRA. Despite this, the Act does not discourage plant-level bargaining, thus raising questions about the relationship between different levels of bargaining. See below.
- ⁶⁸ Hepple 'The Labour Relations Act and Global Competitiveness' (2005) 9 *Law, Democracy & Development* 137.
- ⁶⁹ See, for example, Theron 'Employment Is Not What It Used To Be' (2003) 24 ILJ 1247; Theron & Godfrey *Protecting Workers on the Periphery* (Development & Labour Monographs 1/2000 UCT 2000).
- ⁷⁰ Godfrey in Du Toit et al at 42, citing information supplied by the Department of Labour. Mass unemployment, in South Africa as elsewhere, is a further factor undermining trade union strength.
- ⁷¹ Godfrey in Du Toit et al at 43.
- ⁷² Due to a significant number of councils ceasing to exist, while others have merged to ensure their continued viability.
- ⁷³ The average percentage of non-party employees covered by extended agreements ranged from 39% at a cross-section of nine large councils to 23% at 16 regional and small national councils and 31% at 17 small councils: unpublished research by Godfrey, Maree & Theron. For discussion, see Godfrey in Du Toit et al at 43 - 5.
- ⁷⁴ See Godfrey with Maree & Theron 'Regulating the Labour Market: The Role of Bargaining Councils' (2006) 27 ILJ 731; Godfrey Maree & Theron 'Flexibility in Bargaining Councils: The Role of Exemptions' (2006) 27 ILJ 1368. For an exposition of the underlying issues, see Hamburger 'The Extension of Collective Agreements to Cover Entire Trades and Industries' Aug 1939 vol XL no 2 *International Labour Review* 153. Cheadle argues that the Minister of Labour should have greater discretion, informed by government's labour market policy, in extending bargaining council agreements: 'Regulated Flexibility' paras 121 - 124. See also *Bargaining Council for the Contract Cleaning Industry and Gedeza Cleaning & another* (2003) 24 ILJ 2019 (BCA).
- ⁷⁵ Bhorat, Lundall & Rospabe 'The South African Labour Market in a Globalizing World: Economic and Legislative Considerations' ILO Employment Paper 2002, available at www.ilo.org/public/english/employment/strat/download/ep32.pdf. Although the article was written some five years ago, the issues remain unresolved.
- ⁷⁶ 'The Future of Labour Law' (1995) 24 ILJ (UK) 303; reprinted in 1996 *Comparative Labor Law & Policy Journal* 626.
- ⁷⁷ Hepple at 631; see above. While comparisons between countries with vastly different socio-economic conditions must be handled cautiously, a comparative approach is meaningful to the extent that the trends in question are rooted in global realities. Historical and legal commonalities further facilitate a comparative discussion. For instance, South Africa's bargaining councils were originally modelled on the 'Whitley councils' established in Britain in the same period; while the legal definition of the employment relationship in both countries rests on similar common-law foundations. At the same time, as noted below, the South African labour market has characteristic features which make it necessary to take the inquiry further.

- ⁷⁸ Hepple at 631 with reference to Kahn-Freund 'Industrial Relations and the Law - - Retrospect and Prospect' (1969) 7 *BJIR* 301.
- ⁷⁹ at 640.
- ⁸⁰ at 641.
- ⁸¹ at 644, with reference to Kahn-Freund 'The Impact of Constitutions on Labour Law' 1976 *CLJ* 240 at 270. For a critique of the 'juridification' of labour law in South Africa, see Cameron et al *The New Labour Relations Act* (Juta 1989) ch 5; Davis 'The Juridification of Industrial Relations in South Africa - Or Mike Tyson v Johannes Voet?' (1991) 12 *ILJ* 1181.
- ⁸² Hepple at 646.
- ⁸³ *ibid.*
- ⁸⁴ *ibid* at 646 - 7, with reference to Giddens *Beyond Left and Right* chapters VI and VII; White Paper *European Social Policy: A Way Forward for the Union* COM (94)333 (1994) VI.
- ⁸⁵ Hepple at 647.
- ⁸⁶ s 7(1) of the Constitution.
- ⁸⁷ s 9(2) of the Constitution.
- ⁸⁸ Fenwick & Kalula 'Law and Labour Market Regulation in East Asia and Southern Africa: Comparative Perspectives' 2001 vol 21 (2) *The International Journal of Comparative Labour Law and Industrial Relations* 193, drawing on the analysis developed in Cooney, Lindsey, Mitchell & Zhu (eds) *Law and Labour Market Regulation in East Asia* (Routledge 2002).
- ⁸⁹ Fenwick & Kalula at 200 - 1.
- ⁹⁰ at 204 - 11.
