



The Future of Trade Unions in the Changing World of Work

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Thesis Presented for the degree of

**Master of Philosophy**

**In the Department of Labour Law, Faculty of Law**

UNIVERSITY OF CAPE TOWN

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February 2018

Research dissertation presented for the approval of the Senate in fulfilment of part of the requirements for the MPhil in Labour Laws in approved courses and a minor dissertation. The other part of the requirement for this qualification was the completion of a program courses.

Word Count : 22 119

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## Declaration

I hereby declare that I have read and understood the regulations governing the submission of the MPhil in Labour Laws dissertation, including those relating to the length and plagiarism, as contained in the rules of this university that this dissertation conforms to those regulations

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.....Date.....12/02/2018.....

## Acknowledgements

I would like to give my gratitude to God Almighty who made it possible for me to be here.

To my supervisor Sufinnah, thank you for guiding me through. I would also like to thank Associate Professor Debbie Collier, were always there when I needed you. I am very grateful to the government of the Kingdom of Lesotho, who supported me financially and turned my dream into a reality.

Most importantly, I would like to thank my husband for encouraging me to further my education and for everything. To my beautiful kids, thanks for your love.

And finally my gratitude goes to everybody who supported me through this journey

## Dedication

This work is dedicated to the people who always wanted only the best for me, my late grandmother, father and father-in-law. I hope you are all proud of me wherever you are.



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## **Chapter One: Background**

### **1.1 Introduction**

This dissertation seeks to discuss the impact of the Fourth Industrial Revolution (4IR) on the future of work generally and, in particular, on the future of trade unions. The dissertation will consider past, present and future trends of the world of work, and will discuss the impact this will have on trade unions. In terms of the structure of this dissertation, Chapter one will explore what is meant by the Fourth Industrial Revolution, and its likely impact on the world of work. Chapter two will then go on to explore the current state of work mainly in the context of South Africa. Thereafter, the current state of trade union movements and the role played by trade unions in the world of work is considered in Chapter three with the aim of assessing whether workers are adequately protected in view of the changing dynamics of the world of work. The main focus of the dissertation will, however, be to establish whether the changing world of work is likely to bring opportunities or disadvantages to trade unions.

The fourth chapter will, therefore, consider possible ways in which trade unions can be reinvented in order for them to thrive in the changing world of work. Finally, Chapter five makes recommendations which may potentially respond to the challenges faced by unions in the world of work. In researching the issues outlined above, the author employed the desktop research method. The dissertation is, therefore, informed by the current labour legislation, the relevant International Labour Organization's (ILO) instruments relating to the topic in discussion, as well as other relevant regional and international instruments. Relevant scholarly articles in the area have also been considered.

### **1.2 What is the 'Fourth Industrial Revolution'?**

The ways in which people are living have been changing from time immemorial, likewise, so are the activities undertaken in the world of work. This is mainly because the industries are also evolving. According to Younus, the world has seen three revolutions in the past, and is currently faced with the Fourth Industrial Revolution.<sup>1</sup>He argues that these

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<sup>1</sup>Younus M U *Fourth Industrial Revolution* (2017) Albright Stonebridge Group, Washington DC.

'revolutions' can be traced from the first mechanical loom dating from 1784, exactly 233 years ago, and that we can distinguish four stages in the ongoing process of change known as the Industrial Revolution.<sup>2</sup> The First Industrial Revolution began when humans moved away from using animals and, instead, employed mechanical power by the use of machines based on water and steam. The Second Revolution came around the 20<sup>th</sup> century with the introduction of new power generation, electricity and conveyer belts bringing about mass production.<sup>3</sup> The Third Industrial Revolution came with the digital systems, the emergence of modern computers, communication technology and automation of production. Presently, the Fourth Industrial Revolution, also known as the digital revolution, builds on the progress made by its predecessor. This revolution is now characterized by a fusion of technologies that are blurring the lines between physical, digital and biological spheres.<sup>4</sup>

### **1.3 Fourth Industrial Revolution and the impact of Globalization**

Globalization has brought with it an increase in companies and this has led to corporations increasingly becoming worldwide enterprises, producing and selling products in multiples in strategically selected countries.<sup>5</sup> It is observed that enterprises and corporations are not only in developed countries, but in developing countries as well.<sup>6</sup> In this day and age, when one talks of the corporate world, we talk about multinationals and not national corporations any longer. This means that the developing countries are in direct competition with developed countries, so are workers in developing countries.<sup>7</sup> Work is now being integrated and divided on a worldwide scale. The digital economy connects the whole world in a very short space of time, making economic activities borderless and business continues to run for twenty four hours nonstop. Despite the globalization of work and employment, trade unions are still operating by the labour laws of countries within whose borders they are established.

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<sup>2</sup>Ibid.

<sup>3</sup>SOGETI *The Fourth Industrial Revolution, Things to Tighten the Link Between IT and OT*, (2014) VINT Research Report 3 available at [fr.sogeti.com/globalassets/global/downloads/reports/vint-research-3-the-fourth-industrial-revolution](http://fr.sogeti.com/globalassets/global/downloads/reports/vint-research-3-the-fourth-industrial-revolution)

<sup>4</sup>Klaus Schwab *The Fourth Industrial Revolution : What it means, How to Respond* (2014) World Economic Forum.

<sup>5</sup>The Global Challenge Insight report *The future of Jobs: Employment, skills, and workplace strategy for the Fourth Industrial Revolution*.(2016) World Economic Forum.

<sup>6</sup>Ibid.

<sup>7</sup>Ibid.

Global networks create opportunities for people and organizations to operate on a larger scale across the world. In his report to the G-20, the CEO of the World Bank stated that one important way for countries to connect to the global economy and develop is through global chains.<sup>8</sup> He indicates that globalization is affecting the nature of competition in the global economy as it has an effect on the nature of goods and services that are being produced, how they are being produced, as well as the size of the market that they are being produced for.<sup>9</sup> This has a direct effect on the labour market and the world of work in general as there is an increase in global supply chains.

The report goes on to state that the world of work is realising a change in the way production of goods and services used to be in that the present kind of trade system is such that it is possible to have different levels of production being carried at different countries.<sup>10</sup> For example, the inputs are produced in one country whereas the assembly of those inputs are undertaken in another country. Because of this, the multinational companies no longer limit production to one country but to multiple countries through contractors.<sup>11</sup> The report further observes that this kind of setting allows for more labour intensive stages of production to be based in low wage countries and the technologically intensive stages to be based in high wage countries so that companies spent limited costs on labour.<sup>12</sup>

#### **1.4 The impact of the Fourth Industrial Revolution on the world of work**

The Fourth Industrial Revolution is transforming the entire system of production and management of the labour market.<sup>13</sup> It has been predicted that those who stand to benefit the most from the 4IR are going to be the providers of the intellectual and physical capital, specifically, innovators, shareholders and investors.<sup>14</sup>

As indicated by the World Economic Forum (WEF), the biggest declines in employment globally are expected in the category of jobs classified as ‘Office and

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<sup>8</sup>OECD and World Bank Group *Inclusive Global Value Chains, Policy Options in Trade and Complementary Areas for GVC Integration by Small, Medium Enterprises and Low-income Developing Countries*, (2015) Report for Submission to the G-20 Summit available at <http://www.oecd.org/trade/OECD-WBG-g20-gvc-report-2015.pdf>, accessed on 5<sup>th</sup> February 2018

<sup>9</sup>Ibid.

<sup>10</sup>Ibid.

<sup>11</sup>Ibid.

<sup>12</sup>Ibid.

<sup>13</sup>Klaus Schwab *The Fourth Industrial Revolution: What it means, How to Respond* (2016 )World Economic Forum.

<sup>14</sup>Malone T. *The future of work: How the new order of business will shape your organization, your management style, your life* (2004) Harvard Business School Press, Boston.

Administrative' jobs due to drivers such as mobile internet, cloud technology and workplace flexibility.<sup>15</sup> The report also indicates expected decline of employment in 'Manufacturing and Production' because of technologies that substitute human labour.

On the brighter side, the report indicates that technologies are increasing other job categories. For example, in 'Architecture and Engineering', job growth is accelerated by the need for skilled persons who can operate existing and new technology.<sup>16</sup> Moreover, employment growth in the 'computer and mathematical' job category is fuelled and driven by numerous trends, including the implementation of changes in analytics and technologies causing a decrease in other job categories. The report goes on to project 'total job losses of 7.1 million in other job categories and a gain of 2.1 million new jobs in the computer and mathematical or architecture and engineering jobs'.<sup>17</sup> The total numbers of jobs that seem to be at risk of being lost outweigh the total number of jobs to be gained or created by the introduction of the changes in the world of work.<sup>18</sup>

At the same time, there would be an increase in job opportunities for men dominated jobs meaning that the gender disparities in the world of work are likely to be increased rather than decrease. The world of work would be back to the point where there are more men in the labour market and more women in unpaid jobs.<sup>19</sup> In this regard, the WEF report states the following:

"Traditionally, more women hold positions in the 'office and administrative' jobs while more men are in the 'computer and mathematical' and 'architecture and engineering' jobs, so if more jobs are likely to be lost in the 'office and administrative' job category, and more be created in the 'computer and mathematical' and 'architecture and engineering' category, it means that more women are likely be without jobs as they would be replaced by technology."<sup>20</sup>

The changes brought about in work patterns and the distribution of work, particularly between genders, will in all likelihood affect levels of income. The Fourth Industrial Revolution is transforming the entire system of production and management of the labour

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<sup>15</sup>The Global Challenge Insight Report *The future of Jobs: Employment, Skills, and Workplace Strategy for the Fourth Industrial Revolution* (2016) World Economic Forum.

<sup>16</sup>Ibid.

<sup>17</sup>Ibid.

<sup>18</sup>Ibid.

<sup>19</sup>Ibid.

<sup>20</sup>Ibid.

market.<sup>21</sup> But like all the other Industrial Revolutions that came before it, the Fourth Industrial Revolution has the potential of improving the levels of income, and thus improving the quality of life for the people. Although there is a huge chance of the improvement of the quality of life for the people, there is also a very high likelihood that the Fourth Industrial Revolution will bring with it very high levels of inequality as some people are going to find themselves out of employment because of work being automated.<sup>22</sup> Those who are going to benefit more, as mentioned above, will be the providers of the intellectual and physical capital, which are the innovators, shareholders and investors.<sup>23</sup> The replacement of people by machines will surely increase the inequality gap if properly formulated state policies are not put in place to bridge this gap.

While delivering his keynote address at the global dialogue, Lord Robert Skidelsky (from the University of Warwick in the United Kingdom) said that the emerging consensus is that there will be fewer jobs overall, and that a few jobs available will be of either high or low quality, with a little in between.<sup>24</sup> He indicated that these forecasts are based on the premise that the digital revolution is far more intrusive in the world of work and that it creates competition between human and machine, not just in terms of physical work but also in cognitive work, that is, the area of work previously considered to be the exclusive preserve of human beings given the unique cognitive abilities.<sup>25</sup>

### **1.5 Opportunities and challenges introduced by the Fourth Industrial Revolution**

Although there are challenges that are posed by the Fourth Industrial Revolution and the changes in the world of work, there are also some opportunities. The flexible working arrangements presented by the 4IR make it possible for workers to be able to balance their work life with their personal life, that is, the ‘work-life balance’. Workers can be in a position to decide on the kind of jobs that give them the freedom to decide whether they want to work from home or from the office. This is an advantage, especially for working mothers, who would not have to struggle to get to office after having to get their children to school and performing house work. All the house work and the office work can be done at intervals if they choose to work from home. In this regard, Fletcher and Bailyn argue that the new form

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<sup>21</sup>Ibid.

<sup>22</sup>Ibid.

<sup>23</sup>Ibid.

<sup>24</sup>International Labour Organization’s Global Dialogue on ‘The Future of Work We Want’.

<sup>25</sup>Ibid.

of employment can accommodate and benefit workers by combining work and family priorities.<sup>26</sup>

According to Garson, the spread of computer usage has changed work activities and the management of work in the industries and factories.<sup>27</sup> Free agents are also growing at an alarming rate. They control their own work schedule rather than being controlled by the institution they work for, and perform their work at the time and place that suits them. Contracts of employment are therefore being changed from rigid to being more flexible types.<sup>28</sup> In the past few years, it was estimated that there were about 16.5 million freelancers, 3.5 million temporary workers and 13 million micro businesses, making a total number of free agents in the United States of America alone approximately 33 million, and accounting for about one in four American workers<sup>29</sup>.

This changing landscape is particularly problematic for trade union organisation as there is no single workplace where these freelancers operate from and from where unions can recruit members. An additional challenge for unions lies in the design of labour legislation itself in that in jurisdictions such as South Africa, this legal regime mostly protects employees in formal employment who are usually those who hold one employment contract with one employer or organization.<sup>30</sup> Any other kind of worker, such as informal workers have limited to non-existent legal protection. For example, pension schemes are the employer's responsibility, and protections in terms of occupational safety and health laws are employer-based, leaving those workers who do not have permanent employers unprotected.<sup>31</sup> This demonstrates the extent to which trade unions have to ensure that labour and social security laws are revised to accommodate the changing world of work by protecting all workers, regardless of the category they belong to.

In this regard, according to Malone, the changes in the world of work calls for the creation of guild-like associations, such as those found in the middle ages.<sup>32</sup> His view is that

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<sup>26</sup>Fletcher J. And L. Bailyn *Challenging the Last Boundary ; Reconnecting Work and Family*(1996) Oxford University Press, Oxford.

<sup>27</sup>Garson B *Electronics Sweatshop : How Computers are Transforming the Office of the Future into the Factory of the Past* (1988)Penguin Books, New York.

<sup>28</sup>Ibid

<sup>29</sup>Pink D H *Free Agent Nation : The Future of Working for Yourself* (2001) Warner Books, New York

<sup>30</sup>Theron J *Non-standard employment and labour legislation: The outline of a strategy* (2014) Institute of Development and Labour Law, University of Cape Town.

<sup>31</sup>Ibid.

<sup>32</sup>Malone T. *The Future of Work : How the New Order of Business Will Shape Your Organization, Your Management Style, Your Life* (2004) Harvard Business School Press , Boston.

such associations can take care of workers' needs for financial security, health care, socialization with and recognition by peers, as well as training. He argues that they will replace security and services provided by the traditional employment contract without infringing on the freedom and autonomy of workers.<sup>33</sup> These issues are addressed further below in Chapters three and four.

## **1.6 The outlook for the future of work in the Fourth Industrial Revolution**

The access to information and ideas made possible by the digitisation of the world of work has ignited competition amongst multinational corporations.<sup>34</sup> Companies are trying by all possible means to realise maximum profits at as low costs as possible. The practice of using an external workforce to accomplish a particular task is now becoming a norm in the workplace and continues to grow. This can be attributed to low wages being paid to temporary workers in jurisdictions where the labour law regime provides weak legal protection. Other contributing factors are the falling transaction costs of organizing temporary workers and the concept of shared skills.<sup>35</sup> Communication technologies also make it easy to find workers outside of the organization.

