Centralised bargaining as a minimum wage fixing mechanism

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Summary

The purpose of this dissertation is to consider whether centralised bargaining, through bargaining councils, is a suitable mechanism for determining minimum wages in South Africa. In addressing this issue, the minimum wage fixing mechanisms currently available in South Africa, the impact they have on the labour markets and whether there is a need for reformation of our labour laws relating to the setting of minimum wages will be considered.

The dissertation focuses on the various philosophical perspectives on labour law, the international development of collective labour law, international wage-fixing mechanisms and the development of South African labour law from the Industrial Conciliations Act 11 of 1924 to the current Labour Relations Act 66 of 1995.

The current levels of collective bargaining available in South African, focusing on the establishment and functioning of bargaining councils, the extension of and exemption from collective agreements, as well as the use of collective bargaining to set minimum wages are discussed. The advantages and disadvantages of our current minimum wage fixing mechanisms are also discussed. For the purpose of comparison, reference is also made to wage fixing though sectoral determinations, although the focus of the dissertation is on collective labour law.

In the international comparison, the development and functioning of the Australian and French wage-setting regulations are discussed, as well as policies that could be considered for application in South Africa.

Collective bargaining, and in particular centralised collective bargaining, plays a significant role in South African labour law. Since South Africa does not have a national minimum wage, centralised bargaining remains the main form of fixing minimum wages, apart from sectoral determinations. In the conclusion and recommendations, possible solutions to the shortcomings in our centralised

bargaining system, as well as alternative means of setting minimum wages are considered.

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CHAPTER ONE

INTRODUCTION

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1. INTRODUCTION

The setting of minimum wages originated in the late 19th century in New Zealand and has since spread across the globe. It was introduced to prevent the exploitation of sweatshop workers, the majority of whom were women and youths: the need was generated by the disproportionate bargaining position of these workers.[1]

In South Africa, wage rates are set in one of two key manners:[2] either by the Minister of Labour – through sectoral determinations, or through collective bargaining. South Africa does not have a national minimum wage and employees are thus dependent on wage negotiations to set a realistic minimum wage.

Bargaining councils are partly established to facilitate collective bargaining and the setting of wage rates for a specific industry. In this dissertation the suitability of setting minimum wages through centralised bargaining in South Africa will be considered.

[1] Neumark and Wascher (2008) 1.
[2] See Chapter 6 below for a discussion on minimum wage setting in South Africa.

2. BACKGROUND

The International Labour Organisation (ILO) introduced standards regarding minimum wages in the 1920s in the hope that it would help alleviate the effects of the Great Depression.[3] The Minimum Wage Fixing Machinery Convention 26[4] was issued in 1928 with the main aim of preventing the exploitation of workers. Countries in which collective bargaining structures were well established, questioned the need to introduce minimum wage legislation, as wages were normally established through collective agreements.[5]

In later years, minimum wage mechanisms were also utilised to combat poverty in developing counties. The ideology behind minimum wages became a means to provide workers with the ability to earn a decent income and support themselves and their families. This philosophy ties in with the ILO's Decent Work Agenda.[6]

South Africa finds itself in the precarious position of simultaneously trying to overcome severe unemployment levels and economic division, whilst offering adequate protection for worker rights.[7] According to the current statistical figures, South Africa has an unemployment rate of 25.6%.[8] However, this figure is somewhat optimistic as it only takes into consideration those adults who are unemployed and actively looking for employment. Thus, it is more accurate to say that South Africa has a 25.6% job seekers rate.

In terms of section 51 of the Basic Conditions of Employment Act[9] (BCEA), the Minister of Labour may set certain sectoral determinations for those sectors not covered by a bargaining council. Before publishing a sectoral determination, the Director-General instructs the Employment Conditions Commission to investigate employment conditions within that sector.[10]

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[3] See the discussion in Chapter 3 below.
[4] Hereinafter Convention 26.
[5] Rodgers, Lee, Swepston and Van Daele (2009) 128.
[6] ILO Decent Work Agenda (1999).
[7] See Chapter 4 par 4 below for a discussion on unemployment in South Africa.
[8] StatsSA Quarterly Labour Survey, Quarter Two, 2013.
[9] Act 75 of 1997.
[10] S 54(3) BCEA. In making a recommendation, a number of factors must be considered in such an investigation, including: the ability of the employer to carry on his business; the cost of living; the

In terms of section 27 of the Labour Relations Act[11] (LRA), one or more registered trade unions and one or more employers' organisations may establish a bargaining council for a specific sector. The main functions of a bargaining council include facilitating collective bargaining and concluding collective agreements. These collective agreements are binding on the parties to the agreement as well as their members, as far as it relates to them.[12] Non-parties are not automatically bound by the terms of the agreement. The council may, however, apply to the Minister to extend the collective agreement to non-parties.[13]

3. BACKGROUND TO PROBLEM STATEMENT

In August of 2010, two Chinese-owned clothing factories were closed down in Newcastle due to their non-compliance with the minimum wage conditions set in the National Bargaining Council's (NBC) collective agreement. During the same time, 45 other factories were issued compliance orders by the NBC on threat of closure. As a result 43 factories closed down voluntarily due to an inability to meet the demands set by the NBC. The closures of these factories led to the loss of 1200 jobs.[14]

The incident in Newcastle serves to illustrate the possible shortcomings of centralised bargaining in South Africa. It is, however, important to understand the argument in favour of centralised collective bargaining. Centralised bargaining ensures equality in the workplace across the sector from small to large firms. Ideally, bargaining councils can also help develop small firms by providing access to human resources and industry support.[15]

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alleviation of poverty; conditions of employment and the likely impact of the proposed conditions on current or possible future employment.

[11] Act 66 of 1995.

[12] S 31 LRA.

[13] S 32 LRA. Small firms often divulge that they feel marginalised by collective agreements and are unsatisfied with the result. Larger firms have the advantage of experience and greater human resources and can thus state their case stronger than their smaller counterparts. Godfrey, Maree and Theron (2006) *ILJ* 745 and 749. Also see Hofman (2009) *Obiter* 200.

[14] Maree (2011) 21.

[15] Anstey (2004) *ILJ* 1831.

Centralised bargaining does, however, place certain restrictions on the flexibility of the labour market by the setting certain minimum conditions that are enforceable against any employer within the sector and area covered by the council. As the need for a more flexible labour market increases, centralised bargaining decreases.[16]

It is important to consider the possible shortcomings of centralised bargaining and the possibility of improving on enterprise-level bargaining. As noted above, South Africa has an extremely high unemployment rate, which cannot be overlooked when considering our labour legislation. Any legislation that may potentially serve as an obstacle in the improvement of these statistics must be scrutinised and adapted where necessary.

4. RESEARCH QUESTIONS

This dissertation aims to consider whether centralised bargaining, through bargaining councils, is a suitable mechanism for the determination of minimum wage. In addressing this issue, the minimum wage fixing mechanisms that are available in South Africa will be considered, as well as the impact that they have on the labour market and whether there is a need for reformation of our labour laws relating to the setting of minimum wages.

In addressing this issue three main questions will be considered:

1. Is the current formulation of centralised bargaining in South Africa an appropriate means for setting the minimum of wages?
   In answering this question, the following will be considered:
   - the use of extension of collective agreements as a means to set minimum wages; and
   - the viability of introducing an independent body as overseer of such extensions.

[16] Anstey (2004) *ILJ* 1830. See Brown (1995) *ILJ* 980, where he discusses the decrease in unionisation in Brittain, Japan and the United States between 1980 and 1995.

2. Should South Africa consider promoting decentralised bargaining more than the current status quo?
   In answering this question, the following will be reviewed:
   - the current legislative framework for enterprise bargaining; and
   - the advantages and possible disadvantages of improving on enterprise bargaining.

3. Should South Africa consider a national minimum wage?
   In answering this question the advantages and possible disadvantages of a national minimum wage will be addressed.

5. RESEARCH METHODOLOGY

This study will focus on an analysis of collective bargaining and sectoral determinations as tools to set minimum wages. The study will consist of a literature review of national and international publications.

The chapter outline of the study is as follows:

The purpose of Chapter 2 is to provide an overview of the development of collective labour law from its early beginnings in industrial and labour relations to its evolvement into formal legislation. The purpose of labour law is strongly rooted in its historic development and societies' economic evolution. As with any field of study, it is important to understand the foundations on which our current legislation is built.

This chapter will also set out the two broad perspectives on labour law, namely the economic perspective and the social perspective. These perspectives can be regarded as the two broader schools of thought which labour law is approached.

Chapter 3 provides a brief overview of the development of minimum wage regulation globally and it contains a brief discussion of international standards of minimum wage fixing. The setting of minimum wages is a common practice in most countries.

The purpose of this chapter is to consider the various forms of minimum wage fixing and the possible shortcomings in the South African system.

The purpose of Chapter 4 is to give an overview of the development of collective bargaining in South Africa from the Industrial Conciliation Act of 1924 to the current labour legislation. This chapter will also provide a brief overview of South Africa's unemployment conditions and the impact this has on its labour policies.

Chapter 5 will focus on the establishment and functioning of bargaining councils; the extension and exemption of collective agreements and the use of collective bargaining as a form of minimum wage fixing. The various levels of collective bargaining in South Africa will also be considered. This chapter will set out the collective bargaining mechanisms provided for in South African labour legislation and it will present a brief overview of the various levels of collective bargaining. As centralised bargaining is the main form of collective bargaining in South Africa, this form of wage negotiations will be discussed in more detail.

Chapter 6 covers South Africa's two main forms of minimum wage fixing: sectoral determinations and collective bargaining. In this chapter these two mechanisms will be discussed and compared. This chapter will also critically evaluate these two means of wage fixing as well as possible alternatives.

The purpose of Chapter 7 is to traverse the historical development and current legislative framework relating to the setting of minimum wages in Australia and France. Both aforementioned countries experienced extreme pressure from neoliberals regarding the reformation of labour law to allow for a more flexible labour market – a problem to which South Africa can relate. However, these countries have responded to these pressures in different ways and have, accordingly, produced different results.

Chapter 8 contains conclusions and poses certain recommendations. These recommendations will be based on the three research questions posed under paragraph 4 of this chapter.