- ⁹¹ For example, mass unemployment undermines minimum wages and conditions of employment. Thus, the argument in favour of market liberalization in its most extreme form implies that wages should be allowed to drop to levels acceptable to the poorest of the poor.
- ⁹² Fenwick & Kalula at 224.
- ⁹³ as reflected, for example, in the policy of the SA Department of Labour. Its strategic objectives for 2004 - 2009 include contribution to employment creation; enhancing skills development; promoting equity in the labour market; protecting vulnerable workers and strengthening social protection: see http://www.labour.gov.za/media/speeches.jsp?speechdisplay_id=5877. One important outcome of this approach has been the Skills Development Act 97 of 1998.
- ⁹⁴ In 2005 South Africa accounted for US\$239,4 bn, or 72,5%, of the total US\$330,1 bn gross domestic product of the 16 SADC states combined. The next most productive states were Angola (US\$26 bn) and Tanzania (US\$12 bn). Source: Country Analysis Briefs of the US Energy Information Administration, available at <http://www.eia.doe.gov/emeu/cabs/SADC/Tables.html>.
- ⁹⁵ Bhorat, Lundall & Rospabe 'The SA Labour Market in a Globalizing World: Economic and Legislative Considerations' tables 4 and 23 available at www.ilo.org/public/english/employment/strat/download/ep32.pdf.
- ⁹⁶ Hepple at 646.
- ⁹⁷ Explanatory Memorandum to the Draft Labour Relations Bill at 310 - 14.
- ⁹⁸ Hostility to workplace forums is strongest among unions affiliated to the Congress of SA Trade Unions (COSATU). For a summary of the debate, see Du Toit 'Industrial Democracy in South Africa's Transformation' May 1997 vol 1 *Law, Democracy & Development* 39 at 55ff. As a result, very few workplace forums have been established: see Steadman 'Workplace Forums in South Africa: A Critical Analysis' (2004) 25 *ILJ* 1170; Du Toit et al *Labour Relations Law* at 45.
- ⁹⁹ Hepple at 632.
- ¹⁰⁰ ANC 'Role of the Working Class and Organized Labour in Advancing The National Democratic Revolution' (2007) at http://www.anc.org.za/ancdocs/policy/2007/discussion/labour_ndr.html.
- ¹⁰¹ For an overview, see Godfrey in Du Toit et al at 12 - 13.
- ¹⁰² For a thought-out position on flexible multi-level bargaining, see Baskin *Centralized Bargaining and COSATU: Defining the Sectors and Designing a Flexible System* (National Labour & Economic Development Institute 1994).

- [103](#) See Steadman; Du Toit 'Collective Bargaining and Worker Participation' (2000) 21 ILJ 1544. In fact, s 80(7) of the LRA creates an identical statutory channel to establish a workplace forum by collective agreement, in which event the provisions of chapter V of the Act do not apply. This channel has largely been ignored.
- [104](#) At present, only a majority union in a workplace, or two or more unions with majority membership, may apply for the establishment of a workplace forum: s 80(2). In 2000 the Department of Labour proposed an amendment that would have allowed any registered union to apply for the establishment of a workplace forum provided it had the support of a majority of employees in the workplace. The amendment was, however, abandoned. It is conceivable that a similar amendment in future, introduced as a means of promoting collective bargaining, may encounter less union resistance.
- [105](#) International Labour Office *Organization, Bargaining and Dialogue for Development in a Globalizing World* GB.279/WP/SDG/2 (Geneva November 2000) paras 31 - 32.
- [106](#) *ibid.*
- [107](#) at para 33.
- [108](#) International Transport Workers' Federation *Globalising Solidarity: An ITF Resource Book for Trade Unionists* (2002) at 39, available at <http://fimmen.itf.org.uk/in-focus/index.cfm/themeid/2>. Examples are agreements between Telefonica and Union Network International (UNI); Danone and the International Union of Food, Agricultural, Restaurant, Catering, Tobacco & Allied Workers' Federation (IUF); and IKEA and the International Federation of Building & Wood Workers (IFBWW): at para 34.
- [109](#) Captured in the notion of the 'triple bottom line', reflecting the economic, environmental, and social performance of an organization. The phrase was coined by John Elkington in 1994: see Elkington *Cannibals with Forks: The Triple Bottom Line of 21st Century Business* (Capstone 1999).
- [110](#) Communication from the Commission to the European Parliament, the Council and the European Economic and Social Committee *Implementing the Partnership for Growth and Jobs: Making Europe a Pole of Excellence on Corporate Social Responsibility* (2006) para 5, available at ec.europa.eu/employment_social/soc-dial/csr/index.htm.