The world of work is also experiencing a change in the nature of employment in the formal organizations. The idea of 'one worker, one organization' is quickly fading away in some jurisdictions. Because the world is now one 'global village', there are no more boundaries as to where one can work. Work relations have now gone beyond the boundaries of a single organization and, likewise, beyond the boundaries of a single country. The responsibility of career and skills development is now in the hands of workers themselves as it is for their own benefit to be employable anywhere across the world.

It is clear that the world of work is changing, and has been changing from time immemorial. Looking at the current trends of change in the labour market, one cannot help but wonder what kind of employment will there be tomorrow? Will there be enough paid jobs? What does the future hold for workers and trade unions? With these questions in mind, the International Labour Organization (ILO), for instance, has launched the 'Future of Work Initiative' as one of its programmes towards celebrating its centenary in 2019. While launching the initiative at the International Labour Conference (ILC) in 2015, the ILO's

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<sup>33</sup>Ibid.

<sup>34</sup>Ibid.

<sup>35</sup>Ibid.

Director-General, Guy Ryder, indicated that the world of work is experiencing massive changes attributed to globalization, technological innovations, demographic changes and climate change.<sup>36</sup>

Moreover, the changing world of work is affecting individuals (ranging from workers, employers, clients and even governments) in different ways.<sup>37</sup> The kinds of jobs that most employees have been accustomed to are changing, while other traditional jobs are even disappearing.<sup>38</sup> The idea of having multiple employers is slowly gaining momentum in the world of work today. According to Biberman and Whitty, it is predicted that in the future, workers will be needed to demonstrate to organizations how they can add value to the organizations, and they will have to prove this to multiple organisations at once given the new ‘multiple employer’ model.<sup>39</sup> This means that workers are going to be required to put in more time and effort to their work in order for them to be able to add value to numerous organizations. The authors observe that organizations rapidly restructure their businesses and this places a lot of stress on workers given the uncertainty about what the future holds in terms of their work and survival prospects.<sup>40</sup>

Another characteristic of the new world of work is decentralization.<sup>41</sup> Malone defines decentralization as the participation of people in making decisions that affect them. According to him, some companies are already doing away with the traditional hierarchical structures and considerable decision making authority is delegated to very low organizational levels. For example, management for consulting firms allowing individual partners and consultants assigned to projects to make almost all its operational decisions.<sup>42</sup>

Hence, as indicated earlier, the world of work has always been evolving with patterns and the nature of work always having been subject to change. As observed by Donaghy, however, the pace of change is more rapid than ever before. The push for this change stems

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<sup>36</sup>International Labour Organization’s 104<sup>th</sup> Session, June 2015.

<sup>37</sup>International Labour Organization *Women and the Future of Work, Beijing +20 and Beyond* (2015) Gender, Equality and Diversity Branch, Geneva.

<sup>38</sup>Ibid.

<sup>39</sup>Biberman J. And M. Whitty *A Postmodern Spiritual Future of Work* (1997) Journal of Organizational Change Management, Vol. 10 no. 2.

<sup>40</sup>Ibid.

<sup>41</sup>Malone T. *Future of Work, How the New Order of Business Will Shape Your Organization, Your Management Style, and Your Life*(2004) Harvard Business School Press, Boston Massachusetts.

<sup>42</sup>Ibid.

from both organizations and individuals.<sup>43</sup> This is the era where organizations are under constant pressure to produce and deliver quality goods and services to clients, at the time required by those clients, and at a good price while still maintaining their profit. This means that new ways of working have to be found that will make it possible to make the best use of, and get the best results from, resources that are available whether this be either human, capital, financial or otherwise.<sup>44</sup> For example, the organization may decide to introduce new technology in order to be able to improve performance. However, since the cost and complexity of the new machinery cannot allow it stand idle but instead needs to operate non-stop, this would mean that the organization might find itself in a situation where it will have to introduce shift work to allow for twenty four hour continuous working. An additional factor requiring organizations to change the ways in which they have traditionally been operating is the changing needs of their clients who may have a need for goods and services outside traditional working hours. This would require that the organization find the means of delivering these goods and services within the requested time.<sup>45</sup>

As much as the employer is the one responsible for designing the way in which the work will be done in the organization, in some cases the employees themselves may be drivers for change. For example, some may prefer a certain pattern of work for their own reasons. In other words, an employee may prefer to work part-time rather than full time and, in this way, they would be able to work and partake in family responsibilities. Others may want to have time off in order to be able to further their studies or to have time for religious observances.<sup>46</sup> As a result of all the changes necessitated by the needs of organizations and employees, organizations are always developing ways of working that will serve the increasingly complex and competitive realities of the world of work in the Fourth Industrial Revolution.

The shifts in the size and composition of the labour force in different parts of the globe also contribute to the future world of work as indicated by the current Director of the ILO.<sup>47</sup> The size and composition of the population and the labour force participation rates

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<sup>43</sup> Robert Taylor *The Future of Work-life Balance* (2002) Economic and Social Research Council, Swindon United Kingdom.

<sup>44</sup> Ibid.

<sup>45</sup> Ibid.

<sup>46</sup> Ibid.

<sup>47</sup> International Labour Organization's 104<sup>th</sup> Session 2015.

determine the number and makeup of people who are willing to work.<sup>48</sup> These demographics also determine the consumption patterns of goods and services needed for a particular region, as well as the kind and size of labour needed to produce them. As indicated by Karoly and Panis, some developed countries are faced with a challenge of aging population.<sup>49</sup> For example, the population of the United States has been growing older as the baby boom generation ages and, in turn, the American workforce has also been aging. In this regard, it is estimated that by 2050, there will be three working age adults per elderly person in the United States compared to two in the United Kingdom, France and Germany, and 1.4 in Japan, Spain and Italy.<sup>50</sup> The World Economic Forum's Human Capital Index finds that Sub-Saharan Africa, on the other hand, currently captures 55 per cent of its human capital potential compared to a global average of 65 per cent.<sup>51</sup>

With more than 60 per cent of its population under the age of 25, Sub-Saharan Africa is the world's youngest region and it is estimated that by 2030 the continent's working age population would increase by two-thirds from 370 million adults in 2010 to over 600 million in 2030.<sup>52</sup> It is also estimated that 41 per cent of all work activities in South Africa are susceptible to automation, as are 44 per cent in Ethiopia, 46 per cent in Nigeria and 52 per cent in Kenya.<sup>53</sup> This is likely moderated by comparatively low labour costs and offset by new job creation.<sup>54</sup> The fact that many jobs are becoming more intensive in their use of digital technologies contribute much to labour migration in search of labour intensive jobs, and many people from developing countries find themselves in developed countries doing domestic and care giving jobs.<sup>55</sup>

Closely linked to this is the challenge around labour migration. In the 106<sup>th</sup> Session of the ILO, the Director General of the ILO reminded delegates that the other issue that needs to be examined as part of the changing world of work is the issue of labour migration.<sup>56</sup> He referred to the 'widespread governance deficits' which allow space for labour abuse and too frequently a deterioration of public attitudes and political discourse towards migrants and

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<sup>48</sup>Karoly L.A., and CWA Panis *The 21<sup>st</sup> Century at Work, Forces Shaping the Workforce and Workplace in the United States*(2004) RAND Corporation, Santa Monica California.

<sup>49</sup>Ibid.

<sup>50</sup>Ibid.

<sup>51</sup>Report on The Future of Jobs and Skills in Africa (2017) *Preparing the Region for the Fourth Industrial Revolution*, World Economic Forum.

<sup>52</sup>Ibid.

<sup>53</sup>Ibid.

<sup>54</sup>Ibid.

<sup>55</sup>Ibid.

<sup>56</sup>International Labour Organization's 106<sup>th</sup> Session, June 2017.

migration. He also insisted on the value of social dialogue between governments and social partners to address these challenges and also to harness the opportunities created by increased labour migration.<sup>57</sup> The world of work, both now and in the future, is characterized by racial and ethnic diversity, partly as a result of labour migration.<sup>58</sup> The pace at which technological changes are taking place is increasing the demand for high skilled workers who can develop new technologies and bring them to the market, and who can exploit new technologies in production of goods and services.<sup>59</sup> All these changes contribute highly to global labour migration. Each and every year millions of men and women are leaving their homes and countries and go across national borders in search for greener pastures and a better life for their families. The danger, however, exists that in the absence of improved labour migration governance, migrants may open themselves up to exploitation where, for example, they are forced to work (through slave-like contracts) under very exploitative working conditions as is already the case with many undocumented migrants.<sup>60</sup> Some companies rely on cheap and easily exploited migrant workers who may be internal (from rural to urban areas on one country) or external migrants (from labour sending country to the labour absorbing country), for production, especially in the manufacturing sector.<sup>61</sup>

While migrant workers sometimes find themselves in difficult situations and unacceptable working conditions, technological innovations have made communication easier for them, regardless for how far from home they are.<sup>62</sup> For example, Lesotho is a labour sending country and in the past it used to be very difficult to know the working conditions of Basotho in the receiving countries. However, because of the improved communication means due to technological innovations, it is easier for the labour officers in Lesotho to communicate with Basotho workers from wherever they are around the globe, and also to engage with their employers and resolve whatever disputes that may arise in the course of an employment relationship. With the increasing rate of unemployment in least developed and developing countries, and the aging population in the developed countries, especially in Europe, the trend of labour migration is likely to continue.<sup>63</sup>

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<sup>57</sup>Ibid.

<sup>58</sup>Ibid.

<sup>59</sup>Ibid.

<sup>60</sup>South African report on the future of work to the ILO (2017).

<sup>61</sup>Ibid.

<sup>62</sup>Ibid.

<sup>63</sup>United Nations RT 3 (2006) “*Globalization and Labour Migration*” United Nations Economic and Social Council, Geneva Switzerland.

Another major driving force behind labour migration is high unemployment rates brought on by changes in labour markets, particularly in Sub-Saharan Africa. For example, South Africans have already started feeling the impact of the changes that are happening in the world of work. According to Statistics South Africa, an estimated 9 644 000 persons were employed in the formal non-agricultural sector of the South African economy. As indicated in the report, 'this reflects a net quarterly decrease of 48 000 employees between December 2016 and March 2017'. The statistics also indicate that decreases in employment were led by the trade and industry with 32 000 employees, the business service industry with 23 000 employees, the community service industry with 8 000 employees, the manufacturing industry with 4 000 employees and the transport industry with 1 000 employees. The decreases in employment in these industries were reportedly due to automatic ending of contracts for workers who were employed during the festive season. This goes on to show that the world of work is changing and so are the kinds of employment contracts. Statistics South Africa also indicated that employment opportunities seem to be increasing mainly for the high skilled workers and seem to be on the decrease for workers with limited or no skills. According to the report, unemployment rate remained high among those with education level of less than a Matric at 33.1 percent, which is 5.4 percentage points higher than the national average, while unemployment among the graduates remained at 7.3 percent.

Lesotho is another example of a Sub-Saharan country that could potentially benefit from the changing world of work and technological advances provided opportunities are well executed. The Lesotho Highlands Water Project (LHWP), a multi-stage infrastructure project that enables the transfer of water from Lesotho to the Gauteng Province in South Africa has facilitated investment of more than 3 billion USD and promoted sustainable revenue for the country, nearly 800 million USD since 1996. Despite this revenue, the country is still sitting among the least developing countries with very high unemployment rate. As much as Lesotho exports water to South Africa, lack of adequate infrastructure exposes some households in Lesotho to some degree of water insecurity. But had the country had adequate technological innovations, this would not be the case, and may be even the level of unemployment would be reduced. The report resulting from a study conducted by Annette Huber-Lee and Brian Joyce found significant opportunities for improving water security and support economic growth and poverty alleviation through new water infrastructure. The report also shows that investing in modern irrigation systems could boost income and enhance food security.

#### **1.6.1 Preparing for the future world of work**

In order to be able to prepare for the future world of work, we need also to be able to identify challenges that are faced by the people entering the labour market. The following statistics gives a picture of what challenges young people in many jurisdictions are facing. Amongst other findings, it is clear that for many school leavers, the journey from school to the workforce is becoming difficult by day. Although this is an Australian study, the challenges discovered are cross cutting in many countries. Below are the challenges facing young people trying to enter the labour force found by a report from Mitchell Institute.

- Youth unemployment has remained high since the onset of the Global Financial Crisis. The unemployment rate for young people (15-24 year olds) average 12.7 percent in 2016, up from 9.4 per cent in 2007 (Australian Bureau of Statistics 2016);
- Few young people have full-time work. In 2016, 25 per cent of young people aged 15-24 who were not studying were employed full-time, down from 34 per cent in 2017 (Australian Bureau of Statistics 2016);
- A large population of young people engaged in unpaid work just to get a foot in the door, making it harder for those who cannot afford to work for free;

- The traditional reliable pathways to a permanent job are not providing young people with the same employment outcomes as they once did. The full-time employment rate for bachelor graduates was 71 per cent in 2016, compared to 85 per cent in 2007;
- Many young people struggle to find employment in the field they studied and trained for, indicators of a mismatch between study decisions and employment opportunities.<sup>64</sup>

It is important that the world of work is ready for the changes that arise overtime. Institutions of higher learning and organizations need to be ready to roll with changes as they occur. According to the World Economic Forum's report, 65 per cent of children entering primary schools today will be employed in jobs that do not exist yet.<sup>65</sup> This shows the extent to which the world of work is changing. Much of the work that used to be done by graduates is now digitised; especially in the engineering and banking sectors.<sup>66</sup> As Slade argues, the traditional jobs which universities have prepared graduates for are thinning out as only a few graduates are able to rely on having a "job for life" in a secure profession or corporation. Currently, digital skills are necessary for success.<sup>67</sup> The changes in the world of work are a clear indication that there is a need to revisit the education systems and economic policies. Young people need different sets of skill to be able to thrive on technology-rich, globalized and competitive job markets.<sup>68</sup>

Young people are seeking flexibility and freedom to balance multiple jobs, studies and life outside of work, but others are seeking and struggling to find stability and income security.<sup>69</sup> While flexibility is not standard,<sup>70</sup> it is something that companies need to consider. Policy and law makers also need to look into this issue in order to have labour laws that will provide for flexibility in the world of work. Additionally, workers in flexible working arrangements should be given the same labour protection as those in standard forms of employment.

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<sup>64</sup>Torii K. And M O'Connell *Preparing young people for the future of work* (2017) Mitchell Institute Policy Papers N0.01/2017. Mitchell Institute, Melbourne.

<sup>65</sup>Report on The Future of Jobs (2016) World Economic Forum.

<sup>66</sup>Ibid.

<sup>67</sup>Slade Christina *New World of Work : Are Universities Preparing Students for the Future Careers?* (2017) The World University Rankings.

<sup>68</sup>Ibid.

<sup>69</sup>Ibid.

<sup>70</sup>Ibid.

## **1.7 Conclusion**

From the above discussion, it is clear that the Fourth Industrial Revolution has brought with it changes. The chapter looked into the impacts of globalization as well as Fourth Industrial Revolution on the world of work. The challenges and opportunities introduced by 4<sup>th</sup> Industrial Revolution were discussed leading to the suggestions for preparing for the future of work.