CHAPTER TWO

THE PURPOSE OF LABOUR LAW

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1. INTRODUCTION

> Ours is an age of rapid change, unrest, and conflicting ideologies. Society is unsettled and individuals are apprehensive as groups of nations and organised groups within nations struggle for power and control over material resources and men's minds.[1]

The employment contract is founded on the common law principles of contract: it's concern is the hiring and letting of a person's productive power. Over time this relationship has evolved to meet the needs of an ever-changing environment and to accommodate the demands placed on it by collective bargaining.[2] The principles of

[1] Lester (1951) 3.
[2] Le Roux in Malherbe and Sloth-Nielson (2012) 231.

the common law contract very soon became insufficient to address the need for social justice within an employment relationship.[3]

The form that labour law should adopt has always been a topic of great debate. Traditionally, the purpose of labour law was to address the imbalance in bargaining positions between employer and employee.[4] In time, the purpose of labour law has evolved to include the enhancement of a person's employability and access to the workplace.[5]

The purpose of labour law is found when its historical development is examined. In his discussion on the historical context of labour law, Quinlan notes that a debate around the purpose of labour law often occurs within a narrow historical context. The factors that influence labour law, as well as the factors influenced by labour law, are often excluded from the discussion.[6] However, labour law should not be taken out of its historical context, as it is in its development that the purpose of labour law is to be found.

The purpose of this chapter is to then provide an overview of the development of collective labour law, from its early beginnings in industrial relations to its evolvement into formal legislation. The purpose of labour law is strongly rooted in its historic development and societies' economic evolution. As within any field of study, it is important to understand the foundations on which our labour law framework is built.

This chapter will also set out the two broad perspectives on labour law, namely the economic perspective and the social perspective. These perspectives can be regarded as the two broader schools of thought which labour law is approached.

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[3] See Langille in Davidov and Langille *eds* (2006) 23. Langille state, somewhat poetically, that "labour lawyers see the development of labour law … as one of the elaborations and remedying of a series of disenchantments with this contractual reality."
[4] Kahn-Freund (1977) 8.
[5] Benjamin in Le Roux and Rycroft *eds* (2012) 21. Benjamin notes that these factors have become increasingly important in the light of South Africa's high levels of unemployment.
[6] Quinlan in Arup, Gahan, Howe, Johnstone, Mitchell and O'Donnell *eds* (2006) 22. A further issue raised by the author was the lack of debate on the historical context of the "trifurcation" of labour law into legislation that covers employment contracts, minimum standards and collective labour law. See Fudge in Davidov and Langille *eds* (2011) 121.

2. HISTORICAL DEVELOPMENT OF LABOUR LAW

2.1 Introduction

As with most laws, labour law was not birthed from a single event but was developed over time. Labour legislation was formed out of a need to regulate the parameters within which labour relations should be conducted. Labour law, or employment law, consists of various rules and principles that arose from common law practices.

Labour law can be defined as the setting of rules and regulations that governs the various aspects of an employment relationship, which, in turn, is founded on the exchange of personal services for remuneration. In the broader arena, labour law includes the formation and functioning of trade unions, employers' organisations and the conclusion of collective agreements.[7]

As a whole, labour law encompasses more than the sum of its parts. Although it is, fundamentally, based on the law of contract it also includes aspects of public law – due to its relevance in terms of social policies.[8] Labour law grown and evolved has since its inception to survive in its assigned climate. In the 1950s, influenced by the writings of Sir Otto Kahn-Freund, labour law become a social philosophy and its impact on both business and the working individual was heatedly debated.[9]

The establishment of collective labour law has its roots in the development of industrial relations.[10] Although industrial relations and labour law overlap to a large extent, they are not synonymous. Industrial relations have, over time, become more focused on collective bargaining, trade unionism, labour management and the collective relationship between employment parties.[11] Although labour law includes

[7] Deakin and Morris (2009) 1. See Grogan (2009) 1.
[8] Deakin and Morris (2009) 1. Van Niekerk, Christianson, McGregor, Smit and Van Eck (2012) 3. Van Niekerk *et al* state that the subject matter of labour law "is complex and intertwined body of law drawn from a number of diverse legal concepts."
[9] See the comments in Davies and Freedland (1983) 1-11, where the authors provide a brief introduction to Kahn-Freund's *Labour and the Law*.
[10] See Bendix (2010) 4 for a discussion on the distinction between "labour relations" and "industrial relations". Bendix argues that although certain technical distinctions between these two concepts are often provided, they are, in reality, the same thing.
[11] Kaufman in Whalen *ed* (2008) 31.

these aspects, it is more concerned with the rules and standards governing these relations.[12]

Industrial relations has – since its humble beginnings in the factory system – developed into a formal, organised system of labour relations. As the scope for conflict increased, so did the need for management to effectively communicate with their workers and vice versa.[13] The regulation of this conflict is provided by labour legislation. Labour law is the product of the industrial revolution.[14]

To fully understand the purpose of labour law, it is important to view it in its historical context: as a law birthed out of historical struggles and victories.[15] The roots of labour law are to be found in the development of industrialisation and the introduction of the factory system. Industrial relations play a key role in the formation of collective labour law and is therefore vital to my study.[16]

2.2 A Move Towards Industrialisation

Weiss sates that "[l]abour law is a product of industrialisation".[17]

During the Middle Ages, labour was mainly agricultural and performed for the benefit of the immediate family or the owner of a piece of land. The move towards industrialisation was a result of various factors, including the incorporation of modern science in production, the expansion of economic activity due to larger consumption, migration and the increase of the phenomenon of paying capital for labour.[18]

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[12] Bendix (2010) 98. Bendix notes that, in light of the industrial history, it is evident that a self-regulated labour market is not void of the exploitation of workers and that, due to the often desperate circumstances of workers, they are forced to accept conditions that are wholly unfavourable.
[13] Venter, Levy, Conradie and Holtzhausen (2009) 7.
[14] Hepple in Hepple *ed* (1986) 12.
[15] In Hepple in Davidov and Langille *eds* (2011) 31, Hepple refers to a book published in 2009 called *The Transformation of Labour Law in Europe: A Comparative Study of 15 Countries 1945-2004* by Hepple and Veneziani. Hepple notes that the aim of the book was to analyse labour law "as part of an historical process – as a motion picture rather than still photographs."
[16] See Hepple in Davidov and Langille *eds* (2011) 36 in which Hepple points out that the "making" of labour law is found in the outcome of the industrial revolution. Hepple notes that, in view of the historical background of labour law, it is evident that labour and economics are inseparable.
[17] Weiss in Davidov and Langille *eds* (2011) 45.
[18] Deane (1979) 1.

John Winchcomb, a famous cloth merchant in 16th century England, was known for his innovative wool-weaving workshops.[19] During this time a number of cloth merchants followed the same approach as taken by Winchcomb, which resulted in the creation of greater competition for small cloth manufacturers. Consequently, the English parliament placed certain restrictions on these weaving workshops in order to, once again, even the playing field.[20] Although these were humble beginnings for the greatly industrialised society of today, it planted the seed for future industrial development and industrial relations.

The build-up to the industrial revolution in the late 18th century can be traced back to the Middle Ages. The industrial revolution of the 18th century was not a sudden singular event, but served rather as the breaking point of a phenomenon initiated in the 16th century.[21]

Prior to industrialisation, societies lived fairly modest lives. Save for those engaged in service or functioning as merchants, the working class consisted mainly of agricultural workers or traditional crafters.[22] The fulfilment of basic living needs – rather than profit – was the driving force for labour. In fact, profit-making was seen as dishonourable.[23]

By the 1700s, society started to accept that man was "necessarily greedy for gain", and, as a result, in order to provide room for commercial expansion, any laws that prevented such expansion were to be eliminated.[24] The 18th century saw the rise of the working class, or Proletariat, and the birth of the industrial era. The first industrial revolution took place around 1780 in Britain and later spread across a number of

[19] Mantoux (1961) 34.
[20] *Ibid* 35. A person may, for example, not have more than one wool loom in their house at a time, nor may they let or sell wool looms for profit. The concern regarding "overly productive" industries continued for some time. In France, during 1666, the button-making guild succeeded in passing a law that forbade tailors from making cloth buttons. This law even went so far as to allow for the arrest of a person wearing cloth buttons. See Heilbroner (1969) 27.
[21] Nef (1940) 22. See Heilbroner (1969) 19-37 in which he gives an account of the development of the industrial revolution from 1305 France to the industrial revolution in the 18th century.
[22] Bendix (2010) 7.
[23] Heilbroner (1969) 20 playfully relates the story of a Mr Keayne, charged with the heinous crime of making over sixpence profit on the shilling. After the court finally decided to let him go on a fine of two hundred pounds, Mr Keayne confessed in tears that he had a covetous and corrupt heart.
[24] Bendix (2010) 7 notes that this change of moral views did not occur overnight, but that a number of factors, such as colonial expansion, increased scientific curiosity and greater mechanical inventions influenced it over time, aiding in the greater production of goods.

continents.[25] The revolution had a significant impact on the perceptions of economic order, society and working life in general.

The largest catalyst for the industrial revolution was the introduction of the factory system, which focused on increasing and accelerating production in order to increase profits.[26] This system changed the way products were manufactured and gave rise to significant social change that is still very much a part of modern life today.[27] Manual labour and modern science were brought together to decrease expenditure and increase output. Mass production required labour to be divided into singular steps in order to form production lines – large numbers of workers would perform menial tasks within a larger chain of production.[28]

Adam Smith's point of view in *The Wealth of Nations* impacted greatly on the development of economic philosophy: many view Smith's writings as the foundation of modern economics. Smith's book was first published in 1776, during a time when industrialisation was in its earliest, but very promising, beginnings.[29] According to Smith, a nation's labour is the source that supplies it with the necessities of life. Labour is seen as a means to provide the members of a particular society with the produce it needs.[30] Smith notes that the needs of a society dictate the need for labour and the size of the manufacturing industry.[31]

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[25] Hepple in Hepple *ed* (1986) 13.
[26] Mantoux (1961) 25-26. A further very important aspect of the factory system was the use of machinery, which not only replaced labour, but also required labour in order to maintain the production process. Landes (2003) 41 states that, during the industrial era, the factory system provided the means for profit to outgrow population. In other words, for the first time the increase in profitability of labour was not a result of an increase in population, but rather as an increase in the ability to produce.
[27] Mantoux (1961) 25 provides a detailed overview of the British industrial revolution and the various aspects that have influenced modern labour relations and laws.
[28] For a more detailed discussion on the division of labour, see Smith (2003) 9-21. Mantoux (1961) 25. The concern of the factory owner was not to provide income to the worker, but rather to ensure the increase in production. In a sense, the workers were seen as part of the necessary machinery used to operate and oversee the factory. See Smith (2003) 11, in which he provides a detailed description of the manufacturing of pins, to illustrate the division of labour. See further Bendix (2010) 7.
[29] See the introduction to *The Wealth of Nations* by Krueger in Smith (2003) xi.
[30] Smith (2003) 1.
[31] *Ibid* 10. Smith states that in an industry that supplies the "small wants" to a "small number of people", it is easy to set up production in one single workhouse. But for larger manufacturers, he notes, it becomes impossible to do so and thus labour must be divided into small parts so as to allow for sufficient productivity.