- [111](#) See below. For criticism of the voluntary nature of the EC Communication (above), see *News from Labour*, press release by the European Parliamentary Labour Party dated 22 March 2006, available at www.eplp.org.uk/news/2167.html.
- [112](#) Tripartite Declaration of Principles concerning Multinational Enterprises and Social Policy, adopted by the Governing Body of the International Labour Office at its 204th Session (Geneva November 1977) as amended at its 279th (November 2000) and 295th Sessions (March 2006).
- [113](#) Studies of CSR implementation by European companies conducted under the auspices of the European Foundation for the Improvement of Living & Working Conditions can be accessed via <http://www.eurofound.europa.eu/>. For a synthesis, see Segal, Sobczak & Triomphe *Corporate Social Responsibility and Working Conditions* (2005), available at <http://www.eurofound.europa.eu/publications/htmlfiles/ef0328.htm>. Case studies of CSR implementation by leading Dutch companies outside Europe have been conducted under the auspices of FNV Company Monitor and are available at <http://www.companymonitor.org/asp/company.asp?l=2&m=4>. See, for example, NALEDI and Pillay *Unilever South Africa Research Report 2006* available from this website. For other CSR reports available online, see <http://www.reportalert.info/>.
- [114](#) Royal Dutch Shell *Shell General Business Principles*; available at www.shell.com/static/envirosoc-en/downloads/.
- [115](#) Wright & Lehr *Business Recognition of Human Rights: Global Patterns, Regional and Sectoral Variations* (Corporate Social Responsibility Initiative Working Paper no 31 (Cambridge MA John F Kennedy School of Government Harvard University) at vii, available at www.ksg.harvard.edu/m-rcbg/CSRI/publications/workingpaper_31_wright_lehr.pdf at vii, 6.
- [116](#) Booth et al at 177.
- [117](#) at 177-8.
- [118](#) In which South Africa is regarded as a world leader: see Institute of Directors of SA *King Report on Corporate Governance for South Africa* (2002), available at http://www.ecgi.org/codes/code.php?code_id=106; Van den Ende *Corporate Social Responsibility in South Africa: Fact or Fiction* M Com dissertation (RAU October 2004) available at <http://0-etd.uj.ac.za.raulib.rau.ac.za/theses/available/etd-08292005-112157/restricted/LIESL.pdf>. Thus, CSR merits one paragraph in a 286-page report on the mining industry: see NALEDI (on behalf of the African Labour Research Network) *Mining Africa: South African MNCs Labour and Social Performance* (April 2005) at 129, available at www.polity.org.za/attachment.php?aa_id=2192.

- [119](#) According to Fig, companies favour 'corporate social investment' as a more neutral concept that avoids drawing attention to their role in the apartheid era: see 'Manufacturing Amnesia: Corporate Social Responsibility in South Africa' May 2005 vol 81 no 3 *International Affairs*.
- [120](#) s 1 of the LRA.
- [121](#) s 7 read with s 8(2) of the Constitution.
- [122](#) The Institute for Development and Labour Law at the University of Cape Town has published no fewer than seven specialised studies on the subject since 1991, the most recent being Godfrey, Clarke & Theron *On the Outskirts but Still in Fashion: Homeworking in the South African Clothing Industry* (Monograph 2/05). Publications by the present author include 'Small Business: Deregulation or Collective Bargaining?' (1993) 14 ILJ 570; 'Workers in Small Business: The Forgotten People' (1994) 15 ILJ 954; 'Small Enterprises, Industrial Relations and the RDP' (1995) 16 ILJ 544.
- [123](#) Act 75 of 1997. See ss 50 - 58.
- [124](#) ss 52 - 53 of the BCEA.
- [125](#) Unpublished research by the Labour & Enterprise Project at the University of Cape Town may be expected to shed light on these and other questions.
- [126](#) See, for example, *Fedlife Assurance Ltd v Wolvaardt* (2001) 22 ILJ 2407 (SCA); *Buthelezi v Municipal Demarcation Board* (2004) 25 ILJ 2317 (LAC); *Denel (Pty) Ltd v Vorster* (2004) 25 ILJ 659 (SCA); [2005] 4 BLLR 313 (SCA). For discussion see Bosch 'The Implied Term of Trust and Confidence in South African Labour Law' (2006) 27 ILJ 28; Du Toit 'Oil on Troubled Waters? The Slippery Interface between the Contract of Employment and Statutory Labour Law' (paper presented at the 19th Annual Labour Law Conference Sandton July 2006).
- [127](#) Booth et al at 181.
- [128](#) The quoted words are from the judgment of Justice McIntyre in *Reference Re Public Service Employee Relations Act (Alta)* [1987] 1 SCR 313 cited above.