The world of work seems to be moving into a direction where it might not matter anymore whether one is a freelancer, part-time or full-time worker, and the scope of protection and labour rights should be wide enough to be able to cover everyone in the world of work regardless of the type of employment they are in.

## **Chapter Two: Current Status of Work in the South Africa**

### **2.1 Introduction**

The Constitution of the Republic of South Africa, 1996 (the Constitution) provides that ‘every citizen has the right to choose their trade, occupation or profession freely and that the practice of a trade, occupation and profession may be regulated by law’.<sup>71</sup> Despite the existence of this provision, South Africa’s labour laws do not give the same level of protection to all workers and, as a result, different categories of workers are protected at different levels while others are not given protection at all. The following chapter will examine the scope and ambit of labour laws and the extent and forms of legal protection. More specifically, this section will examine the beneficiaries of the collective labour right conferred by the LRA, and the significance of the specific rights to the role and function of trade unions in South Africa.

### **2.2 Relationship between section 23 of the Constitution and the LRA’s collective labour rights**

The primary sources of law governing labour relations in South Africa consist of the Constitution of the Republic of South Africa,<sup>72</sup> international law, legislation and the common law.<sup>73</sup> The Labour Relations Act, 66 of 1995 (LRA) is the legislation that is enacted to give effect to the Constitutional guarantee of fair labour practices and, as a result, the interpretation and application of this legislation has to be consistent with constitutional principles.<sup>74</sup> Chapter 2 of the Constitution, which is the Bill of Rights, affords fundamental human rights and freedoms to everybody in South Africa and, these rights include the labour rights as set out in section 23 of the Constitution.<sup>75</sup>

As Du Toit et al points out, the rights set out in section 23 of the Constitution provides a primary framework within which labour legislation must be interpreted.<sup>76</sup> This

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<sup>71</sup>Section 22 of the Constitution

<sup>72</sup>Act 108 of 1996.

<sup>73</sup>Du Toit et al *Labour Relations Law : A comprehensive guide* (2015) 6<sup>th</sup> edition Lexis Nexis South Africa.

<sup>74</sup>Ibid.

<sup>75</sup>Ibid.

<sup>76</sup>Ibid.

provision promotes fairness at an individual level, and freedom of association, the right to organise, and collective bargaining. Therefore, this constitutional provision, while upholding individual fairness, also emphasises the collective aspirations of the Bill of Rights.<sup>77</sup> The LRA therefore gives effect to the provisions of section 23 by conferring collective labour rights on both employers and employees, subject to the constitutional right to fair labour practices.<sup>78</sup>

### 2.3 Who are the beneficiaries of the collective labour rights?

Although the Constitution provides every worker with collective labour rights, the LRA,<sup>79</sup> does not give the same protection as that afforded by the Constitution in that it provides that ‘every *employee* has a right to form or join a trade union’.<sup>80</sup> This means that, unlike the Constitution, the LRA extends the collective rights only to employees and not to all categories of workers.

In terms of section 4 (1) of the LRA, ‘every employee has a right to participate in forming a trade union or federation of trade unions: and to join a trade union subject to its constitution’. Section 213 of the LRA defines a ‘trade union’ as follows:

“[A]n association of employees whose principal purpose is to regulate relations between employees and employers including any employers’ organization’, and employers’ organization is defined as any number of employers associated together for the purpose, whether by itself or with other purposes, of regulating relations between employers and employees or trade unions.”<sup>81</sup>

Thus, according to all these provisions, collective labour law is only afforded to those persons who fall within the LRA’s definition of an ‘employee’. In this regard, the LRA grants the right to freedom of association to employees. Section 5 (1) states that: ‘no person may discriminate against an employee for exercising any right conferred by this Act’. An employee may not be discriminated upon because he or she has joined a trade union or have been elected as a trade union representative.<sup>82</sup> An employer does not have to work contrary to the provisions that protect the employees’ right to freedom of association. Although the LRA

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<sup>77</sup>Ibid.

<sup>78</sup>Ibid.

<sup>79</sup>Section 4.

<sup>80</sup>Ibid.

<sup>81</sup>Labour Relations Act 66 of 1995.

<sup>82</sup>Ibid.

facilitates collective bargaining and the establishment of bargaining councils, they cannot be established by individual employees, but by employers and trade unions.<sup>83</sup> This therefore means that workers who are not unionised cannot have access to these establishments. Although the LRA mainly seems to protect employees, in *SANDU v Minister of Defence*,<sup>84</sup> the Constitutional Court dealt with the concept of the ‘worker’, and it held that even though the LRA does not apply to the South African National Defence Force Members, they are still ‘workers’ in terms of the Constitution which protects the rights of every person in South Africa. The Court also indicated that the word must also be interpreted in the light of the ILO Conventions and recommendations to include all workers, even the members of the armed forces.<sup>85</sup>

## 2.4 Who is an ‘employee’ in South Africa?

In answering this question, reference needs to be made to the legal definition provided for by the LRA and interpretation of this definition by the judiciary.

As was mentioned previously, the sources of labour relations law in South Africa consist of the Constitution,<sup>86</sup> international law (these include International Labour Organization’s instruments), legislation and the common law. The legislation must be interpreted in such a way that it gives effect to the Constitution and to South Africa’s international law obligations.<sup>87</sup>

Generally speaking, to establish an employment relationship, there must be some form of agreement between the parties on the nature of the contract and the terms and conditions of employment. The common law of contract, therefore, still plays a central role in establishing the work relationship.

“South African common law is an inherent aspect of the national legal framework and unlike statutes was never adopted through legislative process ... even though the majority of our labour law is encapsulated in legislation, the South African common law remains relevant within such context. The essential feature of labour relations is the employment relationship.

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<sup>83</sup>Ibid

<sup>84</sup>(1999) 20 ILJ 2265 (CC).

<sup>85</sup>*SANDU v Minister of Defence* 1999 (6) BCLR 615 (CC)

<sup>86</sup>Act 108 of 1996.

<sup>87</sup>LRA, section 3.

The law of contract in terms of common law, advances the establishment of such legal relationship in good faith, without recognising the notion of fairness.”<sup>88</sup>

An employee under common law can be defined as a person who performs work or service under the supervision and control of another in exchange for remuneration or reward on such terms and conditions as agreed upon by parties to the relationship. The employment relationship imposes a wide range of rights and obligations on the employer, including the right to commence the employment relationship. According to Abrahams,<sup>89</sup> the rights and interests of employees are protected by both the Constitution and labour legislation, which together guarantee fair labour practices, protection against unfair dismissal and it provide employees with collective labour rights.

While 23 of the Constitution grants ‘everyone’ the right to fair labour practices,<sup>90</sup> Cheadle argues that the term ‘everyone’ must be construed with reference to labour practices:<sup>91</sup>

“Although the right to fair labour practice in subsection (1) appears to be accorded everyone, the boundaries of the right are circumscribed by the reference in subsection (1) to ‘labour practices’. The focus of enquiry into ambit should not be on the use of ‘everyone’ but on the reference to labour practice. Labour practices are the practices that arise from the relationship between the workers, employers, and their respective organizations. Accordingly, the right to fair labour practice ought not to be read as extending the class of people beyond those classes envisaged by the section as a whole.”<sup>92</sup>

In terms of section 213 of the LRA, an ‘employee’ means the following:

“Any person, excluding an independent contractor, who works for another person or for the state and who receives, or is entitled to receive, any remuneration; and any other person who in any manner assists in carrying on or conducting the business of an employer”

Based on this legal definition, it is clear that independent contractors are excluded from the scope of protection of the LRA. However, the line between ‘an employee’ and ‘independent contractor’ is frequently blurred particularly as it applies to work that departs from standard

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<sup>88</sup>Abrahams D et al *Labour Law in Context* (2017) Pearson, South Africa.

<sup>89</sup> Abrahams D et al *Labour Law in Context* 2<sup>nd</sup> edition(2017) Pearson, South Africa.

<sup>90</sup>Section 23 (1).

<sup>91</sup>Ibid.

<sup>92</sup>Cheadle et al *South African Constitutional Law: The Bill of Rights*, (2006) Lexis Nexis, South Africa.

employment.<sup>93</sup>The differences between employees and independent contractors were clearly stated by the court in *South African Broadcasting Corporation v McKenzie*,<sup>94</sup> when the Labour Appeal Court summarised the main differences between the contract of employment and the contract of work as follows:

- In the contract of employment, the object is the rendering of service between the employer and the employee, whereas in the contract of work the object is the production of a certain specified service or the production of a certain specified result.
- The employees renders the service at the behest of the employer, the independent contractor is not obliged to perform his work personally, unless otherwise agreed
- The employer may decide whether it wishes to have the employee render service, the independent contractor is bound to perform specified work or produce specified result within a specified or reasonable time
- The employee is obliged to obey lawful, reasonable instructions regarding work to be done, and the manner in which it is to be done, the independent contractor is not obliged to obey instructions regarding the manner in which a task is to be performed
- A contract of employment proper is terminated by the death of an employee, the contract of work is not terminated by the death of the contractor
- A contract of employment terminates upon completion of the agreed period; the contract of work terminates on completion of the specified work, or on production of the specified result.
- The independent contractor, however, is notionally on the same footing with the employer. He is not under the supervision or control of the employer.<sup>95</sup>

In the case of *Denel (Pty) Ltd v Geber*,<sup>96</sup> the court indicated that the intention of the LRA is to protect unsophisticated and disenfranchised persons in an environment where jobs are scarce and unemployment is rife, which persons would sign anything just to get a job.<sup>97</sup> It was further stated that the LRA was intended to protect employees against unscrupulous employers seeking to abuse the common law of contract to escape employment law obligations.<sup>98</sup>The facts of the case are as follows. Ms Gerber worked for Denel through a

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<sup>93</sup>Ibid.

<sup>94</sup> (1999) 20 ILJ 585 (LAC).

<sup>95</sup> Ibid para 9

<sup>96</sup>(2005) 26 ILJ 1256 (LAC).

<sup>97</sup>Ibid, para 99

<sup>98</sup>Ibid, 99

closed corporation formed for that purpose and was paid monthly consultancy fee for the services. In 1998 she was told that the contract was terminated and she referred an unfair dismissal claim to the Labour Court. Denel, however, argued that Gerber was not an employee in terms of the contract they had. The Labour Appeal Court stated that it considered additional evidence in establishing the true relationship between the disputing parties despite the contract that they had concluded.<sup>99</sup> It stated that it was necessary to look at the realities and the true nature of the relationship that existed between the parties.<sup>100</sup> The court considered the facts of the case and held that the factors indicated that there had been an employment relationship. The court made its conclusion basing itself on the reality of the existence of the relationship between the disputing parties.<sup>101</sup>

The court relied upon the presumptions contained in s 200A of the LRA to test the true nature of the relationship and concluded that there was an employment relationship between Ms Gerber and Denel.<sup>102</sup> This case demonstrates that the judiciary is prepared to look beyond the ‘façade’ that may be created by the contract in order to ascertain the true relationship between the parties. In further interpreting the legal definition of ‘employee’, the courts have over time developed and used various tests to determine whether a person is an ‘employee’ or an ‘independent contractor’.<sup>103</sup> These tests include the control test, and the dominant impression test. The control test is based on the principle that it is the right of the employer to control the employee with regard to work which has to be done by the employee, how such work has to be done, and when the work is supposed to be done and finally, who is supposed to do such work.<sup>104</sup> The employer will be vicariously liable for any delict committed by the employee because of the supervision and control by the employer on how the work has to be done.

This kind of control and supervision was once regarded as the determining factor in ascertaining the existence of the employment relationship.<sup>105</sup> However, other additional common law tests have departed from using control as the sole point of reference. In this regard, the economic dependency test scrutinises whether or not the person is economically

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<sup>99</sup>Ibid, 22

<sup>100</sup>Ibid, para 17-22

<sup>101</sup> Ibid para 202

<sup>102</sup>Ibid, para 15-23

<sup>103</sup>Du Toit et al Labour Relations Law: A Comprehensive Guide (2015) Lexis Nexis South Africa.

<sup>104</sup>Colonial Mutual Life Assurance v MacDonald 1931 AD 412 at 434

<sup>105</sup> *State Information Technology Agency (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration and Others* (2008) 29 ILJ 2234 (LAC) para 12

dependent on the other person, or is self-employed. Furthermore, whether the person has any other sources of income or has other clients, other than the client in question. In *SITA (Pty) Ltd v Commission for Conciliation, Mediation and Arbitration*,<sup>106</sup> the court acknowledged that the economic dependence was *one* of the primary criteria which a court could look into in identifying an employee from an independent contractor. There are, however, other contextual factors that need to be taken into account. This departure from single criteria used to determine employment is essentially captured in the dominant impression test which developed out a response to shortcomings presented by these previous tests.<sup>107</sup>

The dominant impression test involves an assessment of various factors where the main focus is on the existence of the relationship between the parties as opposed to the form of this relationship. The existence of a contract of employment is only one factor in the overall assessment.<sup>108</sup> Other factors are also considered to determine whether one is an employee or not. These factors are as follows: the right to control how the job is done; the right to supervision of such job; whether or not one is allowed to work for other clients while still in contract with the employer; whether the employee has to perform his duties personally or can delegate to someone else, and whether the tools required for performing the job belong to the employee or are provided by the employer.<sup>109</sup> The test also looks into whether the employee may be subjected to disciplinary code of the employer; whether an employee forms the integral part of the organization, and finally, whether an employee is remunerated by a wage or commission. This test has been accepted as a standard test. In the main, no single factor can be a determining factor as to whether a person is an employee or not.<sup>110</sup> The use of this common law test has resulted in the courts looking beyond just the wording of the employment contract in order to establish whether a person is an employee or not, they also enquire into the existence on an employment relationship.<sup>111</sup>

Although it is clear that one can be considered to be an employee if there is a valid employment contract, the courts have interpreted this differently; one can be an employee even without a valid employment contract or valid work visa depending on the situation at hand. The position of the courts, in this regard, was made clear in *Kylie v CCMA* and

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<sup>106</sup>(2008) 29 ILJ 2234 (LAC).

<sup>107</sup>Namely, the control test; the organizational test; and the economic dependency test.

<sup>108</sup>Du Toit et al *Labour Relations Law : A Comprehensive Guide* (2015) Lexis Nexis South Africa.

<sup>109</sup>*Ibid.*

<sup>110</sup>Du Toit et al *Labour Relations Law: A comprehensive guide* (2015) Sixth edition Lexis Nexis, South Africa.

<sup>111</sup>*Ibid.*

*Discovery Health v CCMA*.<sup>112</sup> In both cases, the courts looked beyond the existence of valid contracts of employment, but looked at other factors that could determine employment, such as the existence of an employment relationship, as opposed to the type or form of employment.<sup>113</sup> In this way, effect was given to section 23 of the Constitution. The definition of an ‘employee’ was widely interpreted to also include illegal and irregular workers.