These humble beginnings of industrialisation set the tone for the future development of collective labour. It is in the understanding of man's never-ceasing, ever-growing desire for gain that caution is raised as to the measures taken to achieve such ends. Industrialisation is not the result of humble living, but the consequence of a hunger for economic power. The only real defence that the working class has against such hunger is their labour: the collective offering and withholding of labour.

2.3 The Development of Collective Labour Law

Although labour law has changed and adapted over time, for a large part of the late 19th century and most of the 20th century, labour law was mainly built on collective issues.[32] The term "collective bargaining" was first used by Beatrice Webb (then Potter) in 1891. The term is again used in Webb's account of the development of industrial democracy.

Webb mentions that the earliest example of established trade unionism was that of the collection of journeymen-tailors in London and Westminister. In 1720 the masters of these journeymen wrote a complaint to parliament in which they noted that the journeymen combined in order to demand raised wages and reduced working hours. After the complaint by the masters, law prohibited combinations by journeymen, but the journeymen continued to organise, sometimes informally. Despite further prohibitions set by the law against such combination, the journeymen were adamant in their endeavours.[33]

Webb notes that the introduction of the factory system accelerated the formation of trade combinations.[34] With the factory system came the separation of the worker the

[32] Arthurs in Davidov and Langille eds (2011) 14.
[33] Webb (1911) 27. Webb argues that from all the examples found prior to the 18th century of actions similar to those taken by trade unionism, none met the description that can be regarded as true trade unionism; the combination of wage-earners against their employers. Webb further states that, although the argument for it has been made previously, no evidence could be found of a trade union formed from any of the established Craft Guilds.
[34] Webb (1911) 4. One of the trades where the formation of unions was ideal, proved to fail due to the greed of human nature. Webb notes an interesting case of "piecers" who assisted the cotton-spinners at the mules. Piecers were often as skilled as the cotton-spinners themselves but were paid considerably less. Although the conditions for unions were present, the piecers aimed to ultimately become cotton-spinners themselves and have their own piecers, whom they would then pay dismal

from ownership of his produce. In other words, the worker was no longer concerned with the profit made by the enterprise, as his wages were not dependent on his output but rather on agreed rates; subsequently the formation of trade unionism originated in this divorce between capital and labour.[35] He states that:

> [t]he positive proofs of this historical dependence of Trade Unionism upon the divorce of the worker from the ownership of the means of production are complemented by the absence of any permanent trade combinations in the industries in which the divorce had not taken place.[36]

The conflict of labour arises out of the desire of the master to give as little as possible, and of the labourer to gain as much as possible.[37] The triumphant outcome of the challenge between these two parties usually lies with the employer, as the employer can forego the need for labour much longer, whereas a labourer, due to his need for food, is usually unable to outlast the employer.[38]

The power allocated to the law in regulating labour markets has proved to be limited. Standards set out in legislation do not necessarily translate to results in the workplace. Acts of Parliament may improve some conditions but the labour market is ultimately the dominant force in the setting of employment conditions. The law's ability to effectively restrain the power of management depends on the extent to which employees are organised. In order to actually assist individual employees, legislation must provide the labour market with social power. Kahn-Freund notes that the relationship between collective labour parties and an employer is a relationship of power, as both parties have bargaining powers.[39]

The coming of age of labour law can be regarded as the process whereby historical circumstances have cumulated in the setting of a body of rules and practices

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wages. See further Webb (1911) 7. A further example of early trade unionism is found in the trade of woollen-workers during 1717.

[35] Webb (1911) 34-35.

[36] *Ibid* 35. Landes (2003) 2 describes the factory system as a process whereby different parties participate in the production chain and where the employer hires the labourer to produce for the employer, thereby removing the worker's capacity to produce his or her own income and bringing the worker to a position where he/she is bound by the wages offered by the employer.

[37] Smith (1776) 94.

[38] *Ibid* 96.

[39] Kahn-Freund (1977) 9.

grouped under a particular label referred to as labour law.[40] In order to protect vulnerable workers and mediate collective labour conflict, it was necessary to bring the "rules of law" into the workplace. Self-regulation was seen as essential, but it was also accepted that it would not be possible without some prescriptive laws.[41]

The modern concept of labour law came about as a result of the development of industrialisation, debasement of women and children, unemployment and poverty, as well as the expansion of collective labour. In the late 1800s, German scholars identified the need for state-regulated labour within the framework of self-regulation. The idea was not to "police" labour parties but rather to provide a mechanism that could be used and adapted to self-govern the industry.[42]

In 1954 Kahn-Freund strongly supported the concept of collective *laissez-faire*, which is French for "allow to do" or "non-intervention". Collective *laissez-faire* was based on the development of British labour laws, where legislature followed a hands-off approach, allowing the industries to self-regulate. Collective *laissz-faire* denotes that employers and trade unions are able to self-regulate and that government plays a singular role in collective bargaining. To allow for collective bargaining to operate effectively, the legislature had to ensure that common law principles restricting the freedom to engage collectively were eradicated.[43] Although the conditions of employment were determined collectively, the recognition of the rights of these collective entities had to be regulated.[44]

The need for labour law is found on the supposition that law needs to address the imbalance in the bargaining powers, that labour should *not* be regarded as a commodity, that employees are dependent on their employer and that their human

[40] Arthurs in Davidov and Langille *eds* (2011) 16.
[41] Fudge in Davidov and Langille *eds* (2011) 124. Fudge notes that collective bargaining was the preferred method to restrict "commodification" of labour. In some countries, such as the United States and Canada, labour law was limited to the law that provided a framework for collective labour relations and did not contain provisions relating to minimum employment standards.
[42] Hepple in Davidov and Langille *eds* (2011) 32. Hepple notes that it was during the 1919 Weimar constitution that social and labour rights were recognised.
[43] Davies (2009) 4.
[44] *Ibid* 3. See Fudge in Davidov and Langille *eds* (2011) 122.

dignity has to be protected.[45] The perspective on labour law takes its course from this reasoning in acknowledging the necessity for labour regulation; it focuses on the approach that must be adopted in the setting of these laws.

It is submitted that Kahn-Freund's principle of collective *laissez-faire* must be accepted as correct. What the historical development of collective labour law illustrates well, is that organised labour is the one force that can compellingly demand, confront and enforce labour conditions on the employer. The co-dependent relationship between an employer and his or her employees provides the ideal climate for self-regulation. However, as is the case between a husband and a wife, legislation is often necessary to place certain parameters within which the relationship must function, providing protection for both parties.

Following the birth of a new discipline in law comes the debate as to the best approach in the development thereof. Due to its significant economic implications, labour law in particular attracts considerable attention. The economic perspective may hold all the money, but the social perspective holds all the cards.

3. PERSPECTIVES ON LABOUR LAW

3.1 Introduction

In order to properly set out the perspective on industrial relations or labour law, it is important to define these concepts. Even though industrial relations and labour law overlap to a large extent, they are not synonymous. Industrial relations have gradually become more focused on collective bargaining, trade unionism and labour-management.[46] Although labour law includes these aspects, it focuses more specifically on the rights of employees, setting out the rules and standards by which the employer-employee relationship must be conducted.

[45] Weiss in Davidov and Langille *eds* (2011) 46. Weiss points out that these assumptions upon which labour law is based are as relevant today as they were in the past. For this reason, he argues, there is no need to shift the paradigms of labour law to fit into modern society.
[46] Kaufman in Whalen *ed* (2008) 31.

As labour laws, in particular collective labour law, are predominantly based on the needs created by industrial relations, it is important to consider briefly some of the main perspectives on industrial relations. Furthermore, the perspective on labour law is closely related to those on industrial relations.

3.2 Industrial Relations

Salamon states that there are three broadly accepted theories for industrial relations, namely: unitary, pluralist, and Marxist.[47]

The unitary perspective holds that a specific organisation has a common interest between the management and the workers and that the decisions, made by management for the benefit of the organisation, are to the advantage of the workers.[48] The unitary perspective therefore argues that conflict within the workplace is unnecessary as there is a common goal and consequently no room for an "us versus them"-standpoint.[49] Under the premise of the unitary perspective, trade unions are perceived to be antagonists in the proper management of the organisation, trying to embezzle the loyalty of the employees towards the union.[50] Thus, collective bargaining is endured rather than welcomed, as it is seen as an extension of the trade unions' power to influence.

The unitary perspective has for the most part lost its support – although it is starting to gain traction again in the ideology of "joint decision making". This may be attributed to the increased competitiveness of industries in the global economy.[51] Management and employees are forced to increase productivity in order to ensure that the organisation remains viable. Salamon argues that even during a time when

[47] Salamon (2000) 5.
[48] Finnemore (2009) 6.
[49] Salamon (2000) 5. The unitary perspective holds that conflict within the workplace is frictional and not structural, in other words conflict is based on personality clashes or poor communication. See also Smith (2009) 326.
[50] Salamon (2000) 7. See Benix (2010) 23, in which she relates the approach of unitarianism to Smith's "common good"-theory where the parties within a certain enterprise must strive for the common good, thereby making collective labour unnecessary.
[51] Provis (1996) *BJIR* 475.

the unitary perspective received little recognition it remained alive in the subconscious minds of management under the "right to manage".[52]

The pluralist perspective argues that any organisation will have groupings of individuals with similar interests, whether formally or informally, in order to reaffirm certain objectives. In essence pluralists strongly advocate collective labour and self-regulation. Their stance is that government cannot be the final authority on industrial relations, as within industrial relations itself separate groupings exist, each with their own unique interests.[53] The pluralist perspective claims that the two interest groups, namely employer and employees, are not polar opposites and disputes can therefore be resolved through structured negotiations. Each party must be willing to "limit" their interests as far as they see equitable to do so in order to ensure continued collaboration.[54] Even though there may always be an imbalance of power, the best way to counteract it is through collaboration in the form of unionisation.[55]

The last perspective on industrial relations is the Marxist perspective, or the "[r]adical approach".[56] The Marxist perspective focuses on workers' position in a capitalist society: class conflict in the fight to access economic power plays a significant role. Although the Marxist perspective is focused on the protection of labour and the need to regulate industries – as is evident in the pluralist perspective – the Marxist perspective holds that a mere acknowledgement of bargaining power does not grant labourers access to equality in the workplace. The Marxist perspective is more about on the effectiveness of collective bargaining; it notes that trade unions are merely tolerated and not a real power against management.[57]

Even though none of these perspectives are absolute, each contains some element of truth – some perhaps more than others. In most developed societies the pluralist

[52] Salamon (2000) 7.
[53] Clegg (1975) *BJIR* 309. See also Salamon (2000) 8. See Bendix (2010) 24.
[54] Finnemore (2009) 7. Finnemore expounds on this point in that a compromise will not always be possible in all circumstances and that a dispute will often be resolved by the "test of strength resulting in the emergence of a winner and a loser". The caution presented by pluralism, however, is that collective negotiations will not survive if the one party always gains at the expense of the other. For this reason the stronger party might need to relinquish some of its power in certain instances in order to safeguard the continued existence of the relationship.
[55] Bendix (2010) 24. Salamon (2000) 8.
[56] See Bendix (2010) 24.
[57] Salamon (2000) 9.

perspective is correctly preferred.[58] However, the unitary perspective may provide some understanding of an employer's desire to manage, and should thus not be completely disregarded.