The LRA also provides for what is termed the ‘Presumption of an employment’. In this regard, s 200A of the LRA provides as follows : “until the contrary is proven, a person who works for or renders service to any other person is presumed, regardless of the form of contract, to be an employee, if any one of the following factors are present:

- a) The manner in which the person works is subject to the control or direction of another person;
- b) The person’s hours of work are subject to the contract or direction of another person;
- c) In case of a person who works for an organization, the person forms part of that organization;
- d) The person has worked for the other person for an average of at least 40 hours per month over the last three months;
- e) The person is economically dependent on the other person for whom he or she works or renders service;
- f) The person is provided with tools of trade or work equipment by the other person; or
- g) The person only works for or renders service to one person.”<sup>114</sup>

But in order for section 200A of the LRA to apply the person alleging employment relationship must be earning below a threshold prescribed by the Minister of Labour in terms of s6 (3) of the Basic Conditions of Employment Act, 75 of 1997 (BCEA).<sup>115</sup> Currently, the threshold stands at R205 433.00.<sup>116</sup>

In *SABC v CCMA*,<sup>117</sup> it was indicated that if section 200A of the LRA is not applicable, then the point of departure in deciding the nature of the relationship between alleged employer and employee would be the contract that they had concluded with one

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<sup>112</sup>*Kylie v CCMA* [2010] 7 BLLR 705 (LAC) and *Discovery Health v CCMA* [2008] 7 BLLR 633 (LC).

<sup>113</sup>*Ibid* para 25

<sup>114</sup>Act 66 of 1995.

<sup>115</sup>Act 75 of 1997.

<sup>116</sup>*Ibid*.

<sup>117</sup>*South African Broadcasting Corporation (Soc) Ltd v Commission for Conciliation and Arbitration and others* (JR 745/16 [2007] ZALCJHB 76 (8 March 2017).

another. The construction of the contract between them would be able to determine the legal relationship. Furthermore, the Labour Court in *Catlin v CCMA and others*<sup>118</sup> held that although the presumption is useful in determining whether a person is an employee or not, as it is closely linked to the principles and the approaches developed by the court, section 200A is not the starting point. It is, therefore, necessary to consider the provisions of the contract before applying the presumptions.

Unfortunately, while being instructive, the plethora of laws used to determine whether a person is an ‘employee’ or not, has failed to give precise meaning to the term ‘employee’. This determination has become even more challenging given the diverse and changing nature of the labour market and the world of work where we are experiencing the emergence of non-standard forms of employment and self-employment. According to the ILO, dependent self-employed workers perform services for a business under a contract different from a contract of employment, but are dependent on a small number of clients for their income and may receive direction on how the work has to be done. An example of this kind of arrangement commonly found in the 4IR s is that of ‘gig-workers’ who perform work in the ‘gig-economy’, such as Uber Drivers.

Workers in this labour market are classified as independent contractors despite the fact that their work is more often than not supervised by someone else, either through a specific application or internet platform, and their payment is directed through a specific internet application. Gig economy workers are not classified as being in employment relationships and are not offered protection by the labour legislation, including the right to paid leave and social security. Moreover they are not able to exercise important workers’ rights such as the right to freedom of association and collective bargaining as they are not considered as employees. Emerging forms of work, therefore, pose great risks to workers as it may push them out of the net of legal protection, depriving them of both individual and collective labour rights. The following section further examines the common forms of work found in the labour market that, in some way or another, limit access to these labour rights.

## **2.5 New forms of employment in the changing world of work**

The changes that are taking place in the world of work and in the nature of the labour marker seem to be having a strong effect on the power and density of trade unions.

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<sup>118</sup> (2004) ZALC 39 (May 2004).

Traditionally, trade unions gained their membership base from employees in the standard forms of employment. Trade unions have always been able to mobilize these type of employees, especially on issues concerning the rights and entitlements of permanent employees and the obligations of their employers.<sup>119</sup>

In recent years, however, the world of work has seen a rise in participation of workers in alternative forms of employment commonly known as non-standard forms of employment. These employment relationships deviate from what is traditionally known as standard forms of employment. They include part time workers, casual workers, fixed term workers and temporary agency workers, among others.<sup>120</sup> Workers in non-standard forms of employment not generally granted the full extent of protections offered by the legislation, and they are not granted often granted the exact rights and privileges offered to employees in standard forms of employment contracts. According to the ILO, the increase in non-standard forms of employment has been driven by various factors like demographic shifts, changes in labour market regulations, macroeconomic fluctuations and technological innovations.<sup>121</sup>

The ILO indicates that in some instances non-standard forms of employment accommodate these changes and allow more workers to get integrated into the labour market; and sometimes they pose challenges for working conditions as well as the overall performance of the labour market.<sup>122</sup> Some employers prefer flexible employment contracts which fail to provide employees with the same statutory benefits as provided to permanent employees.<sup>123</sup> Non-standard employment contracts are characterized by contingent and contract work and are often described as resulting in declines in permanent employment.<sup>124</sup> A common form of work arrangement is that of the ‘temporary employment’ where the employee is engaged to perform a specific task for a specified period of time.<sup>125</sup> This type of contract of employment is automatically terminated upon completion of the said job or the specified time-frame. Examples of temporary employment contracts include fixed-term

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<sup>119</sup>Campbell I. *Trade Unions and Temporary Employment : New Initiatives in Regulations and Representation* (2005) Centre for Applied Social Research Working Paper.

<sup>120</sup>Ibid.

<sup>121</sup>ILO Report on Non-standard forms of employment around the world: Understanding challenges, shaping prospects (2016) ILO Geneva.

<sup>122</sup>Ibid.

<sup>123</sup>Ibid.

<sup>124</sup>Heery E. (2005) *Sources of Change in Trade Unions' in Work Employment and Society* (2005) London

<sup>125</sup>ILO Report on Non-standard forms of employment *Around the World: Understanding Challenges, Shaping Prospects.* (2016) ILO Office, Geneva.

contracts for a specific project, seasonal work, as well as ‘day work’.<sup>126</sup> Temporary employment contracts are normally used as a response to the changes in demand in the labour market. They may be used as replacement for temporarily absent workers, for seasonal fluctuations in the labour market and demand for the workforce, or just for performance of a specific task.<sup>127</sup>

Some workers see temporary employment as an advantage compared to indefinite term contracts of employment.<sup>128</sup> They choose to be temporary workers so that they can be able to balance work with personal life, work with their studies, or work and family responsibilities.<sup>129</sup> In this way, they are able to strike the ‘work life balance’. The problem with the temporary or fixed term contracts is that in most cases the arrangements are often not as good or lucrative as those of indefinite term contracts. Less protection and fewer benefits are often characteristics of fixed term contracts.<sup>130</sup>

Another frequently occurring work arrangement in the world of works is that of ‘labour broking’. This is the type of employment relationship where employees are not directly employed by the company in which they work or provide the service to.<sup>131</sup> For example, the employees would be employed by company ‘A’ (the employee) but would be working for or providing service to company ‘B’ (the client). An employment contract normally exists between the company that hired the employee and the employee. The client to whom the service is directly provided, does not have an employment contract with the employees although the employees are actually doing the work for the client.<sup>132</sup> The employee is employed and paid by the company (the labour broker/employer), but work is performed for another company (user firm or client). The only contract that exists between the two companies, (the labour broker and the client) is the commercial contract of service governed by the common law of contract.<sup>133</sup>

In South Africa, the LRA does govern this triangular relationship in terms of s 198 of the LRA, and recently, 2015 amendments to the LRA introduced increased legal protection to these employees. In this regard, Chapter IX of the LRA contains provisions that improve the

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<sup>126</sup>Ibid.

<sup>127</sup>Ibid.

<sup>128</sup>Ibid.

<sup>129</sup>Ibid.

<sup>130</sup>Ibid.

<sup>131</sup>Ibid.

<sup>132</sup>Ibid.

<sup>133</sup>Ibid.

working conditions of certain categories of labour broker employees as well as fixed term and part time employees. While it is beyond the scope of this thesis to examine each of these provisions and their impact, it is important to note law-makers in South Africa have attempted to respond to the risks posed by non-standard employment by widening the net of legal protection to these categories of employees.

Another kind of multi-party employment relationship is that of ‘subcontracting’. The difference between subcontracting and labour broking is that, with respect to the former, subcontractors hire workers to execute the work of the client, and also manage the employees whilst they work at the client’s premises.<sup>134</sup> According to the ILO, the rise in non-standard forms of employment is the outcome of multiple forces, which includes globalization, through the interconnectedness of business across the globe by means of global supply chains. This process has been facilitated by technological advances.<sup>135</sup> The shift from the manufacturing sector to the service sector, and the social changes such as international migration have also contributed to the rise in the non-standard forms of employment.<sup>136</sup> The report indicated that these kinds of employment relationships are associated with more insecurity for workers when compared with standard forms of employment.<sup>137</sup> However, non-standard forms of employment may also have unpleasant consequences for companies in the long term by realising under-investments in innovation, slowing productivity growth and risking sustainability as workers would not feel obliged to increase production when they are only short term workers.<sup>138</sup> This could have negative effects by increasing the volatility in the labour markets and may contribute to poor economic performance.<sup>139</sup>

## 2.6 Conclusion

This chapter dealt with the relationship between section 23 of the Constitution and the collective labour rights, establishing who the beneficiaries of collective labour rights. The chapter also discussed who is an employee and the new forms of employment that are emerging with the changing world of work.

From the discussions above; it is clear that workers engaging in new forms of work are often deprived of labour law’s protection. There is, therefore, a need for governments and social

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<sup>134</sup>Ibid.

<sup>135</sup>Ibid.

<sup>136</sup> The ILO Report *Non-standard Forms of Employment Around the World: Understanding Challenges, Shaping Prospects*.(2016) ILO Office, Geneva.

<sup>137</sup>Ibid.

<sup>138</sup>Ibid.

<sup>139</sup>Ibid.

partners to develop legislation that will be able to address the needs of all workers and provide protection to all workers. The world of work is changing, and so should the governance or regulatory framework in order to allow for the changes while still providing the much required protection.

## Chapter Three: Trade unions in South Africa: history, regulation and challenges

### 3.1 Introduction

Trade unions have been very instrumental in the fight against the oppression of human rights in many countries in the past. One classic example is their resistance to oppression in South Africa which resulted in the country's transition to a constitutional democracy.<sup>140</sup> Globally, trade unions have also improved the rights of workers through their participation in the drafting of ILO Conventions and Recommendations and by representation and participation in negotiation and collective bargaining processes at both national and international levels.<sup>141</sup>

This chapter will seek to discuss the current status of trade unions in South Africa, starting with a brief history of the South African labour movement. The dissertation will thereafter briefly discuss the ILO instruments guiding freedom of association and collective bargaining. The dissertation will also discuss the relevance of trade unions in the world of work, and the factors influencing the level of trade unionism. And finally, there will be a discussion on trade unions and gender equality.

### 3.2 The role of trade unions in South Africa: Past and Present

The existence of trade unions can be traced back to the 18<sup>th</sup> century when rapid expansion of industrial society attracted women, children and immigrants to the workforce in large numbers.<sup>142</sup> The purpose of a trade union is not to fight against the demands made by the employer, but mainly to seek harmonious industrial relations. Trade unions also play an important role in workplace health and safety and in making sure that the conditions of work

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<sup>140</sup>Adler G. And E. Webster *The Labour Movement, Radical Reform and the transition to democracy in South Africa* (1999) in Munck and Waterman *Labour Worldwide in the Era of Globalization: Alternative Union Models in the New World Order*(1999) Palgrave Macmillan, New York.

<sup>141</sup>Wood G. "Solidarity, Representativity and Accountability :The Origins, State, and Implications of Shop floor Democracy within the Congress of South African Trade Unions" (2003)*Journal of Industrial Relations* 45 (3) pp. 326-343.

<sup>142</sup>Bryson Alex and John Forth *Trade union membership and influence 1999-2009* (2010) CEP discussion paper No. 1003, Centre for Economic Performance, London School for Economics and Political Science.

are conducive for employees.<sup>143</sup> Trade unions may, thus, be formed for a number of reasons, but chief among them is for negotiating better working conditions for their members, with the employer.<sup>144</sup> Research shows that union members in the United Kingdom receive higher pay (on average 12.5% more), better sickness benefits more holiday and more flexible hours than non-members.<sup>145</sup> According to the University and College Union (UCU), every year around 7,000 members seek help for a problem at work from their local UCU branch, and in a year UCU's legal service can win approximately more than £2 million in settlement for members who are treated unfairly at work.<sup>146</sup>

If a single staff member approaches the employer about improvement in their conditions of work, they are less likely to succeed than if the employer is approached by the whole workforce or by representatives of the whole of at least a larger percentage of the workforce. Trade unions can better bargain for better working conditions than individual workers. Employees therefore organise themselves in trade unions in order for them to be able to maximise their collective power against the employer.<sup>147</sup> The more powerful the union gets, the more rights it becomes entitled to and the stronger the bargaining powers it will have.

In the early 20<sup>th</sup> century, the industrial relation system in South Africa was divided along racial lines with white South Africans being legally allowed to form unions representing their mining and agricultural interests.<sup>148</sup> As stated by Borat, series of laws were enacted which specifically excluded African South Africans from formal union participation. Among them, the Mine and Works Act of 1911 which reserved the skilled mining jobs for the whites only. The Land Act of 1913 which forbade black Africans from owning land in designated white areas and forced them to certain areas called reserves.<sup>149</sup> The

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<sup>143</sup>Law Teacher The importance of Trade Unions(November 2013) Law Essay (Online) available at <http://www.lawteacher.net/free-law-essays/employment-law/importance-of-trade-unions-law-essay.php?cref=1> Accessed on 8th February 2018.

<sup>144</sup>Ibid.

<sup>145</sup>University and College Union (UCU) Campaigns Unit, Carlow Street London.

<sup>146</sup>Ibid.

<sup>147</sup>Law Teacher The importance of Trade Unions (November 2013) Law Essay (Online) available at <http://www.lawteacher.net/free-law-essays/employment-law/importance-of-trade-unions-law-essay.php?cref=1> Accessed on 8<sup>th</sup> February 2018.

<sup>148</sup>Du Toit et al Labour Relations Law: A comprehensive guide (2015) Lexis Nexis South Africa

<sup>149</sup>Ibid.