3.3 Labour Law

3.3.1 Introduction

In the words of Kahn-Freund, the purpose of labour law can be summarised as being "to regulate, to support, and to restrain the power of management and the power of organised labour".[59] This ideology correlates well with the pluralist perspective of collaboration in problem solving.

Due to the superabundance of labour, workers are more likely to accept conditions that are wholly unfavourable to them in return for some form of remuneration. The justification for labour law lies in the oversight in the law of contract regarding the need to balance the bargaining position of the relevant parties. The notion has developed under the premise that, in order to ensure that unscrupulous employers do not exploit workers, the state has to introduce labour-regulation mechanisms.[60] This can either be by way of direct legislative regulation or by the provision of rights, in order to empower the industry to regulate itself: such as the right to organise and the freedom to associate.[61] In the latter instance the legislature's function is more indirect in providing for a framework in terms of which various bargaining units may be formed and in which they might function.

The power of law is not to be undervalued. As Kahn-Freund states, it has the "capacity effectively to direct the behaviour of others".[62] According to Kahn-Freund it is the duty of the law to reveal the inequality or subordination that is present behind a

[58] Bendix (2010) 25. Finnemore (2009) 7.
[59] Kahn-Freund (1977) 5.
[60] See Arthurs in Davidov and Langille *eds* (2011) 27.
[61] Kahn-Freund (1977) 5.
[62] *Ibid* 3.

contract of employment. The purpose of labour law is therefore to regulate the inherent power of management and organised labour.[63]

Over time various perspectives on labour law developed. Van Niekerk *et al* state that there are two broad perspectives on labour law: the free-market perspective and the social-justice perspective.[64] Although there are other perspectives, it is submitted that the majority can be placed in one of these two categories. For purposes of this study I will use the term "economic perspective" with reference to the free-market view.

3.3.2 Economic Perspective on Labour Law

As protection afforded to employees and regulation of the industry increased, either through legislation or collective bargaining, so did concerns as to the economic consequences thereof. Employers were, and still are, apprehensive of the financial implications of wage increases and the consequences of industrial action on the productivity of the enterprise. These concerns have not since subsided but have rather attracted further concerns – such as the impact of labour regulation on job creation.[65]

Within the economic perspective there are various schools of thought, which Davies submits can be broadly divided into two categories: neoclassical theory and new-institutional theory.[66] Neoclassical economists favour a "self-equilibrating" labour market in which individuals pursue their own reasonable interest within a free market.[67]

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[63] Kahn-Freund (1977) 4. See Le Roux in Malherbe and Sloth-Nielson *eds* (2012) 237. Le Roux states that this view by Kahn-Freund suggests that, if labour law successfully counteracts the imbalance in the bargaining powers, "workplace justice and industrial peace should follow".
[64] Van Niekerk, Christianson, McGregor, Smit and Van Eck (2012) 6.
[65] Davies (2009) 20.
[66] *Ibid* 25.
[67] Peck (1996) 46. Hyde in Davidov and Langille *eds* (2006) 55, draws a correlation between labour and commodity. This comparison might have some merit with reference to unemployment. Hyde notes that when a seller of a commodity is faced with poor demand for the commodity, the seller either stops selling or stores the commodity until the market demand increases. The price of the commodity is also closely linked to the demand. Similarly, in the labour market, the person selling his labour is forced to reduce its asking price if the demand for labour decreases.

Neoclassical economists hold the view that labour should be regarded as any other commodity: that the importance of supply and demand would regulate the industry and that no outside intervention should be allowed to disrupt the system.[68] Smith explains this approach by stating that "the demand for men, like that of any other commodity, necessarily regulates the production of men".[69] In other words, the demand for labour must determine the supply of labour.

The neoclassic economists are strong supporters of the freedom of contact. They argue that if an employee is willing to work for the conditions set by the employer, then it is the employee's prerogative to do so. The law should not dictate to employees what conditions are suitable to them.[70] What the neoclassic economists fail to take into account, however, is the willingness of a desperate person to sell himself short. The neoclassical approach may be applicable in the case of professionals or highly skilled workers since their shortage in the labour market makes them a sought-after commodity, tipping the balance of power in their favour.

Advocates of the neoclassical approach often argue that minimum wage arrangements cause unemployment. The advocates of this theory notes a contradiction in the setting of minimum standards in that it causes more harm to those it aims to protect.[71] Neoclassical economists seek a flexible and deregulated labour market, free from outside interferences.[72] This perspective relies on the "invisible hand" of the market that will automatically tip the scale to find the equilibrium between supply and demand.[73]

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[68] Pocock in Isaac and Lansbury *eds* (2005) 45-46. Pocock points out that the neoclassical labour-market theory focuses on the employee's ability to supply labour and completely disregards the person who is supplying it.

[69] Smith (2003) 112. The ideology of neoclassical economists is linked to the approach taken by neoliberals. Neoliberals, however, focus more on the need for flexibility in the labour market. However, the distinction between the two is marginal and, for purpose of clarity, neoclassical economy will be used. Creighton in Barnard, Deakin and Morris *eds* (2004) 265, observes that countries in pursuit of neoliberal idealism have stepped back from the International Labour Organisation's standards due to the conflict with their own idealisms.

[70] Davies (2009) 28.

[71] Mundlak in Davidov and Langille *eds* (2011) 324. Neoclassic economists support minimising the regulation of the labour market and allowing the institution to "find its own level of real social support". See also Du Toit (2007) *ILJ* 1405 and Hepple (1995) *ILJ* 321.

[72] Peck (1996) 2.

[73] Finnemore (2009) 2.

Hayek criticises the unions and submits that society has been placed under the control of unions due to the wide array of powers bestowed on them.[74] Hayek argues that the interference has rendered the market ineffective as it has cancelled out the natural balance created by a competitive structure.[75] He forcibly approach did not go unheard and was picked up by a number of government policy makers; this formed a foundational part of the Thatcher government's labour policies in Britain.[76]

Should one equate the labour market to the basic principles of economics, the issue of supply and demand raises a number of concerns. The supply of labour by the employee and the demand for labour by the employer takes on a different form in light of the inherently personal nature of labour supply. The price or wage paid for the supplying of labour is not the only consideration: employees also consider job security, prospects of promotion, working conditions, social benefits and other relevant factors.[77] Due to the personal nature of labour, the remuneration alone is not the only consideration taken into account by an employee.[78]

The second theory introduced by Davies is that of the new institutional economists. The new institutionalists believe that efficiency cannot be achieved through an unregulated market, as the notion that "everyone has perfect information" is not applicable to the real world. They argue that the market must be regulated to overcome market failures.[79]

The new institutional economists disagree with the neoclassical theory that the market will be able to achieve efficiency if it remains unregulated. They argue

[74] Hayek (1960) 267. Countries such as the United Kingdom and Australia have in the past adopted a number of neoclassic policies. See Cooper and Ellem (2007) *BJIR* 532.
[75] Hayek (1960) 272-273.
[76] Smith (2009) 339. See Hepple in Davidov and Langille *eds* (2011) 38, in which Hepple compares the British and French governments during the 1980s. Hepple notes that Britain followed a very conservative approach to the economic downturn, which placed collective labour on the chopping block. France, during the same time, adopted a socialist approach, which saw the strengthening of labour laws. Although no clear link between the labour policies and the economic climate of the country can be drawn, the British government accepted that they had "won" the economic battle and thus continued their support of the neoclassic labour market. See Fredman in Barnard, Deakin and Morris *eds* (2004). Fredman points out the contradiction of a neoclassical state: the law had to interfere to prevent the natural market regulation. The author refers to the Thatcher regime in which the state had to interject in order to place a halt to the natural expansion of the trade unions.
[77] Davies (2009) 24.
[78] *Ibid.*
[79] *Ibid* 29.

instead that the law can assist the market to avoid certain weaknesses by providing better solutions to common problems: they perceive an unregulated labour market to be filled with various imperfections, which lead to inefficiencies. [80] Deakin[81] uses the example of minimum wage to illustrate this point: if employers are free to set minimum wages below the market-clearing rate, workers are not incentivised to offer their labour and consequently labour supply diminishes. Therefore, if wages are set closer to the market-clearing rate by way of statutory regulation or other means, it will impact positively on wage and employment levels, providing the employer with additional labour.[82]

The economic argument often emphasises that, in a global economy, the lower the regulated labour cost, the more attractive the country will be to foreign investors – thus improving the demand for labour and leading to increased wages as well as better working conditions.[83]

Globalisation impacts the labour market in that goods can be produced on a global scale without regard to country borders. Similarly, labour can also be obtained elsewhere. For example, a company in the United Kingdom may outsource certain parts of its services to another country where labour is considerably cheaper.[84]

3.3.3 Social Perspectives on Labour Law

Hepple states that:

> [t]he temptation for labour law scholars is to focus their energies on developing an ideal theory of labour rights or social justice. But any theory is sterile unless we first try to understand why real employers, workers, politicians, and judges act as they do in practice. Labour law is not an exercise in applied ethics. It is the outcome of struggles between different social actors and ideologies, of power

[80] Davies (2009) 31. One of the possible solutions is the regulation of dismissal law. In order to ensure job security, certain provisions should be in place to ensure that employees are provided with job security and are consequently more motivated to produce better results.
[81] Deakin in Davidov and Langille *eds* (2011) 156.
[82] *Ibid* 160. Deakin points out that an essential part of a new institutionalist approach to labour regulation is that parties responsible for setting standards, or minimum wages, must be well informed in order to ensure that their influence in the labour market does not tip the scale too far in the opposite direction.
[83] Hepple in Davidov and Langille *eds* (2011) 34.
[84] Davies (2009) 26.

> relationships. Labour laws are used by people to pursue their own goals, and sometimes they need rights such as to a minimum wage or to freedom of association simply in order to survive.[85]

He continues that there has been a shift in the perception of labour law from a "protective" system of law to a "rights" based system. He argues that the focus on the "rights" of labour law is often, and progressively, used as a means to address inequality in bargaining powers.[86] Hepple notes that the link between labour and human rights is essential and that in many instances human rights have paved the way for labour rights – for example the rights to equality of minorities.[87]

The slogan "labour is not a commodity," which was first used in the 1944 ILO Philadelphia Convention, is often quoted to distinguish labour agreements from an ordinary commercial contract.[88] Due to the human aspect, and the fact that a person's dignity is involved, labour cannot be regarded as just a product that one buys in order to fulfil a function. The slogan "labour is not a commodity" highlights the human aspect of labour and restore its inherent personal nature.

Collins states that this slogan provides a paradox as it "asserts as a truth what seems to be false".[89] In essence, an employer buys labour like he does other commodities: in order to start a business the employer needs to acquire certain objects and materials to produce a product, and labour is often one of the ingredients needed to succeed in producing the desired result.[90]

The relationship between employer and employee is based on an agreement that the employee will hire out his time to the benefit of the employer in exchange for wages. This agreement takes on the form of a contract, which creates rights and duties, much the same as when buying a commodity. It is due to these similarities that

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[85] Hepple in Davidov and Langille *eds* (2011) 30.
[86] *Ibid* 34. See Benjamin in Le Roux and Rycroft *eds* (2012) 22. Benjamin notes that although the inequality in the employment relationship is generally present, it is not always true to the same degree. Some employees, especially those that are highly skilled, may be able to enforce their desired demands on the employer.
[87] Hepple in Davidov and Langille *eds* (2011) 34. Hepple further provides that in recent years the focus of labour rights has been on the individual and not on collective labour groups. The recognition of the right to freedom of association serves as an illustration of this.
[88] Fudge in Davidov and Langille *eds* (2011) 122.
[89] Collins (2010) 3.
[90] *Ibid*.

Collins correctly argues that labour, to some extent, can be treated or regarded as a commodity.[91]

Collins asserts that the human aspect of labour law necessitates that labour cannot be regarded as a commodity. He expounds:

> [w]orkers are compelled by economic necessity to comply with a system of production that tends to treat them like commodities, yet within that system they seek and often find recognition for their dignity and humanity.[92]

There can be no argument against the fact that within the social perspective of labour law the role of human rights law is the guiding principle. Rights such as equality, dignity and economic freedom are all part of the view taken by socialist thinkers. Correctly so, as to assume that a capitalist society will naturally place the interests of the workers above their own, is idealistic at most.

The imbalance of bargaining power is inherent in an employment relationship. Langille notes that labour laws' response in this regard follows closely those found in consumer protection laws: the protection of the "weaker party". To this he adds that the intervention by legislation to remove any obstacles for collective bargaining is a procedural device.[93] For substantive intervention legislation needs to set certain minimum standards that are regarded as fair and just.[94]

The assumptions made by the neoclassical economists fail to realise that the labour market scale is not balanced; it is not an even or a fair scale. Labour is not a commodity and economic theories that may be relevant and true of commodities therefore cannot be applied to labour.[95]

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[91] Collins (2012) 3.
[92] See Block (1990). Economic theories on labour law are often criticised for paralleling labour, capital and raw materials. Block argues that this comparison separates labour from the social standing its individuals are party to.
[93] Langille in Davidov and Langille *eds* (2006) 24. Langille correctly states that the substance of collective labour law is left in the hands of the participating parties. In other words, providing a procedure to engage in collective bargaining does not directly impact on an employee's employment conditions.
[94] Langille in Davidov and Langille *eds* (2006) 25.
[95] Peck (1996) 2.

Picchio states that in the classical approach to labour, wages were regarded as prices because labour was regarded as a commodity. Wages were seen "as the costs of production because labour was considered producible".[96] The view was that labour could be produced just like any commodity. The difference, however, between labour and commodity is that labour and economics will never be devoid of each other. This becomes even truer in the light of today's global competition.[97]

An important aspect raised by Collins is that, although employment conditions affect an employee's dignity, lack of employment has far more dire consequences. Through participation in the work force, employees obtain access to the economic community.[98] It is thus important to not tip the scale too far in the opposite direction.

In contrast to the standpoint adopted by the economists, the human rights perspective concerns itself with the humanity of labour rights and the protection of the vulnerable party. With the development of labour laws, it became apparent that legislation could not always provide complete or suitable labour protection. The role that collective units can play in the labour market became strongly endorsed.[99]

Collins states that labour laws regulate labour relations for two main purposes: "to ensure that they function successfully as market transactions" and, simultaneously, "to protect workers against the economic logic of the commodification of labour".[100]

In a sense the correlation between labour and an everyday commodity is striking: the theory of the neoclassical economist is logical if looked at superficially. However, labour cannot be separated from its inherent human aspects and thus cannot be viewed clinically only. Neoclassical economists presume that non-interference in labour is the best policy, as it will create a natural balance. What this approach fails

[96] Picchio (1992) 2.
[97] Hepple in Davidov and Langille *eds* (2011) 36.
[98] Collins (2010) 4.
[99] Davies (2009) 38. See Compa and Diamond (1996) 13, in which the authors note that the increase of the global economy outputs strain on workers' rights. Developing countries in particular have been a target for business due to the low labour costs. See further Le Roux in Malherbe and Sloth-Nielson *eds* (2012) 232, in which Le Roux notes that globalisation has increased the ease with which services can be relocated to developing countries with lower labour standards.
[100] Collins (2010) 5. See Langille in Davidov and Langille *eds* (2006) 27. Langille notes that the "core assumption" is that the employment contract avails itself to intervention, and that such intervention is justified by the need for the protection of the people (employees).

to appreciate is the fact that anything left to its own devices turns to chaos. The imbalance of power between an employer and employee will only lead to animosity and labour unrest.

Labour rights should, however, be cautioned against over-protecting workers to the detriment of economic freedom. It is submitted that the correct approach to labour legislation is, once again, a balance of power. Both the economic perspective and the social perspective must be considered, as both are crucial to the labour market. The human aspect of labour cannot be disregarded, but similarly the economic consequences can also not be overlooked.

4. CONCLUSION

Collective labour law has its roots in a timeframe when workers were at the mercy of their employers. As noted by Webb, with the factory system came the separation of a worker from ownership of his produce. In other words, the worker was no longer concerned about the profit made by the enterprise, as his wages were not dependent on his output but rather on agreed rates. The only definite way to effect a change was to collectively oppose the powers-that-be.

The shift from common law freedom of contract to statutory regulation of the employment relationship did not happen overnight. The shift was, however, inevitable. Despite the obvious need for regulation of the employment relationship in order to balance the power of the parties and prevent exploitation, labour law is often still criticised for its interference with the natural order.

The economic perspective on labour law is somewhat critical: Neoclassic economists perceive this intervention as counterproductive and unnecessary, asserting that overregulation of the employment relationship dampers the intrinsic flow of the labour market. This perspective finds a number of similarities with the unitary perspective on industrial relations.

The need for labour law is generally accepted, but the form that it should take is still widely debated. The economic perspective on labour law is often criticised for its failure to consider the social aspect of the labour market. “Labour is not a commodity” is a resounding theme amongst socialists. An employee’s human dignity necessitates the need to regulate an employment relationship. The employment relationship is seen as inherently unbalanced due to the economic power held by the employer.

These two broad perspectives on labour law should not be regarded as mutually exclusive. It is submitted that both have valid arguments and both viewpoints should have influence in the labour market.

The economic perspective, although mostly void of human relations, provides a realistic approach to labour: society does not operate separate from economy. In fact, labour law finds its roots in economy, and a thriving of economy is in turn vital for the creation of employment. Labour is also by nature human and thus the social aspect cannot be disregarded. It is submitted that a careful, on-going balance between the two approaches must be preferred. It should also be noted that finding this balance differs fundamentally between conditions found in developed countries as oppose to those encountered in developing countries such as South Africa.

However, in an instance where an equal compromise between these two perspectives are not possible, the social perspective should be preferred, as the right to human dignity is more important than economic gains.

CHAPTER THREE

STATUTORY MINIMUM WAGE FIXING MECHANISMS

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1. INTRODUCTION

In terms of the common law, parties could freely agree upon the wage to be paid for services rendered. The person hiring the service has a desire for the service to be rendered and the person making his or her services available has a desire to receive remuneration for the efforts. Wages would thus be determined based on the specific service to be rendered and the worker's desire for remuneration.

Although the freedom of contract is still vital in society today, it is generally accepted that in certain instances the law needs to step in to prevent exploitation of the weaker contracting party.[1] The regulation of minimum wages can be regarded as a means to protect workers from exploitation.

[1] In the South African context a number of legislative instruments have been developed to protect the contractually weaker party, such as the National Credit Act 34 of 2005, the Consumer Protection Act 68 of 2008, the Labour Relations Act 66 of 1995 and the Basic Conditions of Employment Act 75 of 1997. Kahn-Freund aptly state that "[t]he main object of labour law has always been, and I venture to say will always be, to be a countervailing force to counteract the inequality of bargaining power which is inherent and must be inherent in the employment relationship. Most of what we call protective legislation and indeed most labour legislation altogether must be seen in this context." Kahn-Freund (1977) 8.

Minimum wages originated in the late 1800s in New Zealand and has since spread globally. It was originally introduced as a method to settle or prevent industrial disputes. A few years later it was utilised to prevent the exploitation of sweatshop workers, the majority of whom were women and youths.[2] The need for a regulatory framework was generated by the disproportionate bargaining position of these workers.[3]

In this chapter a brief overview of the development of minimum wage regulation globally, as well as a short discussion on international standards of minimum wage fixing, will be discussed. The setting of minimum wages is a common practice amongst most countries.

2. HISTORICAL DEVELOPMENT

2.1 Introduction

After the introduction of minimum wage fixing regulations in New Zealand in the late 1800s, the Australian state of Victoria established wage boards that determined wages for six trades.[4] Britain followed the Australian model in the prevention of payment of exploitative low wages, or "sweating", and established the Trade Boards Act 1918 whereby four industries' minimum wages would be regulated.[5] The regulations of minimum wage fixing mechanisms have since been adopted in various international conventions and recommendations.[6]

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[2] Starr (1981) 1. In 1894, under the New Zealand Industrial Conciliation and Arbitration Act, the Court of Arbitration was empowered to settle industrial disputes by making minimum wage awards that were binding on all the workers in the industry where the dispute took place.
[3] Neuwmark and Wascher (2008) 1.
[4] Cunningham (2007) 7. Starr (1981) 1.
[5] Starr (1981) 2. See Rocella (1984) *CLL* 86-87.The Trade Boards Act provided for a tripartite body in the specific sector to set minimum wages if the real wages were unreasonably low. The minimum wages set by the board were given legally binding effect. In 1919 the Trade Boards Act was amended, providing the board with a broader area of application.
[6] See the International Labour Organisation's Minimum Wage-Fixing Machinery Convention 26 of 1928 and the Minimum Wages Fixing Convention 131 of 1970 as discussed in par 2.3 below. Other conventions include Wages, Hours of Work and Manning (Sea) Convention 76 of 1946 (revised by convention 93 in 1949 and convention 109 in 1958) and Minimum Wage-Fixing Machinery (Agriculture) Convention 99 of 1951. See further Recommendation 89 on aforementioned Convention.