Pass Laws which restricted free movement of blacks, therefore forcing blacks into low income sectors of the South African economy.<sup>150</sup>

In 1922, following the revolt by white mineworkers on the Rand, the government introduced the Industrial Conciliation Act, 11 of 1924. One of the consequences of this Act was to exclude African workers from the legal definition of ‘employee’ thereby preventing them from joining trade unions and creating a dual system of industrial relations in South Africa.<sup>151</sup> In response to this law, the pool of unskilled and semi-skilled labour African and Indian workers organized themselves into worker collectives which led to the development of the first non-white trade unions. In 1956, a new Industrial Conciliation Act 28 of 1956 was enacted which further extended the racial segregation within the labour market and labour relation system.<sup>152</sup> No new racially mixed trade unions were allowed to be registered, unless the number of non-white union members was too small to make a separate trade union viable.<sup>153</sup> The already existing racially mixed trade unions were required to have two separate branches (one for the whites and one for the coloured and Indians) and hold separate branch meetings, but only the whites could sit on such unions’ executive committee.<sup>154</sup>

The early 1970s was marked by frequent strikes by unorganised African workers based on wage demands and, in response, the government amended the Bantu Labour (Settlement of Disputes) Act 48 of 1953 by the Bantu Labour Relations Regulations Amendment Act 70 of 1973 to provide for joined liaison committee of employers and African workers with the aim of restricting union registration.<sup>155</sup> This failed to prevent these workers from forming and joining unregistered trade unions.<sup>156</sup> The government’s response of using the law to suppress this collective action, along with the political and economic pressures imposed on South Africa during the late 1970s and 1980s, forced it to appoint the Wiehahn Commission of Inquiry into Labour Legislation.<sup>157</sup>

In 1979, the Wiehahn Commission of Inquiry made recommendations for reforms in order to change the system. Chief among them was a proposal that African workers be

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<sup>150</sup>Bhorat H. et al *Trade Unions in an Emerging Economy*.(2014) Working Paper : Development Policy Research Unit.

<sup>151</sup>Ibid.

<sup>152</sup>Du Toit et al *Labour Relations Law : A Comprehensive Guide* (2015) Lexis Nexis South Africa

<sup>153</sup>Ibid.

<sup>154</sup>Godfrey S. et al *The Collective Bargaining in South Africa : Past, Present and Future?*(2010)1<sup>st</sup> edition Claremont : Juta & CO Ltd.

<sup>155</sup>Ibid.

<sup>156</sup> Du Toit et al *Labour Relations Law, A comprehensive guide* 6<sup>th</sup> edition (2015)Lexis Nexis South Africa.

<sup>157</sup> Ibid.

allowed to join registered trade unions and be directly represented on the industrial councils and conciliation boards.<sup>158</sup> Another recommendation was to replace the Industrial Tribunal with an Industrial Court that would have extensive jurisdiction over claims relating to unfair labour practices.<sup>159</sup> The government at the time accepted most of the recommendations. The changes were enacted in a series of amendments. In post-Apartheid South Africa, the enactment of the LRA was a milestone as it saw the establishment of the Commission for Conciliation, Mediation and Arbitration (CCMA).<sup>160</sup> Another milestone was the establishment of National Economic Development and Labour Council (NEDLAC),<sup>161</sup> a statutory social dialogue body primarily used as a platform for consultations on socio-economic issues, labour policy and proposed legislation by representatives of government, organised labour, organised business and the community.<sup>162</sup> This means that NEDLAC is a tripartite plus structure and trade unions are a vital component of it.

### 3.2.1 Relevant legal framework for trade unions in South Africa

Trade unions in South Africa are provided for in the law. During the fight against apartheid, some trade unions like COSATU (The Congress of South African Trade Unions) joined hands with political parties in order to weaken the apartheid regime.

“With COSATU entering an electoral alliance with the African National Congress (ANC) and the South African Communist Party (SACP), the election saw a comprehensive victory for the ANC... and within two months of assuming power, the new ANC led government announced its intention to introduce new labour legislation statute ... that would provide equal rights for all workers: basic organising rights (including the right to form and join trade unions, the right to strike and picket on all economic and social matters.”<sup>163</sup>

As a result, the right to form and to join trade unions was provided for in the Constitution.<sup>164</sup> Moreover, this right is also provided for in the LRA.<sup>165</sup> Additionally, the new Constitution in

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<sup>158</sup>Report of the Commission of Inquiry into Labour Legislation (RP 47 /1).

<sup>159</sup>Ibid.

<sup>160</sup>Section 112.

<sup>161</sup>Act 35 of 1994.

<sup>162</sup>Blog (June 5 2014) ‘*Parliament’s legislative function :what role does NEDLAC play?*’(June 2014) People’s Assembly available at [pa.org.za/blog/parliaments-legislative-function-what-role-does-ne](http://pa.org.za/blog/parliaments-legislative-function-what-role-does-ne) accessed on 18<sup>th</sup> January 2018.

<sup>163</sup>Ibid.

<sup>164</sup>Section 23(2).

South Africa includes provisions which give international law the status of law in the country, provided the instrument is ratified by Parliament. Even then, the courts can refer to international law to inform their interpretation of domestic law.<sup>166</sup> In the context of labour relations, the most important international laws to be considered are those adopted by the ILO as South Africa is a member of this UN organization.

In this regard, South Africa is one of the founding members of the ILO as it joined the organization in 1919. The country has ratified twenty conventions with its first ratification being in 1920 and last ratification being in 2003.<sup>167</sup> Regardless of being the founding member, on the 15<sup>th</sup> February 1964, the ILO's Governing Body voted in favour of suspending South Africa from participating in its annual General Conferences because the ILO objected to the South Africa's policy of racial discrimination.<sup>168</sup> However, in 1992, a fact finding and conciliation commission of freedom of association (FFCC) visited South Africa appointed by the ILO's Governing Body in response to a complaint of trade union rights infringements in South Africa.<sup>169</sup> And as indicated by Grawitzky,<sup>170</sup> after elections in 1994, South Africa resumed its membership in the ILO and delegates attended the Conference. Once South Africa rejoined the ILO, it was provided with technical assistance around drafting of the new labour legislation and the creation of NEDLAC.<sup>171</sup>

### 3.3 Relevant ILO instruments on freedom of association and collective bargaining

The Freedom of Association and Protection of the Right to Organise Convention, 87 of 1948 provides for the rights of workers and employers to establish and join organizations of their own choosing without prior authorization from any anybody.<sup>172</sup> The Right to Organize and Collective Bargaining Convention, 98 of 1949 provides that workers should be afforded protection against any acts of anti-union discrimination such as making employment of workers subject to them not joining unions, relinquishing trade union membership for

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<sup>165</sup> Section 4(1).

<sup>166</sup> Sections 39 (1) and 233 of the Constitution.

<sup>167</sup> Gilefiles (May 2011) 'South Africa's ratification of ILO Conventions' Collective Bargaining (LRL 5), Legal Principle.

<sup>168</sup> Kaley J.A, Schoeman E. and Ador L.E *Southern African Political History: a chronology of key political events from independence to mid-1997* (1999) Westport, Greenwood, SAHO (2014) 'International Labour Organization (ILO) suspends South Africa' South African History Online available at [sahistory.org.za/dated-event/international-labour-organization-ilo-suspends-south-Africa](http://sahistory.org.za/dated-event/international-labour-organization-ilo-suspends-south-Africa). Accessed on 30<sup>th</sup> January 2018.

<sup>169</sup> Grawitzky Renee *The role of the ILO during and ending apartheid* (2015) ILO History Project.

<sup>170</sup> Ibid.

<sup>171</sup> Ibid.

<sup>172</sup> Convention No. 87 of 1948.

those who already have joined trade unions, or dismissing or prejudicing workers in any way because of them having union membership or participating in union activities.<sup>173</sup> This principle was illustrated in the South Africa case of *IMATU v Rustenburg Transitional Council*,<sup>174</sup> where the employer had adopted a rule of prohibiting senior employees from participating in trade union activities and from serving in executive positions in trade unions. The employer's argument was that senior employees could not perform their obligations of directing and disciplining staff while acting as trade union office bearers. They, moreover, argued that senior employees have access to employer's confidential information.<sup>175</sup> The Labour Court noted that the Constitution and the LRA granted every employee the right to join and hold office in a trade union and participate in its activities.<sup>176</sup> The court ruled that senior employees are entitled to join and hold office in a union.<sup>177</sup> However, it indicated that employees who join trade unions must still perform the work for which they were engaged. If they did not, they could be disciplined for misconduct.<sup>178</sup>

The ILO Committee on Freedom of Association has clarified that by virtue of the principle of freedom of association, all workers, except members of the armed forces and the police, should have the right to establish and join organizations of their own choosing and that therefore, the entitlement to the right should not be 'based on the existence of an employment relationship, which is often non-existent'.<sup>179</sup> According to the Committee, agricultural workers, self-employed workers, and those who practice liberal professions, and temporary workers, should also enjoy the right to organize.<sup>180</sup> It held that the requirement for the establishment of a trade union that workers need to be employees of one employer is a violation of the principle of freedom of association. It also indicated that the right to collective bargaining should be afforded to temporary workers so that they are able to negotiate collectively.<sup>181</sup>

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<sup>173</sup> Convention No. 98 of 1949.

<sup>174</sup> (1999) 12 BLLR 1299 (LC).

<sup>175</sup> *Ibid.*

<sup>176</sup> Section 4

<sup>177</sup> *Ibid.*

<sup>178</sup> *Ibid.*

<sup>179</sup> ILO 2006, Freedom of Association – Digest of the decisions and principles of the Freedom of Association Committee of the Governing Body of the ILO, fifth edition .

<sup>180</sup> *Ibid.*

<sup>181</sup> ILO 2006, Para 254-271 and para 906.

South Africa ratified both the aforementioned Conventions in February 1996, which were subsequently given effect to by the new set of labour laws, particularly the LRA.<sup>182</sup> The ILO's Freedom of Association Committee and the Committee of Experts have interpreted the freedom of association principle to include the right of trade unions to represent members in individual workplace grievance and disciplinary matters, and have also determined that trade unions have the right to strike to enforce collective bargaining demands.<sup>183</sup> Notably, in an infamous judgement delivered by South Africa's Constitutional Court in *National Union of Metal Workers of SA v Bader Bop (Pty) Ltd*,<sup>184</sup> it was held that the right to freedom of association will be impaired, or negatively affected, where workers are not permitted to have their own trade union represent them in workplace discipline and grievance issues, but are instead required to be represented by a rival union that they have not chosen to join.

### **3.4 Domestic law as it pertains to trade unions**

#### **3.4.1 The Constitution**

Section 23 of the Constitution provides that every worker has a right to form or join a trade union, and to participate in the activities and programmes of a trade union, and also provides that every employer has a right to form or join an employers' organization and also to participate in the activities and programmes of an employers' organization.<sup>185</sup>

#### **3.4.2 The Labour Relations Act, 66 of 1995**

The LRA regulates collective labour law in South Africa by providing a framework within which collective bargaining can take place. It is important to note that the LRA favours voluntary, self-regulatory, centralised bargaining and therefore does not impose a legal duty to bargain. In the case of *SANDU v Minister of Defence and others; Minister of Defence and others v SANDU and others*<sup>186</sup> the appeal arose from three judgments of the lower courts. Common to all three appeals was the issue of whether SANDF was obliged to collectively bargain with SANDU. SANDU mainly relied on section 23 of the Constitution which provides trade unions with a right to engage in collective bargaining. The Supreme Court of Appeal (SCA) mentioned that voluntarism does not mean that employers and employees necessarily negotiate voluntarily.<sup>187</sup> Often they negotiate in order to avert the

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<sup>182</sup>Ibid.

<sup>183</sup>Abrahams D et al *Labour Law in Context* 2<sup>nd</sup> edition (2007) Pearson, South Africa.

<sup>184</sup>(2003) (2) BCLR 182 (CC).

<sup>185</sup>Section 23 (2)(b).

<sup>186</sup>(2006) 15 SCA 4.5.1 and [2006] 11 BLLR 1043 (SCA).

<sup>187</sup>Ibid para 19.

economic pressures brought about by a strike or a lock-out. This pressure is one of the principal driving forces behind voluntary collective bargaining system. The SCA found that when regard is had to the objectives of the LRA, it becomes clear that the legislature understood that its role was to do no more than provide a framework for collective bargaining and the fact that the legislature had only provided for advisory arbitration in disputes relating to collective bargaining clearly indicates that the Act does not envisage an enforceable duty to bargain.<sup>188</sup>

Despite the absence of the duty to bargain, the LRA does encourage the organisations of workers into majority trade unions through its various provisions.<sup>189</sup> This section will briefly outline some of the mechanisms and provisions supporting the establishment and functioning of trade unions in South Africa.

Firstly, it is important to note that section 213 of the LRA defines a trade union as ‘an association of employees whose principal purpose is to regulate relations between employees and employers, including employers’ organizations’. Trade unions and employers’ organizations have to be registered with the Department of Labour, and their operations must be guided by their constitutions which are submitted to the office of the registrar during registration.<sup>190</sup> Trade unions are a channel through which workers bargain with the employer, but for them to be able to negotiate, the employer must first recognise them in the workplace.

In drafting the LRA, the Parliament made an effort to level the industrial relations playing field for employers and employees by providing employees with certain labour rights, such as the constitutional right to strike. The LRA provides for the industrial relations system that promotes formation of trade unions and creates an environment conducive for collective bargaining,<sup>191</sup> the legislature also provide for certain strategies to help maintain union strength as discussed below.<sup>192</sup>

In this regard, s 16 of the LRA protects majority trade unions and provide that the majority union (a union with 50% plus 1 of the employees in the workplace as their members) have a qualified right to require an employer to disclose information. The

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<sup>188</sup>Ibid para 55.

<sup>189</sup>Section 14, 16, and 23

<sup>190</sup>Guidelines for registration of Trade Unions and Employers’ Organizations..

<sup>191</sup>Raju R, and C. Stilwell 'From adversarialism to cooperation : Key implications of the new South African labour dispensation' (2007) UNISA Press ISSN 0027-2639 Mousaion 25(1) : 1-20.

<sup>192</sup>Vettori S. ‘The Labour Relations Act 66 of 1995 and the Protection of Trade Unions.’ (2005) *South Africa Mercantile Law Journal* 17 : 295-304.

employer must then disclose to a trade union representative all relevant information that will allow the trade union to perform its functions, whenever consulting or bargaining with a representative trade union, the employer must disclose to the union the relevant information to allow the representative of the trade union to engage effectively.<sup>193</sup> In negotiations, employees regard access to business information as important in order for them to be able to gauge their employer's financial position as well as ability to meet their demands.<sup>194</sup> Moreover, information disclosure is a vital element in joint decision making and in labour relation processes such as dispute resolution, collective bargaining, and consultations.<sup>195</sup>

The Constitution also provides that every trade union, employers' organization and employer has the right to engage in collective bargaining.<sup>196</sup> This means that the right to join trade unions and participate in their activities is a constitutional right. While 'strong protection of freedom of association and the simple procedure for registration provided by the LRA suggested that there would be an increase in the number of trade unions and the total number of membership',<sup>197</sup> table 1 below shows that after peaking in 1999, the numbers of unions have declined, but not the number of membership. This may be attributed to the principle of majoritarianism.

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<sup>193</sup>Van de Walt R. (2007) "Access to information: Information disclosure in some South African organizations." (2007) *South African Journal of Business Management* 38 (1) : 25-35

<sup>194</sup>Ibid

<sup>195</sup>Van de Walt R. "Sharing Business information with employees" (2003) *South African Journal of Economic and Management Sciences* 6 (3) 542-561

<sup>196</sup>Section 23 (5)

<sup>197</sup>Du Toit et al *Labour Relations Law, A Comprehensive Guide*, Sixth Edition (2015) Lexis Nexis, South Africa

Table 1

Year	Registered trade unions	Total membership	Average size
1995	248	2 690 727	10 850
1999	499	3 359 497	6 732
2003	365	3 277 685	8 980
2007	261	3 049 860	11 685
2011	194	3 392 149	17 485
2012	196	3 057 772	15 600

\*Source: Du Toit et al<sup>198</sup>

The system of majoritarianism which has been adopted by South Africa and which aims to avoid proliferation of trade union in one workplace or sector is in the interest of orderly collective bargaining.<sup>199</sup> The impact of this principle was illustrated in the case of *POPCRU v Ledwaba*,<sup>200</sup> where the majority trade union had a collective agreement with the employer regarding thresholds of representativeness, and had extended the application of the collective agreements to all employees at the workplace, including members of the minority trade union. The minority trade union subsequently negotiated and agreed upon organizational rights with the employer, the majority trade union argued that the agreement between the employer and the minority trade union was a breach of binding collective agreements that existed and was invalid.<sup>201</sup> The Labour Court held that in terms of section 23 of the LRA, a collective agreement is binding on the parties to the agreement and also to non-parties to the agreement provided that such non-parties are identified in the agreement, the agreement expressly binds them and that the agreement is concluded by a union or unions that have majority members in the workplace.<sup>202</sup> Also that in the situation where a collective agreement concluded with the majority trade union conflicts with the one concluded with the minority trade union, the one concluded with the majority trade union must take preference.

<sup>198</sup>Ibid .

<sup>199</sup>Abrahams d. et al 'Labour Law in Context' (2017)Pearson ,South Africa.

<sup>200</sup>(2013) 11 BLLR 1137 (LC).

<sup>201</sup>Ibid para 27.

<sup>202</sup>Ibid para 27

Another significant factor contributing to trade unionism is the protection of the right to strike. The right to strike is one of the constitutional rights afforded to employees in South Africa. Both s23 (2)(c) of the Constitution and s64 of the LRA make provisions for this right. Section 66 of the LRA also provides for the right to participate in secondary strike even though there are restrictions to this right. The LRA defines a ‘strike’ as follows:

“The partial or complete concerted refusal to work or the retardation or obstruction of work, by persons who are or have been employed by the same employer or different employers for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between the employer and the employee.”<sup>203</sup>

This means that this economic tool that employees have can only be used if it is a collective action. Thus, in order to qualify as a strike, refusal to work must be a collective action among employees. As a result; one employee cannot go on strike in terms of the LRA.<sup>204</sup> This again emphasises the importance placed on collective action.

The LRA, furthermore, provides for agency shop and closed shop agreements.<sup>205</sup> Section 25(1) provides as follows:

“A trade union and an employer or employers’ organization may conclude a collective agreement to be known as an agency shop agreement, requiring the employer to deduct an agreed agency fee from the wages of employees identified in the agreement who are not members of the trade union but are eligible for membership thereof.”

As argued by Abrahams,<sup>206</sup> the reason for agency shop agreements is that employees, who are not members of the union and thus do not pay subscription fees, nevertheless receive the benefits of the trade union’s collective bargaining with the employer. Because of the agency shop agreement, employees may end up joining trade unions even if they did not intend to so that they enjoy all the benefits enjoyed by union members as they are paying subscription anyway. The LRA also permits registered trade unions and employers to conclude a closed shop collective agreement, requiring all employees of the employer or employers covered by the agreement to be members of the trade union.<sup>207</sup> This means that

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<sup>203</sup>Section 213.

<sup>204</sup>Ibid.

<sup>205</sup>Section 25 and 26 respectively.

<sup>206</sup>Abrahams et al *Labour Law in Context* 2<sup>nd</sup> edition(2017) Pearson, South Africa.

<sup>207</sup>Section 26(1).

non-members of the trade union may be obliged or forced by the agreement to become members of the trade union, these agreements are referred to as union security agreements.<sup>208</sup>

The above represents some of the provisions and mechanisms contributing to trade unionism in South African workplaces.

### 3.5 Challenges faced by trade unions in the era of globalisation

Globalization has brought with it many challenges for trade unions, particularly because of the global supply chains. Schmidt argues that as big companies are building trade networks between them, trade unions are often forced to confront sophisticated and often anti-union human resource management strategies at a national level within a global production system.<sup>209</sup> The author further argues that there is a potential conflict of interest between workers of the north and those from the south, especially when it comes to outsourcing. For trade unions that are accustomed to organize within national borders, it becomes a challenge for them to get into the international arena as the integration of national economies into the global market and the coordination of national and international agendas poses major challenges. Another challenge is that some international companies are not trade union friendly in that codes of conduct are not accompanied by measures of accountability by the company to unions and employees.<sup>210</sup> Moreover, not all countries are fully democratic and are still authoritarian. For workers in authoritarian countries, many of them are afraid of exercising their right to freedom of association because of hostilities to trade unions or for fear of dismissal. According to Staritz and Reis, 'women are mostly likely to be affected by lack of freedom of association as most of them work in factories or firms producing goods and services at the bottom of global supply chain'..<sup>211</sup>

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<sup>208</sup>Vettori S 'The Labour Relations Act 66 of 1995 and the Protection of Trade Unions.' (2005) *South Africa Mercantile Law Journal* 17 : 295-304.

<sup>209</sup>Schmidt Verena on ILO online. Available at <http://ilo.org/global/about-the-ilo-newsroom-wcms-087711/lang-en/index.htm>

<sup>210</sup>Ibid. Also at Trade Union Responses to Globalization: A review by Global Union research Network 2007, ISMB 978-92-2-119860-4

<sup>211</sup>Staritz C. and Guilherme Reis J. *Global value chains, Economic upgrading and Gender: case studies of the Horticulture, Tourism and call centre industries*(2013)World Bank International Trade Department, Gender Department Unit. Available at <http://www.capturingthe region.org/pdf/GVC-Gender-Report-web.pdf>.

Christian M. Evers and Barrientos S. 'Women value chains: making a difference', (2013) Capturing the Gain Summary, Revised Summary Briefing No.63 Cape Town South Africa.

### 3.6 Current Trade Unions and Their Relevance in the World of Work

Looking at the current labour legislation, and the current definition of a trade union, it seems like focus is directed at employees and not at workers as a whole. The world of work is moving away from traditional employment relationships as indicated earlier. The ILO Conference of Labour Statisticians has defined employment as ‘denoting all work performed in the context of transactions for remuneration, whether in the form of pay for work done or for the hours worked, or in the form of profits derived from goods and services that are sold or bartered’<sup>212</sup>.

This means that work can be seen as any economic activity regardless of whether an individual engaged in it is acting on their own or on behalf of someone else (an employer). The current labour legislation is regulating employment relationships in the formal sectors of the economy rather than regulating both the formal and informal sectors. The ILO defines the informal economy as:

“All economic activities by workers and economic units that are – in law or in practice – not covered or insufficiently covered by formal arrangements. This refers particularly to those in the informal economy who own and operate economic units, including: own- account workers, employers, and members of cooperatives and of social and solidarity economic units; Contributing family workers, irrespective of whether they work in economic units in the formal or informal economy; Employees holding informal jobs in or for formal enterprises, or in or for economic units in the informal economy, including but not limited to those in subcontracting and in supply chains, or paid domestic workers employed by households; and workers in unrecognized or unregulated employment relationships.”<sup>213</sup>

The Recommendation is that the informal economy be formalised, and thus extending the legal protection to all workers. According to the South African Future of Work Initiative Report , the formalisation of the informal economy depends largely on whether the regulatory system retains its traditional character or is re-imagined to embrace all forms of work on the principle of functionality in terms of socio- economic developments as well as human rights

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<sup>212</sup> ILO ‘*Report II : Statistics of work, employment and labour underutilization*’ : 19<sup>th</sup> International Conference of Labour Statisticians Geneva 2013.

<sup>213</sup> ILO Recommendation 204

protection. If the current labour legislation was to be re-imagined to give equal protection to all workers, then all workers would be afforded same trade union rights.<sup>214</sup>

As was noted before, traditionally trade unions organized workers in the standard forms of employment, but with the emergence of non-standard forms of employment, their strategies of organising and whom they organise needs to be reconsidered. With the changes in the world of work and with many companies resorting to outsourcing services which are not their core functions, workers find themselves being forced to work under contracts which are not like traditional employment contracts where employers are obliged to take care of the their employees. Workers find themselves in relationships that benefits employers/clients and which comprises their job security, stability and safety.<sup>215</sup> With the outsourcing of work, many employers opt for temporary agency workers and part-time workers as opposed to full time workers with all the legal protection and benefits afforded to them. It is high time that trade unions focus on these ‘new’ categories of workers/employees, including workers in the informal economy. Their traditional ways of organising have to be reconsidered if they are to remain relevant in the Fourth Industrial Revolution.

Furthermore, a major threat to the existence of trade unions and a contributing factor to the decline of trade union membership is the unemployment rate in South Africa; recent statistical reports indicate a decline in employment. For example, in the reports produced by Statistics South Africa, the results of the Quarterly Employment Survey (QES) for the second quarter of 2017 show a decline of 34 000 jobs (-0.4%) to 9 617 000 in the formal non-agricultural sector in the quarter ended June 2017<sup>216</sup>. This report shows that 13 000 (or 0.1%) jobs were gained when compared to the same period in June 2016.<sup>217</sup>The report further indicates that the quarterly employment declines were mainly driven by the manufacturing industry with 13 000 jobs (-1.1%), construction industry with 11 000 jobs(-1.8%), and community services which lost 10 000 jobs (-0.4%). Additional job losses were also observed in transport and communication services with 5 000 jobs (-1.1%) and business services with 1 000 jobs (-0.0%).<sup>218</sup>However there were increases in employment observed in trade and mining with 3000 jobs respectively. The report further reveals that there was a job decline in employment in both March 2017 and June 2017 quarters. The QES recorded losses of 41 000

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<sup>214</sup> South Africa Future of Work Initiative Report to the ILO 2017.

<sup>215</sup> Ibid.

<sup>216</sup> Statistics South Africa, Quarterly Employment Survey September 2017.

<sup>217</sup> Ibid.

<sup>218</sup> Ibid.

jobs and 34 000 jobs over those last two quarters respectively.<sup>219</sup> Against this backdrop, the level of participation in trade union will be highly determined by the number and the kind of workers in the labour market.<sup>220</sup>

Another factor inhibiting the growth of trade unions is lack of female participation in the formal labour market despite the fact that women comprise 49.55% of the population.<sup>221</sup> For instance, the observation by Statistics South Africa is that for the entire workforce, ‘44 in every 100 employed individuals are women’.<sup>222</sup> The labour data released show that women fill 44% of skilled posts, which includes managers, professionals and technicians.<sup>223</sup> But the figure has not shifted over the years; it was still 44% in September 2002.<sup>224</sup> Although South Africa as a country has done well in this regard, gender representation is still below 50%. Data from 2014 show that woman comprised 32% of Supreme Court of Appeal Judges, 31% of advocates, 30% of ambassadors and 24% of heads of state owned enterprises.<sup>225</sup> But of the top 40 Johannesburg Stock Exchange (JSE) listed companies, only one company had a female Chief Executive Officer (CEO).<sup>226</sup> However, in the third quarter of 2016, 970 000 women were recorded to be in the informal sector, constituting 37% of the total informal sector employment.<sup>227</sup> As observed by Skinner, this is down from 45% in 2008 first quarter (confirmed as a long term trend).<sup>228</sup>

It is, therefore, important for trade unions to devise strategies to increase their membership base by taking into account the changes in nature of work, how work is performed and the demographic of both the South African population and those in the labour market. Unfortunately, trade unions have been slow to respond to the new employment practices and categories of work.<sup>229</sup> Additionally, labour legislation and labour market regulatory framework are still, primarily, focused on traditional standard employment. Collective bargaining structures and the organisation by trade unions are still aligned to the regulatory framework. This means therefore that the organisation of workers in the informal

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<sup>219</sup>Ibid.

<sup>220</sup>Ibid.

<sup>221</sup><https://data.worldbank.org/indicators>.

<sup>222</sup>Ibid.

<sup>223</sup>Ibid.

<sup>224</sup>Labour Force Survey, Historical Revision, September Series 2000 to 2007.

<sup>225</sup>Ibid

<sup>226</sup>Statistics South Africa, Gender Series Volume 1 : Economic Empowerment, 2001=2014

<sup>227</sup>Statistics South Africa, Quarterly Labour Force Survey Q3 2016

<sup>228</sup>Skinner Caroline *Informal Sector Employment: Policy Reflections* RED13\*3 (2016)Conference, WIEGO

<sup>229</sup>Benjamin P. ‘Restructuring triangular employment : The interpretation of section 198A of the Labour Relations Act’, (2016) *Industrial Law Journal*, 37, 28-44

economy and those in new categories of work is negligible despite these groups representing a potential boost to trade union membership.

### **3.7 Conclusion**

This chapter of the dissertation discussed the history of trade unions in South Africa, taking into consideration the regulations for trade unions as well as challenges faced by trade unions. The chapter also considered the role of trade unions, in the past and currently. While considering the role of trade unions, attention was also given to legal framework for trade unions in South Africa, as well as relevant ILO instruments on freedom of association and collective bargaining. The chapter also considered the challenges facing trade unions in the era of globalization.

From the above discussion, one cannot deny the fact that trade union have been instrumental in the shaping of many countries and the world of work as a whole. But at the same time, it is without doubt that the trade union movement is faced with major challenges and that its collective strength is at risk. Trade unions have to find better way or strategies to overcome these challenges if they are to survive in the future world of work.

## **Chapter Four: Reinventing the trade union movement for the future of work**

### **4.1 Introduction**

It was evident from the discussion in the previous chapters, the Fourth Industrial Revolution has brought with it rapid changes in the world of work, therefore, adaptation to the new world of work is needed so as to keep up with the pace of change. In this regard, this chapter will attempt to discuss strategies trade unions could adopt in the running of their affairs in order for them to remain relevant in the changing world of work.

### **4.2 Challenges faced by trade unions**

#### **4.2.1 Emerging forms of non-standard employment**

It is now generally accepted that remunerated work is not only engaged through employment contract and that not all work is remunerated.<sup>230</sup> Work is categorized into standard and non-standard forms of employment. As explained by Le Roux:

“Standard employment is typically full-time, the employee has only one employer, the work is generally performed at a single place subject to the control of the employer and it is characterised by the existence of a contract of employment.”<sup>231</sup>

The employment relationship of this type of engagement is regulated by, amongst others, the labour legislation. The LRA and the Employment Equity Act, 55 of 1998 (EEA) give protection against unfair dismissal and unfair discrimination respectively, while the LRA provides for, amongst other rights, the right to freedom of association, formation of trade unions as well as channels for collective bargaining.<sup>232</sup> Chapter 9 of the LRA contains provisions for temporary employment services as well as part-time and fixed term employment. These are forms of employment considered as non-standard forms of employment. While non-standard forms of employment may present some difficulties, one must accept they are a result of the inevitable changes of the modern world of

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<sup>230</sup>Rochelle le Roux *Development and Labour Monograph Series* (2009) Institute of Development and Law, University of Cape Town (quote taken from Sipirot, *A Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (2001) at 1-21.