After the end of the Second World War in 1945, the popularity of regulated minimum wage fixing increased exponentially. More and more countries adopted legislation whereby wages would be fixed for large numbers of workers. In later years the development of minimum wage fixing evolved from the more industrialised countries to the developing countries.[7]

2.2 Development of Statutory Minimum Wage Fixing

In structuring a fair method for determining minimum wages, Higgins J, from the High Court of Australia, stated in 1915 that the primary test was "the normal needs of the average employee, regarded as a human being living in a civilized community."[8] Minimum wage fixing has since developed into two main categorie: those set through collective bargaining, and those set by government.

In industrialised countries, where collective bargaining systems were responsible for the setting of minimum wages for workers in specific industries, minimum wage fixing legislation was absent or limited. In these countries, if adequate collective bargaining structures were absent in the industry, the employer and his workers determined the wages and state intervention was avoided if possible. In other words, no statutory minimum wages were set for unorganised workers.[9]

During the same time, the United Kingdom followed a proactive approach and provided for legislation whereby the state was authorised to set minimum wages for industries not governed by collective bargaining, or where average wages were unreasonably low.[10]

Between 1900 and 1920 only a few countries provided for state intervention in the fixing of minimum wages. During this time, the United States debated the constitutionality of minimum wage laws. The Appeals Court of the District of

[7] Starr (1981) 3.
[8] Higgins (1915-1916) *HLR* 14.
[9] Starr (1981) 4. In countries where minimum wages are set though collective bargaining, state involvement is limited. The state is, however, involved when it comes to the extension of collective agreements. See Eyraud & Saget (2005) 23.
[10] Starr (1981) 5. Eyraud and Saget (2005) 5 mention that in countries where collective bargaining is well-developed, government involvement is commonly limited in the setting of minimum wages.

Columbia held that these laws were unconstitutional as they infringed upon the freedom of contract. The Unites States Supreme Court, however, overruled this decision based on the accepted practice of enacting "policy laws" which set certain legal minimum standards.[11] In 1938 the United States introduced a national minimum wage for workers in the Labour Standards Act. This wage applied to all workers in inter-state and foreign trade.[12]

Starr notes that although the minimum wage systems applied in various industrialised countries differ, they all have one common denominator: once a system has been adopted, minimum wage regulations remain active within that country. These countries typically viewed statutory minimum wage fixing regulations as a supplement to the main form of wage fixing – collective bargaining.[13] It is therefore clear that minimum wage fixing is still seen as an essential part of industrial relations and to aid in preventing the exploitation of workers not covered by collective agreements.

Among the developing countries, Mexico was the forerunner in incorporating a minimum wage fixing mechanism in 1931. In the Latin-American counties the State was regarded as responsible for ensuring the provision of decent wages.[14] In Africa minimum wage legislation was adopted fairly early. After the First World War a number of African colonies instituted minimum wages in order to prevent indigenous workers from being placed under forced labour.[15] However, it was only in the 1940s

[11] See *Adkins v Children's Hospital* 261 U.S 525 (1923), in which the Supreme Court of the United States had to decide on whether the Act of 19 September 1918, which provided for the fixing of minimum wages for women and children in the District of Columbia, was constitutional. The Act allowed for a board to set a minimum wage for women and children engaged in various occupations within the District of Columbia. The case was originally brought to court based on the fact that a number of the female employees' wages were below that set by the board. The Court of Appeals of the District of Columbia held that the board's power to provide a minimum wage infringes upon a person's right to freedom of contract and thus the legislation, in allowing such infringement, was unconstitutional. At par 570 the Supreme Court of the United States, however, held that the wage rate set by the board was only a minimum to prevent the exploitation of workers and that, as with many other so-called "police laws", it was not unconstitutional.
[12] Starr (1981) 5.
[13] *Ibid* 6.
[14] Legge (2009) 17. See further Starr (1981) 7-8.
[15] In the early 1930s both Kenya and Uganda passed ordinances in terms of which the Governor in Council was empowered to make orders setting minimum wages in any municipality, township or district for occupations where the wages were unreasonably low. See Scott (1967) *CJAS* 145.

and 1950s that real and effective legislation was enacted, and this was largely due to the colonial ties of a number of African countries.[16]

State minimum wage fixing mechanisms are often a catalyst for the development of collective bargaining structures. Trade unions have indicated a dislike for state-set minimum wages, as it does not take into account a specific enterprise's ability to pay. When one considers the historical background of collective bargaining, it appears that minimum wages initiated the need for collective bargaining and not the other way around.[17]

There are also instances of minimum wages being set using statistics as to the average wage being paid. This is, for obvious reasons, an unreliable method, as it does not take the employee's needs into account and assumes that the wage being paid is fair and reasonable. A combination of the aforementioned methods is to be preferred.[18]

In the 1930s, Roosevelt's New Deal on minimum wage legislation was used in an attempt to combat the economic crisis. The Deal allowed for state intervention in the setting of minimum wages in order to influence the economy, by increasing the purchasing power of consumer wages.[19]

2.3 International Standards

A decent living wage is one of the International Labour Organisation's (ILO) main objectives. In the preamble to the 1919 ILO Constitution it is stated that an "adequate living wage" is one of its labour conditions to improve on.[20]

[16] Starr (1981) 9. See further Scott (1967) *CJAS* 143-153 for a discussion on the development of statutory minimum wages in East Africa.
[17] Eyraud & Saget (2005) 14.
[18] *Ibid* 25.
[19] Rocella (1984) 88. See Cole and Ohanian (2004) *JPE* 783, in which they refer to the National Labour Relation Act (NLRA). Roosevelt believed that the Depression was aggravated by business competition which resulted in the reduction of wages and consequently negatively impacted on employment.
[20] ILO Constitution 1919.

In 1928 the ILO introduced the Minimum Wage-Fixing Machinery Convention.[21] During the preliminary phase of Convention 26, some countries were openly against the issuing of a minimum wage fixing convention. It was only with much-needed pressure from England that Convention 26 was finally accepted in 1928.[22]

One of the aims of Convention 26 was to prevent the exploitation of workers, thus countries where collective bargaining structures were well established questioned the need to introduce minimum wage legislation.[23] The enactment of Convention 26 was also largely based on the ILO's concern that cheap labour may become a victim of global trade.[24]

Government representatives raised concerns that Convention 26 provided for minimum wage fixing mechanisms to allow for general application without limiting the scope to "home work" only.[25] The opposition against Convention 26 did not only arise from government representatives, but also from delegates of workers' organisations. They feared that Convention 26 might suggest that minimum wage legislation should be used as an alternative to collective bargaining, which would consequently stunt union growth. This concern was later found to be unwarranted, which drew the concern back to the issue of "home workers".[26]

Convention 26 required members who ratified the convention to create or maintain machinery whereby minimum wages can be fixed for workers in a trade where no arrangements exist for the setting of wages through collective agreements; as well as partial wage setting for home workers.[27] The machinery whereby wages were to be determined was left open for each of the ratifying countries to decide.[28]

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[21] ILO's Minimum Wage-Fixing Machinery Convention 26 of 1928. Hereinafter Convention 26.
[22] Rocella (1984) 88.
[23] Rodgers, Lee, Swepston and Van Daele (2009)128. See Bazen (1994) *IJM* 6.
[24] Brosnan in Michie *ed* (2003) 179.
[25] Article 1 of the ILO Home Work Convention 177 of 1996 provides that "home work" is any work done by a person at his or her home, or premise of choice, for remuneration resulting in a product or service specified by the employer. Home workers are usually seen as more vulnerable workers and, due to the nature of the work, less organised.
[26] Rocella (1984) 88. Article 1 of the final draft of Convention 26 provides special mention of "home work."
[27] Article 1 of Convention 26.
[28] Article 2 of Convention 26 provides that each country may determine its own mechanisms, provided that before the machinery is applied in a trade, the employers and the workers, or their respective representatives, will be consulted as to the machinery used; that the employers and the workers must

Convention 26 did not require reference to be made to the worker's living conditions in determining minimum wages. Rather, it focused on the implementation of machinery for wage fixing in trades where no collective bargaining structures were in place.[29]

By the 1960s, Convention 26 enjoyed wide recognition in both developed and developing countries. However, it became apparent that developing countries' implementation of minimum wages had evolved beyond the ambit of Convention 26. In developing countries, minimum wage fixing was often utilised as a method to alleviate poverty and foster the distribution of wealth.[30] The ILO recognised that the minimum wage instruments played a much broader role in developing countries, and, as a result, in 1970 the ILO introduced the Minimum Wage Fixing Convention 131.[31]

Convention 131 states that, in determining the level of minimum wages, regard must be taken of –

> (a) the needs of the workers and their families, taking into account the general level of wages in the country, the cost of living, social security benefits and the relative living standards of other social groups;
>
> (b) economic factors, including the requirements of economic development, levels of productivity and the desirability of attaining and maintaining a high level of employment.[32]

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be equally associated in the operation of the machinery; and that the minimum wages set shall be binding and not open for amendment by individual agreement or other authority.

[29] See article 3 of Convention 26 in which it makes provision for the minimum requirements for minimum wage fixing. This article provides that the preferred method of minimum wage fixing should be by way of joint decision-making.

[30] Rodgers, Lee, Swepston and Van Daele (2009) 131. See Starr (1981) 13-14. Due to the generally low living standards present in many developing countries, as well as the vulnerability created by illiteracy and scarcity of work pressure was placed on governments to use legislative means for distributing wealth to the working classes. Starr notes that the poor coverage of collective bargaining structures in developing countries also contributed to the government's willingness to interfere with the labour market.

[31] ILO's Minimum Wage Fixing Convention 131 of 1970. Hereinafter Convention 131. See Starr (1981) 94.

[32] Article 3 of the 1970 Convention.