<sup>231</sup>*Ibid.*

<sup>232</sup>*Ibid.*

work.<sup>233</sup> However, workers in these types of work arrangements also need legal protection as they find it difficult to be unionised and, therefore, gain collective representation. As argued by Le Roux, it is clear that these forms of (non-standard) employment are not necessarily suitable for regulation:<sup>234</sup>“While there is clearly a need for extension of coverage of labour legislation to more forms of work, in some cases there may be merit in a diverse approach similar to the one followed in co-operatives”.<sup>235</sup>

#### 4.2.2 Declining levels of union membership

According to Hyman, there are cross-national differences in the character and severity of challenges from both above and below confronting trade unions in their organizational capacity to respond effectively, and in the traditions and identities which shape their directions of change.<sup>236</sup> Primarily, the strength of trade unions, which has always been in their solidarity, is seen to be in continual decline. This can be attributed to many things but chief among them is the structural changes in the economies, leading to the reduction of the total workforce. For example, total manufacturing employment in America has fallen from nearly 20 million in 1979 to 12 million in 2015, and the workers who were lost would have been likely members of trade unions.<sup>237</sup> Another contributing factor could be the reforms to the minimum wages and workplace discrimination which have also reduced the need to be members of trade unions. Moreover, unions being affiliated with political parties to which workers are not affiliated with is yet another challenge.<sup>238</sup>

Their relevance can be seen to be diminishing in recent years as reflected in their membership numbers. As observed by Steyn, workplace unionisation in South Africa was at its peak in 1997 at 45.2% of total employment, but, by 2012, it had dropped to 25.4%.<sup>239</sup> The

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<sup>233</sup>Rochelle le Roux *Development and Labour Monograph Series* (2009) Institute of Development and Law, University of Cape Town (quote taken from Sipirot, *A Beyond Employment: Changes in Work and the Future of Labour Law in Europe* (2001) at 1-21.

<sup>234</sup>Ibid.

<sup>235</sup>Ibid.

<sup>236</sup>Hyman Richard *How can trade unions act strategically?* (2007) Transfer : European Review of Labour and Research, 13 (2) pp 193-210 ISSN 1024-2589 SAGE Publications.

<sup>237</sup>E.H. *Why trade unions are declining* (2015)The Economist. [economist.com/blogs/economist-explains/2015/09/economist-explains-19](http://economist.com/blogs/economist-explains/2015/09/economist-explains-19).

<sup>238</sup>Heidecker Perry ‘Four Reasons for the decline in union membership’ (2013) Cleanlink.

<sup>239</sup>Steyn Lisa ‘The downward spiral of South African Unions’ *Mail&Guardian*.(2014, 13<sup>th</sup> November) Available at [mg.co.za/article/2014-11-13-the-downward-spiral-of-sa-unions](http://mg.co.za/article/2014-11-13-the-downward-spiral-of-sa-unions) accessed on 05<sup>th</sup> February 2018 The data was from the South African Survey published by the Institute of Race Relations.

statistics from the Department of Labour also indicates the downward movement in the membership of trade unions:<sup>240</sup>

Table 2

Registered employer and employee organizations

Province	2012-13	% change	2013-14	% change	2014-15
Registered Trade Unions	191	-2.1%	187		181
Membership of trade unions	3 028 400	22.7%	3 715 659	-4.3%	3 556 365
Registered Employers' Organizations	164	-0.6%	163	-2.5%	159
Bargaining Councils	47	-4.3%	45	-15.6%	38

Source: Department of Labour, Collective Bargaining, April 2014-March 2015

Wright observes several other factors that have contributed to the sharp decline in union membership:

“The exposure of firms and industries to great market pressures, a growing trend in outsourcing and the growth in atypical employment, employer sponsored forms of participation and representation, and the imposition of legal constraints on the ability of unions to recruit, organise, collectively bargain and take industrial action, has all contributed to a sharp fall in union membership.”<sup>241</sup>

This downward trend has been especially pronounced among certain groups of employees, notably manual workers, male workers and those in the private sector, although membership has remained relatively stable among non-manual workers, female workers and

<sup>240</sup>Department of Labour South Africa, 2014/15 Annual Labour Market Bulletin.

<sup>241</sup>Wright F. Chris ‘Future workplace what role for trade unions in relations?’ (2011)ACAS Future of workplace Relations discussion paper series, University of Cambridge.

public sector workers.<sup>242</sup> Unions in developed countries have lost membership in recent decades as observed by Bryson and Forth, but particularly in Britain with union density dropping from 50% in 1980 to 30% in 2000, and to 27% in 2010.<sup>243</sup>

The manufacturing sector used to be typically labour intensive and as a result employed a huge number of employees. This meant that a large number of employees could be found in one location, making it easy and possible for unions to recruit large numbers in one workplace. The ability of unions to recruit in this way made it possible for them to be able to better influence employers to bargain and improve terms and conditions of employment.

In order for unions to play a leading role in the Fourth Industrial Revolution, they need to strengthen their membership base. These numbers used to be found in one workplace, but given the changes in the world of work as outlined above, they need to consider strategies of organising that allows them to secure members and numbers in multiple workplaces.

One means of widening their membership base would be to take on gender issues faced by female workers. As indicated in the Future of Work report, gender inequalities continue to undermine decent work objectives despite the increase in the number of women in the South African labour force. According to the report on the status of South African women in the economy, roughly 9.5 million women were participating in the labour market in 2015, representing about 45.2 percent of the total number of women.<sup>244</sup> There were some differences in the racial composition of male and female participation, for example, the racial composition of the male and female labour force was very similar with growth amongst Africans, driving the overall labour force growth in both instances. However, amongst women, Asians and Whites accounted for slightly smaller proportions of the labour force than amongst men, indicating lower participation rate.<sup>245</sup> What is indicated by the report is that amongst women, 46.3 percent were under the age of 35 years compared to the 47.6 percent for males. The female labour force was therefore slightly older and thought to be due to the fact that women are more likely to exit that labour force during childbearing ages.<sup>246</sup>

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<sup>242</sup>Bryson Alex and John Forth “Trade union membership and influence 1999-2009”(2010) CEP Discussion Paper No. 1003, Centre for Economic Performance, London School for Economics and Political Science.

<sup>243</sup>Ibid.

<sup>244</sup> Department of Women, South Africa, Report on the Status of Women in South African Economy, August 2015.

<sup>245</sup>Ibid.

<sup>246</sup>Ibid.

The report goes on to show that employment growth amongst women was most rapid amongst 55 to 65 years olds (6.3 percent per annum), although the absolute gains in employment were even, ranging between 160 000 and 215 000 over the period across all age groups except 15 to 24 year olds.<sup>247</sup> This was in contrast to males, where employment growth amongst 55 to 65 year olds equalled that amongst 35 to 44 year olds at around 3.2 percent per annum.<sup>248</sup> The age structure of employment was slightly older for women than for men; 30.7 percent of employed women were at least 45 years old compared to 27.9 percent of employed men.<sup>249</sup>

Some of the problems that confront women are difficulties in balancing family and work life, pay differentials, discrimination on grounds of maternity and family responsibilities, and the fact that women are mainly found in feminized professions such as teaching and nursing.<sup>250</sup> As argued above, for a long time, women have been overlooked in union structures, this might have been due to the fact that women were traditionally employed in informal jobs, or because most trade unions used to organize in the manufacturing and mining sectors, which used to be male dominated.<sup>251</sup> Trade unions have to change their traditional views of their membership and employ new strategies to incorporate women, especially those in the informal economy. Trade unions have for many years claimed to be committed to gender equality and the elimination of gender discrimination in the workplace and especially in the 4IR, must proactively take steps to eliminate these inequalities. With the changes that are taking place in the world of work and the trade union movement itself, it is time for trade unions to develop measures to address these inequalities.

“We have a responsibility to address gender in the unions, in the workplace and in society. Often gender links to the developmental issues. Structural adjustments often results in tariff liberalism that puts female ... workers out of work. The informal sector is in many cases a ‘ghetto’ where women are condemned to working without fair labour standards or legal protection, trade unions should lead these struggles.”<sup>252</sup>

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<sup>247</sup>Ibid.

<sup>248</sup>Ibid.

<sup>249</sup>Ibid.

<sup>250</sup>Cohen T and L Moodley ‘Achieving decent work in South Africa?’ (2012) *PER/PRLJ* (15)2.

<sup>251</sup>Ibid.

<sup>252</sup>Congress of South African Trade Unions (COSATU) (2001) A strategic perspective on the International Trade Union Movement for the 21<sup>st</sup> century: A minimum platform to reposition the ICFTU to meet challenges of the new millennium..

Unions can take a cue from their counterparts in the United Kingdom (UK). According to Nowak, the past 50 years have seen some socio-economic change in the UK, especially the growing participation of women in the labour market.<sup>253</sup> The Trade Union Congress (TUC) currently has, in the first time in the history of the union, a female General Secretary, Frances O’Grady.<sup>254</sup> Nowak goes on to indicate that the composition of the TUC’s governing body (the General Council) has undergone transformation as now women make up half of the membership of the governing body as compared to 1964 when out of 36 members, only two were women.<sup>255</sup>

According to the ILO,<sup>256</sup> despite the significant progress since the 4<sup>th</sup> World Conference on Women in Beijing in 1995, women continue to experience widespread discrimination and inequality in the workplace. The future of work means more women at work, and this future must deliver on gender equality. Since 1995, important progress has been made in the number of ILO member states that have formally committed to promoting gender equality with a view to eliminating discrimination and ensuring equal pay for equal work irrespective of gender.<sup>257</sup> Notably, in 1995, 126 member states ratified Convention 100 of 1951 on Equal Remuneration, and 122 member states had ratified Convention 111 of 1958 on Discrimination (Employment and Occupation). And as at 2014, 171 member states have ratified the Equal Remuneration Convention while 172 have ratified the Discrimination Convention.<sup>258</sup> Significantly, the gap between men and women labour participation rates has been decreasing although at a very slow rate.<sup>259</sup>

Despite this positive movement towards the goal of gender equality, the Beijing Platform for Action refers to the fact that women are concentrated in jobs with low pay and poor working conditions, often lack of access to maternity protection<sup>260</sup>. The ILO’s report<sup>261</sup> further notes that women are substantially less likely than men to participate in the labour market, that is, to be either employed or be looking for a job. The current global labour force participation rate for women at just over 49 percent is nearly 27 percentage points lower

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<sup>253</sup> Paul Nowak “The past and future of trade unionism”, (2015) *Employee Relations*, Vol. 37 Iss 6 pp 683-691.

<sup>254</sup> *Ibid.*

<sup>255</sup> *Ibid.*

<sup>256</sup> International Labour Organization *Women and the Future of Work, Beijing +20 and Beyond*, Gender, Equality and Diversity Branch.

<sup>257</sup> *Ibid.*

<sup>258</sup> International Labour Organization, *Trends, Econometric Models*, October 2014.

<sup>259</sup> *Ibid.*

<sup>260</sup> International Labour Organization *World Employment and Economic Outlook*, Geneva 2015.

<sup>261</sup> International Labour Organization, *World Employment Outlook, WOMEN*, Trends for Women 2017.

than the rate of men (with no improvements anticipated in 2018).<sup>262</sup> The report indicates that underlying this participation gap is a downward trend in participation role for both men and women between 2007 and 2017.<sup>263</sup> The participation rates for both sexes have fallen by roughly 3 percentage points. This appears to indicate that in some countries where the gap has narrowed, it has been as a result of male rates falling more sharply than those of their female counterparts.<sup>264</sup>

The report also indicates that globally, the unemployment rate for women stands at 6.2 percent in 2017, representing a gap of 0.7 percentage points from the male unemployment rate at 5.5 percent.<sup>265</sup> It goes on to explain that women are also more likely to undertake a greater number of hours of unpaid work due to time spent on household chores and care provision. Overall, they are more likely to work longer hours than men when both paid and unpaid work is taken into consideration.<sup>266</sup> Women who seek to improve their participation in the labour market are often held back by social norms and economic constraints, with the most prevalent of these socio economic constraints being marital status and the lack of a 'work-life balance'.<sup>267</sup>

### 4.3 Re-inventing the Trade Union Movement

A strategy that may be used by unions in addressing current levels of representation and organization in order to re-establish themselves so that they can remain effective and regain their influence is through social movement unionism.<sup>268</sup> For example, South Africa recently experienced alliances of trade unions, students and non-unionised workers in the fight against fee increases in the institutions of higher learning (the #feesmustfall movement).<sup>269</sup> The issue of fee increases was not workplace related, but affected workers as they are parents to the students in institutions of higher learning and therefore fee payers. This shows that trade unions can start to focus not only on labour related matters, but also on the social issues and help society in the quest for better living conditions. They might want to start looking at issues affecting their members or society at large as long as they have an

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<sup>262</sup>Ibid.

<sup>263</sup>Ibid.

<sup>264</sup>Ibid.

<sup>265</sup>Ibid.

<sup>266</sup>Ibid.

<sup>267</sup>Ibid.

<sup>268</sup>Von Holdt, Karl. *Social Movement Unionism: The case of South Africa. Work, Employment and society.* (2002)16.2 (2002): 283-304.

<sup>269</sup>Ibid.

impact on workers, this might be just what they need to regain popularity and increased membership density.

Another example of social movement unionism in South Africa is the National Union of Care Workers of South Africa (NUCWOSA).<sup>270</sup> This union represents majority of workers who care for the sick and elderly in their communities, and who are not recognised as employees by the National Department of Health, notwithstanding the critical health care function they perform.<sup>271</sup> As argued in the report, those workers that are recognised fall outside the collective bargaining system regulating wages and conditions of service of health care practitioners.<sup>272</sup> These workers want to be recognised as employees of the Department of Health and, in an effort to achieve their demands; they are placing great emphasis on forming alliances with the local communities to assist them in the struggle.<sup>273</sup> If trade unions fail to adapt to the changing context, the future may be characterised by their continued decline organisationally and politically.<sup>274</sup> This would have a negative impact on social dialogue and labour relations, thereby affecting the well being of workers and the nation at large.

The other problem that seems to be the cause of the decline in the union density is the union involvement in party politics. The support that unions seem to be giving to certain political parties has a very big potential of dividing workers. An example of this is that of Lesotho textile trade unions, these unions worked very hard to merge and form one big union that would represent all workers in the textile sector, but within a very short period of time after the merger, they had to part ways because of their affiliation to conflicting political parties. It is a high time that unions realise that the only politics that are beneficial to them are those related to labour relations. While it is true that these changes in the world of work do not only affect workers but the society as a whole, unions' focus should mostly be on the well being of *all* workers, their conditions of work and their safety in the workplace.

However, trade unions have been instrumental in the social and economic landscapes of many countries. They played different roles depending on the uniqueness of each country. For example, as outlined in chapter 3 above, in South Africa, the 1970s marked the birth of

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<sup>270</sup>South Africa Future of Work Initiative Report to the ILO, 2017.

<sup>271</sup>Ibid.

<sup>272</sup>Ibid.

<sup>273</sup>Ibid.