Convention 131 highlights the need for a balancing of the respective interests: the financial needs of workers and the ability of employers to pay. It therefore requires a balance between social justice and economic efficiency.[33]

Both Convention 26 and Convention 131 had significant impact on the enactment of minimum wage fixing mechanisms in developing countries, as they were challenged to bring their local legislation in line with international standards.[34] The close link between labour and poverty is not surprising. With reference to Convention 131, the ILO has long since realised that the development of decent work ties in directly with the alleviation of poverty amongst the working classes.[35]

During the 87th ILO session, the Director-General Report on decent work stated:

> The main propose of the Organisation today: Decent work is the convening focus of all its four strategic objectives: the promotion of rights at work; employment; social protection; and social dialogue. It must guide its policies and define its international role in the new future.[36]

The ILO introduced the Decent Work Agenda in 1999. The regulation of minimum wage instruments has been echoed in the ILO's Decent Work Agenda. It aims to give effect to the ILO's purpose of creating decent and productive working conditions for workers.[37] A few years later the ILO released *Decent Work and Poverty Reduction Strategies: A Reference Manual for ILO Staff and Constituents.* The manual holds that "creating decent jobs is the missing link between economic growth and poverty reduction." The manual sets out key areas of focus in order to achieve its goals, and emphasises the importance of social dialogue.[38]

Decent work also entails that the same remuneration is paid for the same work done. Globalisation has, however, placed this right under threat, as labourers with similar

[33] Naidoo, Klerck and Manganeng (2007) *SAJLR* 26.
[34] Starr (1981) 13.
[35] Egger (2002) *ILR* 164.
[36] ILO Director-General Report (1999) 3.
[37] Rodgers, Lee, Swepston and Van Daele (2009) 223.
[38] ILO Decent Work and Poverty Reduction Strategies Report (2005) 1:1.

skills are willing to work for different wages, depending on the availability of job opportunities where they live.[39]

2.4 Functions of Minimum Wage Fixing Mechanisms

Sixty per cent of minimum wage fixing legislation focuses on the needs of workers and their families, as well as on the cost of living: this reconfirms that social protection is one of the main aims of minimum wages.[40] It is not surprising that the economic growth of a country also directly impacts on the wages earned by its labourers. In fact, when it comes to improving wage earnings the determination of minimum wages can only assist in providing decent income up to a limit. Focusing on a country's economic growth will necessarily impact the wages earned by workers.[41] The concern attached to using minimum wages as a means to address poverty is that it can only protect those persons who are employed in the formal sector.[42]

When minimum wage instruments are used as a tool to alleviate poverty, distribute wealth and prevent social dumping, it is vital to determine the financial need for daily consumption, the real wage of workers in similar categories of labour and the wages paid in other countries.[43]

If the increase in the minimum wage is in relation to the average minimum living cost, the increase will directly impact on the poverty ratio. However, those in poor conditions, who are without regular employment will not be protected. Brosnan[44] argues that although this may be true, it does not justify exploitative wages, as perpetuated exploitation is a result of poverty. Brosnan states that although an

[39] See The ILO *Global Wage Report 2012/2013* 11 for a wage comparison on compensation for hourly direct pay for time worked in manufacturing.
[40] Eyraud & Saget (2005) 40.
[41] Fields (2003) *ILJ* 258. Fields notes that economic growth improves with the demand for labour and consequently wages paid.
[42] Eyraud & Saget (2005) 46.
[43] Brosnan in Michie *ed* (2003) 179. The impact of globalisation is that, save for trade restrictions, a manufacturer may choose where to establish an industry for manufacturing and thereby exploit the cheap, low-skilled labour of poorer developing countries. However, it is submitted that overly rigid wage restrictions may discourage necessary foreign income and investment.
[44] Brosnan in Michie *ed* (2003).

increase in minimum wages on its own will not alleviate poverty, it does prevent a worker from living in poverty due to a low paying job.[45]

Various factors are used to determine the minimum wage rates. Inflation and cost of living are the most common factors, while the need of the worker and the capacity of the employer to pay are less common.[46] However, it is submitted that an employer's ability to pay must be taken into account. It will be counter-productive and of little help to the worker demanding a wage increase, only to find him or herself unemployed due to the employer's operational requirements. It is therfore important that the two aspects be balanced carefully.[47] When minimum wages were first introduced, the connection between productivity and wages was not a problem as workers were often exploited and earned way below their production value; however, those conditions are not necessarily true in all instances.[48]

Next to a national minimum wage, the setting of minimum wages by a public body for a specified sector is most common. This system often substitutes collective bargaining and is used for those sectors that are not governed by collective bargaining.[49] A national minimum wage cannot be a substitute for collective bargaining, or even state-determined minimum wages. A national minimum wage may offer some protection for those workers excluded from collective bargaining structures, but the diversity in labour and cost of living across a country demand alternative wage determination mechanisms.[50]

Collective bargaining provides no solution for wage negotiations in a number of sectors, due to either the particular employment relationship or the lack of adequate bargaining structures. Domestic workers, due to their one-on-one employment

[45] Brosnan in Michie *ed* (2003) 179. Cunningham (2007) 4. Cunningham notes that for minimum wage structures to be effective it must not be over-complicated, as this will prevent the effective implementation thereof. Furthermore, if minimum wages are set too high, it may increase poverty.
[46] Eyraud & Saget (2005) 29.
[47] Cunningham (2009) 76-77.
[48] Eyraud & Saget (2005) 41.
[49] *Ibid* 10. See Naidoo, Klerck and Manganeng (2007) *SAJLR* 26. The regulation of minimum wage fixing only becomes relevant in industries where collective forces are unable to enforce adequate wages. Collective bargaining remains the ideal method of determining minimum wages.
[50] Cunningham (2007) 47. Bazen (1994) *IJM* 70 argues that minimum wage legislation is a form of centralised minimum wage fixing in that the wage rates are determined by the state independently of the employer upon which the wage rates will be imposed.

relationships, are in greater need of state interference, as their bargaining power is very weak.[51]

3. CONCLUSION

The foundation of minimum wage fixing lies in preventing the exploitation of workers: this is as relevant today as it was in the 1800s. In later years, the development of minimum wage fixing as a means to address poverty highlights the importance of a fair wage, based not just on productivity but also on the need for a decent living wage.

The fairly rapid dissemination of minimum wage fixing internationally is evidence of the need to regulate. Developed and developing countries alike quickly took hold of this means to address exploitation of workers and assist in defusing labour unrest. The importance of incorporating a minimum wage fixing mechanism within a country's legal framework is highlighted by the enactment of several international conventions. The ILO's Decent Work Agenda also emphasises the importance of providing for decent jobs and the alleviation of poverty through the setting of minimum wages.

Globally, the majority of countries have adopted some form of minimum wage fixing, although the purpose for doing so is not uniform. Some, largely developing countries, focus mainly on the poverty-reduction element offered by minimum wages, whilst others are more concerned about the prevention of exploitation.

The setting of a national minimum wage is most commonly observed, therefore, by the setting of minimum wage by a public body for a specific sector. Despite the inclusion of aforementioned mechanisms, collective bargaining still plays an important role in wage determination. Countries with strong collective bargaining structures rely more on collective-wage bargaining than on statutory minimum wage

[51] Eyraud & Saget (2005) 13.

fixing. However, due to the shortcomings of collective bargaining, statutory minimum wage fixing provides a vital fall-back for unregulated sectors.

CHAPTER FOUR

DEVELOPMENT OF SOUTH AFRICAN COLLECTIVE LABOUR LAW

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1. INTRODUCTION

South Africa's history can be dated back to 1652, when Jan van Riebeeck, established a trading post on behalf of the Dutch East Indian Company, where Cape Town is today, to replenish the ships on route to the East Indies.[1] These early beginnings created little need for regulating employment, as the main economy was built on small, uncivilised businesses such as farming, blacksmiths, wagon-builders and other one-man businesses.[2]

[1] Feinstein (2005) 1.
[2] Wiehahn (1982) xvii.

The discovery of gold in 1880 spurred on industrialisation in South Africa. Although industrialisation slowly made its way across the country, it was on the Witwatersrand, around the gold and diamond mines, that industry was at its most vibrant.[3] These economic developments prompted the start of collective labour law in South Africa.

The racial divide had a significant impact on the development of labour laws throughout South Africa's history. The fear of African workers encroaching on "White" jobs served as a catalyst for 1922's Rand Rebellion.[4] For more than fifty years thereafter, African workers were kept out of the collective labour law structures. The country's fight for equality and the recognition of labour rights naturally brought about an alliance between trade unions and political activists. The African labour struggle played a significant part in the eventual relinquishing of power of the apartheid government and consequently in the establishment of new labour legislation.[5]

A true understanding of the current significance and shortcomings of collective bargaining in South Africa requires a look at the development of both collective bargaining and minimum wage fixing. South Africa's political history had a big impact on the development of its labour laws – it is therefore important to understand the historical significance of current labour laws, especially those relating to collective labour law.

This chapter will give an overview of the development of collective bargaining in South Africa as well as the transition to a new, free labour-market in the enactment of new labour legislation. The chapter will also provide a brief overview of South Africa's unemployment conditions and the impact this has on its labour policies.

[3] Bendix (2010) 58.
[4] Krikler (2005) 39.
[5] Venter, Levy, Conradie and Holtzhausen (2009) 37.

2. HISTORICAL BACKGROUND TO SOUTH AFRICAN LABOUR LAW

2.1 Introduction

As with most countries, South African labour law was founded in the practice of slavery. Master-and-servant laws provided a primitive foundation for labour regulation.[6] It was after the discovery of diamonds and gold that the need for more formal labour relations became apparent. The mines had an increased need for unskilled and low-wage labour, and the majority African population served as the ideal low-wage labour force.[7]

The Rand Rebellion of 1922 was the first key turning point in South African labour legislation. It was after this strike action by White miners that government placed a high priority on creating legislative mechanisms for sectoral bargaining. For fear of further industrial unrest, the Industrial Conciliation Act[8] (ICA 1924) was enacted.[9]

In order to protect the interests of the White minority from the African majority, the government legislated strong racial divides between the two racial groups them.[10] African unions were excluded from taking part in Industrial Council negotiations and were consequently weak in numbers.[11] The development of South African labour law is therefore deeply embedded in racial inequality and the struggle against apartheid.[12]

Due to mounting pressure from African workers, as well form as international trading partners, government was forced to address the racial inequality evident in its labour

[6] Chanock in Hay and Craven *eds* (2004) 338. Master-and-servant laws were enacted to bind natives to labour after the abolition of slavery. Master-and-servant laws, together with the laws regulating passes, were used to regulate the inundation of African people to urban areas. See further Deakin, Lele and Siems (2007) *ILR* 140, Venter, Levy, Conradie and Holtzhausen (2009) 38 and Bendix (2010) 57.
[7] Venter, Levy, Conradie and Holtzhausen (2009) 39-40. See Bendix (2010) 58 and Finnemore (2009) 24.
[8] Act 11 0f 1924.
[9] Bendix (2010) 60. Anstey (2004) *ILJ 1833.*
[10] Finnemore (2009) 30. With the enactment of the Industrial Conciliation Act of 1924, African workers were excluded from the definition of "employee". Job reservations were also later introduced to prevent African workers from being appointed to "White" positions.
[11] Godfrey, Maree, Du Toit and Theron (2010) 45.
[12] Steenkamp, Stelzner and Badenhorst (2004) *ILJ 943.* Godfrey. Maree, Du Toit and Theron (2010) 50.