<sup>274</sup> Buhlungu S. *A paradox of victory: COSATU and the democratic transformation in South Africa*. (2010) University of KwaZulu-Natal Press, Scottsville South Africa.

new trade union movement and rising resistance to Apartheid.<sup>275</sup> The growth of the new union movement and their collective action during Apartheid contributed to the country's eventual transition to a constitutional democracy.<sup>276</sup> The Fourth Industrial Revolution presents a new set of challenges for unions not only in South African, but all over the world. It is one they must be well prepared for. As indicated by International Trade Union Confederation (ITUC), unions have been involved in shaping technological changes and bargaining on skills development and productivity gains for decades. As a result, they will need to be at the table when discussing industrial transformation at the policy level, when developing employment and safety standards, including fair wages and social protection, as well as training packages for the introduction of new technologies at the workplace.<sup>277</sup>

#### 4.4 Is the design of legislation fit for purpose?

From a legislative perspective, the LRA does not give the same protection and labour rights to *all* workers, and as a result, there is a need to reconsider the existing labour laws to respond to the current and future challenges facing the world of work. In this regard, Theron argues that the labour relations system had been established based on the then prevailing situation, and on a number of assumptions that seemed valid then but are no longer valid now.<sup>278</sup> For example, 'the organizational rights the LRA provided assume that all workers work in the workplace which is controlled by the employer', this is because most employers did control the places where their workers worked, at the time the law was introduced.<sup>279</sup> However, in the current world of work workers are dispersed and work for multiple employers/clients. The labour market is thus more nuanced and complex. In 2015, the South African Parliament introduced amendments to the LRA in an attempt to address the situation of workers in non-standard forms of employment. These amendments, however, are still not providing enough coverage. Trade unions need to focus on developing strategies on how workers in the non-standard forms of employment and other workers can be organised so that they have collective representation and forums where they can be heard.

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<sup>275</sup>Ibid.

<sup>276</sup>Ibid.

<sup>277</sup>International Trade Union Confederation CSI IGB 'The future of work: A global deal, a new contract for the global workforce'.

<sup>278</sup>Theron Jan *Non-standard employment and labour legislation: The outlines of a strategy* (2014) Institute of Development and Labour Law, University of Cape Town.

<sup>279</sup>Ibid.

## 4.5 Recommendations

In the Fourth Industrial Revolution, the world of work will undergo rapid transformation, new types of jobs will be created, while at the same time they are partly or wholly displacing others, for example, jobs of bank tellers and are rapidly being replaced by the auto-teller machines. The skill sets required in both old and new occupations in most industries will transform how and where people work.<sup>280</sup> The changing organisational structure and culture (where flexible work arrangements is becoming a norm and digitalisation of the workplace continues) is yet another challenge.<sup>281</sup> This replacement of workers by machines potentially means that there will be fewer employees in the market resulting in reduced numbers for trade union membership.

While the world of work is changing rapidly and the economic climate is becoming difficult and uncertain for organised labour, trade unions remain powerful agents in shaping relations in the workplace. However, challenges facing world of work, brought about by the technological transformation, migration, and climate change, now need powerful trade unions to address them. The need for collective organization of workers is crucial.<sup>282</sup> Trade unions primarily operate at the national level; however, because of globalization and the growth of multinational companies, their capacity to act as employers' watch dogs is limited. Hyman argues that the limitation faced by unions coupled with their inability to achieve the improvements in real wages and social benefits, which had become part of workers' normal expectation, is in turn a reason for loss of membership and status.<sup>283</sup>

There is an overwhelming need for trade unions to reach out to the unorganised workers in the formal and informal sectors of the economy and, in so doing, they would be widening their scope and increasing their chances of regaining power. As argued by Nowak, trade unions need to be more imaginative in the way they engage with unorganised workers by building alliances and campaigning for a living wage, linking up with other lobbying groups such as fair trade or green NGOs and using social media and new technology

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<sup>280</sup>WEF (2016) *Global challenge insight report*. The future of jobs, employment, skills and workforce strategy for the Fourth Industrial Revolution/ January 2016 8.

<sup>281</sup>Kokt Desere *Human Resources Challenges in the New World of Work*, Global CEO Report (2017) : PwC, Bloemfontein South Africa.

<sup>282</sup>Hutt Rosamond 'What are the biggest global challenges?' (2016)World Economic Forum.

<sup>283</sup>Hyman R. *How can trade unions act strategically? Transfer: European Review of Labour and Research*,(2007) 13 (2) pp 193-210 ISSN 1024-2589 SAGE Publications.

effectively.<sup>284</sup> They must also publicise their success stories, such as helping workers access training and development opportunities, so that everybody is aware of them.<sup>285</sup> This will make more workers realise other benefits of being union members and, as a result, potentially join these unions.

With the shrinking or declining membership, private sector trade unions are increasingly poaching from other unions in the same sector, and are beginning to organise beyond their traditional sectors.<sup>286</sup> As argued in the future of work report, this advance into other sectors has a strategic underpinning, namely to move from a sectoral focus for collective bargaining to a greater value chain orientation.<sup>287</sup> This move to pursue collective bargaining along value chains has a potential to alter the current structure of collective bargaining.<sup>288</sup>

While organising along value chains might be one of the solutions to the trade unions' dilemma of shrinking membership base, they have to be prepared for the possibility of an increase in inter-union conflicts or conflicts with other unions.<sup>289</sup> These conflicts in most cases have a possibility of breaking up unions and as a result further weakening their strength as opposed to having large numbers, which is what is needed for unions to be able to execute their mandate of fighting for better wages and working conditions for their members. The unions would have to come up with strategies to overcome fragmentations, they have to realise that diversity cannot be avoided; it has to be accepted and welcomed in order for them to reach desired goals.<sup>290</sup> Actual and potential trade union members can be encouraged to perceive common interests despite difference, and to negotiate the tensions which often exist between their own multiple social identities in a way which is compatible with collectivism.<sup>291</sup> South African trade unions during the Apartheid era were able to put their differences aside and fight apartheid, which was the common enemy to them, so they could still unite and fight for the common cause, which is the well being of workers.

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<sup>284</sup>Nowak P. *Building Stronger Unions : A Review of Organising in Britain* (2009) in G.Gall (ed) ' *Union Revitalisation in Advanced Economies : Assessing the contribution of union organising*'. Palgrave Macmillan London.

<sup>285</sup>Ibid.

<sup>286</sup>Bhorat H., Naidoo K., Oosthuizen M., and Pillay K. *Demographic, employment and wage trends in South Africa* (2015)(No. 2015/141) Wider Working Paper.

<sup>287</sup>South Africa's Future of Work Report to the ILO 2017.

<sup>288</sup>Fergus E. and S. Godfrey 'Organising and bargaining across sectors in South Africa: recent developments and potential problems'.(2016) 37 *ILJ* 2211.

<sup>289</sup>Ibid.

<sup>290</sup>Ibid.

<sup>291</sup>Hyman R. *Solidarity for Ever* (2004) in J. Lind, H. Knudsen and H. Jorgensen, eds, *Labour and Employment Regulation in Europe*. PIE-Peter Lang, Brussels.

Collective bargaining is used by employers and workers to resolve their conflicting goals, such as better working conditions and increased salaries for workers and more profits with minimum expenses for employers. However, this institution evolved through the years to become a means of transforming and regulating what occurs in the workplace.<sup>292</sup> Despite the importance of collective bargaining, the fragmented labour market and a shift from collective to individual employment contract has resulted in weakened union power.<sup>293</sup> This fragmentation is related to globalization and the integration of world economies.<sup>294</sup>

“In the industrial arena, trade unions provide a formal mechanism of collective representation, partly (though not totally) independent, to workers who are already organised collectively by the employer. Organizational structures are thus indirectly shaped by the capitalist division of labour and by the practices and preferences of their members’ employers. In the socio-political arena, unions’ goals and methods are likewise shaped, even if in some cases conflictually, in relations to the dominant institutional arrangements. In both respects, despite (usually sincere) professions of internationalism, their terrain of action is largely bounded by the contours of the national state.”<sup>295</sup>

In the era of globalization, trade unions are faced with the dilemma of organizing workers who are governed by dichotomous regulations, that is, workers working for multinational companies governed by regulations and policies of such companies, while at the same time having to abide by the legislation of the country in which they operate from. The question remaining is how can trade unions address this challenge of having to fit the policies of multinational companies into the legislation regulating labour relations and within which they operate.

Despite the challenges faced by unions, when strong enough, trade unions still have the capacity to bring about positive change for the workers. For example, COSATU is one example of trade union federations that have been very influential in the politics of South

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<sup>292</sup>John Grogan *Workplace Law* (2007) 9<sup>th</sup> edition 353, and John Windmuller (1987) ‘*Collective Bargaining in industrialised market economies; A reappraisal.*

Barbara Adair and Sue Albertyn ‘*Collective bargaining in the South African public sector- the emergence of sector based bargaining*’ (2001)21 *ILJ* 813.

<sup>293</sup>Wright Chris F. *what role for trade unions in future workplace relations* (2011)Acas Future of workplace Relations discussion paper series.

<sup>294</sup>Burda M. C and Dluhosch B. *Fragmentation, Globalization and Labour Markets.*(2002) In : Greenaway D., Upward R., Wakelin K.( eds) *Trade, Investment, Migration and Labour Market Adjustments.* The International Economic Association. Palgrave Macmillan, London.

<sup>295</sup>Hyman Richard *How can trade unions act strategically?* (2007)Transfer : European Review of Labour and Research, 13 (2) pp 193-210 ISSN 1024-2589 SAGE Publications.

Africa and the fight against apartheid<sup>296</sup> and can still be in a better position to fight policies that would not be beneficial to workers. This union movement and others' engagement on national issues at local level have influenced the way South African businesses and world of work is shaped through mass action and continued resistance to government and private sector demands, the unions have managed to change the actions and policies of government and private sector.<sup>297</sup>

## 4.6 Conclusion

The modern society or workforce is different from the traditional world of work. As Hyman notes, today the typical employee may live a considerable distance from fellow workers, possess a largely private domestic life or a circle of friends unconnected with work, and pursue cultural or recreational interests quite different from those of other employees in the same workplace. These changes in the way of working (and living) bring about the loss of many localised networks that support union membership.<sup>298</sup> Trade unions need to, therefore, change the traditional ways in which they have been operating by accommodating to all workers and not only focus on employees. According to Joseph Stiglitz,<sup>299</sup> they need to accept that there are likely to be structural changes in the economy that will change the nature of how people work, for example, that work can no longer be thought of only in terms of forty-hour week, four weeks annual leave and other traditional forms. Trade unions have to be more focused on the upcoming challenges to protect decent work for all workers<sup>300</sup>. Some unions are already changing their way of operation in order to accommodate any type of work arrangement. For example, the Media Entertainment and Arts Alliance in Australia, which represents artists and journalists, has a category of membership called 'Freelance Pro' that offers benefits to members while recognising that the work they do involve multiple employees and are in short time contracts.<sup>301</sup>

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<sup>296</sup>Buhlungu S A paradox of victory : COSATU and the democratic transformation in South Africa (2010) University of KwaZulu Natal Press. The future of work report.

<sup>297</sup>Ibid.

<sup>298</sup>Hyman Richard '*Imagined Solidarities : Can trade unions resist globalization?*' Global Solidarity Dialogue Available at [globalsolidarity.antenna.nl/hyman2.html](http://globalsolidarity.antenna.nl/hyman2.html).

<sup>299</sup>The Nobel prize winning economist, in the Australian Trade Union Opinion.

<sup>300</sup>The chief guest for the discussion forum on the trade unions and future of work which was held in Napal on the 30<sup>th</sup> July 2017.

<sup>301</sup>'The best way to prepare for the future of work? Join a trade union' Australian Trade Union opinion.

Trade unions are developed in the context of the industries in which they operate, within the standard employment relationship. The voices of workers are collectively represented to employers through collective bargaining within this context; therefore, unions represent specific categories of workers within a specific industry. They are mostly not in a position to accommodate the needs of those workers who are not employed in standard forms of employment. Unions need to employ new forms of organisational structures which would assist them to access, recruit and retain workers in atypical employment.

Trade unions would benefit by including the communities in their restructuring and make their membership base more inclusive. For instance, South African unions could use reciprocal community unionism as type of collective voice.<sup>302</sup> Reciprocal community unionism is based on the notion that unions can create relationships with community groups and together help each other improve local life as well as foster trade union growth.<sup>303</sup>

“Community organizations can assist unions in mobilising pressure, and perhaps generating resources, which can counteract the destructive impact of global competition and global corporations.”<sup>304</sup>

These types of organizations promote representation of all relevant parties by linking unions with communities. This kind of arrangement shifts identification of trade unions from employment relationship to more community involved thereby allowing for flexibility within the labour market and being useful in the informal sector.

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<sup>302</sup>Jane Wills and Melanie Simms (2001) ‘*Building reciprocal community unionism in the UK*’ at 66 Available at <http://one.sagepub.com/content/28/1/59> accessed on the 06th January 2018.

<sup>303</sup>Ibid.

<sup>304</sup>Richard Hyman ‘An emerging agenda for trade unions’ (2011) Labour and Society Programme Discussion Paper 98/1999 at 9.

## **Chapter five: Conclusion**

This dissertation has attempted to identify and understand the changes brought about by globalization and the impact of the Fourth Industrial Revolution on the trade unions and the world of work in general. In particular, what the future world of work might bring for the trade unions. It was found that the 4IR, like other industrial revolutions that came before it, have brought about changes in both the way work is conducted and in the way work relations are arranged. The advantages brought about by the 4IR were examined, as well as ways in which workers could benefit. Moreover, the dissertation looked at the current status of work in the context of South Africa, as well as the current and emerging forms of employment.

With respect to the discussion on the current status of trade unions, it was found that the labour force participation and the composition of the labour force is changing and the future world of work is going to be different. The level of trade union participation is steadily declining which can be attributed to many factors, including the growth of emerging non-standard forms of work and high unemployment rates brought on by changes in the global economy and labour markets. It was further discovered that the world of work is still dominated by gender inequality. A global view of women participation in the world of work revealed that the world still has more men than women in the better paying jobs. There is still a dichotomy in the sense that men still occupy higher paying positions than women, further entrenching the inequality in terms of pay between these two groups of workers.

Since the world of work is changing, it was discovered that trade unions also need to change the way they have been traditionally operating as a way of adapting to globalization and the 4IR. It is evident that the scope of what constitutes the world of work is changing and that the traditional workplace is transforming. The intense labour exploitation and the growth of job insecurity in industrialized labour markets have created the dynamics for a 'race to the bottom' or 'harmonizing down' of labour standards where labour rights of workers in the

globe are undermined by capital mobility and corporate power.<sup>305</sup> The dissertation therefore draws the conclusion that trade unions remain a powerful counterforce to the power of business and they should move with the changes by adopting strategies of organising *all* workers in all sectors of the economy, including the female workforce. Additionally, they should also widen their agendas to include other socio-economical issues which are of importance to workers.

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<sup>305</sup>Ross R. *Slaves to fashion : Poverty and abuse in the new sweatshops* (2004) Ann Arbor University of Michigan Press.

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