laws. As a result the South African government appointed a Commission of Inquiry into Labour Legislation in the 1970s, more commonly known as the Wiehahn Commission.[13] The Wiehahn Commission report marked a second key-point in South African labour law, as it kick-started the modernisation of our labour legislation.[14]

The next milestone in the country's labour law was in 1994, when South Africa had its first democratic election and with it a new constitutional dispensation, including re-enlistment with the International Labour Organisation (ILO).[15]

2.2 Development of Collective Labour Law

2.2.1 Pre-1924 Collective Labour Law

The discovery of diamonds and gold in the late 1800s was one of the most significant industrial developments in South African history.[16] The newfound fortune required both inexpensive unskilled workers as well as skilled workers. At the time South Africa had a shortage of the latter – as a result, skilled European workers – of which the majority were British – were shipped into the country. These workers brought with them the British collective trade union movement and various other labour rights.[17]

With the development of the mining industry, and the new founded trade unions also came labour unrest. The depression in the Transvaal during 1907 caused large-scale unemployment among White workers. Mine owners used this opportunity to break the monopoly held by White skilled workers by introducing low-wage African workers into more skilled positions and simultaneously reducing the wages paid to

[13] Bendix (2010) 77. Benjamin in Davidov and Langille *eds* (2011) 210.
[14] Benjamin in Davidov and Langille *eds* (2011) 210.
[15] Van Niekerk, Christianson, McGregor, Smit and Van Eck (2012) 20.
[16] Wiehahn (1982) xvii. The mines attracted over 600 000 people, of which the majority were white skilled workers.
[17] Bendix (2010) 58. Wiehahn (1982) xvii. Evidence of collective workers' organisations in South Africa existed as early as 1838. However, these organisations were not legally recognised and were often regarded as hostile towards the work environment. Wiehahn (1982) xvii.

White workers.[18] Threatened by the inroads made into their employment positions, White workers went on strike and forced the mine owners to protect their interests.[19]

Strike action became increasingly prevalent in the early 1900s, with both White and African workers downing tools for better employment conditions. Government remained mostly indifferent, preferring the industry to self-regulate. In order to curb the proliferation of strike action, government enacted the Riotous Assemblies Act.[20]

After the First World War, industry experienced a season of stability. In 1919 government held a national congress with employers and employees in an attempt to encourage employers to recognise workers' unions. A number of agreements were concluded between White unions and the Chamber of Mines, including the Status Quo Agreement. The Status Quo Agreement provided that, if a semi-skilled position was held by a White or African worker at a particular mine, the respective race will continue to hold the position. In other words, White jobs must not be given to African workers and vice versa.[21]

During this time skilled White mine workers enjoyed fairly high wages. Between 1914 and 1920 wages increased by 60% – whilst productivity decreased.[22] During this time the cost of transporting gold also increased – whilst the gold prices fell. As a result, mine owners tried to cut corners to avoid a loss in profits.[23]

In January of 1922, after threats by mine owners to cut wages, revoke two paid holidays, repeal the Status Quo Agreement and lay off two thousand workers, one of South Africa's largest and most violent strikes erupted.[24] This strike action, which later became known as the Rand Rebellion, saw some twenty thousand workers

[18] Wiehahn (1982) xix. Bendix (2010) 58. The mining industry also broke down skilled positions into smaller jobs that could be performed by unskilled African workers.
[19] Wiehahn (1982) xx. Finnemore (2009) 27. White workers went on strike in 1907 and 1913, after mine owners attempted to reduce White workers' wages and change their working hours, respectively.
[20] Act 27 of 1914.
[21] Krikler (2005) 39. See further Bendix (2010) 60.
[22] Finnemore (2009) 28. Wiehahn (1982) xxi.
[23] Bendix (2010) 60. Finnemore (2009) 28.
[24] Krikler (2005) 1, 47 and 293. The Rand Rebellion is regarded as one of the most violent strikes the country ever as experienced. Of further significance is the racial tension that was heightened by the strike. Krikler states that the strike-violence was "accompanied by the most hysterical fear of African people by the White working-class". See further Finnemore (2010) 28.

standing up against the mining capital. The strike was mainly organised by White miners, who led arson attacks and committed theft.[25] On 10 March 1922 General Smuts sent in government troops to contain the violence, which led to the death of some two hundred people and left 534 people wounded.[26]

White workers saw this attack from the Smuts government as a betrayal of their trust and shifted their loyalty to Hertzog and Malan's National Party.[27] This once again highlighted the precocious link between labour and government. Before being voted out of office, Smuts commissioned the Industrial Board to investigate the conditions around the Rand Rebellion. The outcome of this study produced the ICA 1924.[28]

2.2.2 The Industrial Conciliation Act of 1924

Prior to the ICA 1924, collective bargaining took place on an *ad hoc* basis. Conciliation Boards were set up to deal with certain industrial disputes that would only be binding on the parties involved.[29] The ICA 1924 was specifically enacted to regulate collective labour. It made provision for a set dispute-resolution procedure and placed restrictions on when employees or employers were allowed to engage in strikes or lock-outs.[30]

In order to regulate collective labour, the ICA 1924 provided for the voluntary establishment of industrial councils and industrial boards.[31] The function of the

[25] Venter, Levy, Conradie and Holtzhausen (2009) 41. See Krikler (2005) 2, who gives an account of the events that occurred on 8 March 1922, when twelve men set out to sabotage a railway track, resulting in the derailing of a train carrying 200 passengers. Fortunately, no one was seriously injured by this act of vandalism.
[26] Venter, Levy, Conradie and Holtzhausen (2009) 42. See Krikler (2005) 291 and Jones (1985) *MDE* 160.
[27] Krikler (2005) 107-108. 291. After the strike, Smuts still attempted to gain favour with the White workers, but it was too late. The workers' loyalty shifted to the National and Labour Party, which eventually formed the Pact Government of 1924.
[28] Venter, Levy, Conradie and Holtzhausen (2009) 42. See Krikler (2005) 292. One of the provisions of the ICA 1924 was the limitation placed on the right to strike. The ICA 1924 provided for mandatory conciliation and mediation prior to the commencement of a strike.
[29] Godfrey, Maree, Du Toit and Theron (2010) 42. Du Toit, Bosch, Woolfrey, Godfrey, Cooper, Giles, Bosch and Rossouw (2006) 6-7. If parties failed to comply with the procedural prerequisites for engaging in industrial action, they would be guilty of an offence. S 12(2) of the ICA 1924.
[30] S 2, 7 and 12 of the ICA 1924. Bendix (2010) 62.
[31] S 2 and 4 of the ICA 1924. Conciliation boards could be appointed by the Minister if this was applied for by a group of employees or employers in an industry where an industrial council had not yet been established. The board would consist of an equal number of employer and employee

industrial councils was to facilitate the mediation and arbitration of industrial disputes.[32] Any agreement reached between the parties in the council would become legally binding once published by the Minister in the Government Gazette.[33] The ICA 1924 provided that collective agreements set by an industrial council could be extended to non-parties by the Minister, provided that the council was "sufficiently representative".[34] The Minister had discretion in extending a collective agreement and had to be satisfied that the failure to extend would result in unfair competition for those employers not covered by the agreement.[35]

In 1924, for fear of being overpowered by African workers, the ICA attached racial exclusions to its definition of "employee" by excluding the application of the Act from persons whose "labour is regulated by any Native Pass Laws and Regulations".[36] Although African employers were not excluded, African workers could not enjoy the privileges of the regulated collective labour structure.[37] This exclusion effectively prevented African unions from registering with an industrial council and prevented African workers from becoming members of registered "White" unions.[38]

2.2.3 The Wage Act of 1925

The Wage Act[39] was enacted to accompany the ICA 1924. The Wage Act provided for unilaterally determined wages and basic conditions of employment for sectors

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representatives. Agreements concluded by this board could also be extended to non-parties. In terms of s 4 of the ICA 1924, any employer or employers' organisation, or any trade union or group of trade unions, may establish an industrial council. See Godfrey, Maree, Du Toit and Theron (2010) 44 and Moll (1996) *AER* 326.

[32] Bendix (2010) 62. Standing, Sender and Weeks (1996) 146. S 6 and 7 of the ICA 1924.

[33] S 9 of the ICA 1924. See also Bendix (2010) 62 and Du Toit, Bosch, Woolfrey, Godfrey, Cooper, Giles, Bosch and Rossouw (2006) 6.

[34] S 9(1)(b) of the ICA 1924.

[35] Bhorat, Van der Westhuizen, Goga (2007) DPRU Report 3.

[36] S 24 of the ICA 1924. Du Toit, Bosch, Woolfrey, Godfrey, Cooper, Giles, Bosch and Rossouw (2006) 7.

[37] Wiehahn (1982) xxi.

[38] Du Toit, Bosch, Woolfrey, Godfrey, Cooper, Giles, Bosch and Rossouw (2006) 7. See further Lewis (1984) 7. It is important to note that Africans were not prohibited from engaging in collective bargaining through unions, but that their recognition in industrial councils was restricted. As a result, employers were able to pay African workers' wages below the minimum and were consequently incentivised to fill the majority of positions with cheaper African labour. In order to prevent this, the 1930 amendment to the ICA 1924 allowed the Minister to extend collective agreements to African workers. Godfrey, Maree, Du Toit and Theron (2010) 46.

[39] Act 27 of 1925.

and industries where no industrial council agreement was in place.[40] Preceding the Wage Act was the Regulation of Wages, Apprentices and Improvers Act (Wage Act of 1918).[41] The Wage Act of 1918 provided for the establishment of wage boards responsible for the setting of minimum wages for women and youths.[42] The Wage Act of 1918 was later repealed by the Wage Act of 1925.

The Wage Act also provided for the establishment of the Wage Board, which had the responsibility of making minimum wage recommendations to the Minister of Labour, who could then publish these wage rates in the Government Gazette and make them binding on a particular industry.[43] Unlike the ICA 1924, the Wage Act did apply to African workers, which allowed African unions to utilise the provisions in the Wage Act to gain some advantages for their members.[44]

In making recommendations to the Minister, the Wage board had to take various factors into consideration, including:

- the labour conditions and remuneration paid in the trade or sector at the time the investigation was conducted;
- any recommendation made to it for the specific trade or sector by the Board of Trade and Industry;[45]
- the ability of the employer to carry on business should any of the recommendations made come into effect;
- the cost of living in a given area;
- the cost of boarding, rations or lodging in a given area; or
- any other matter that might be relevant.[46]

[40] S 1(2) of the Wage Act. Finnemore (2009) 31.
[41] Act 29 of 1918.
[42] S 2(1) of the Wage Act 1918. The Wage Act 1918 only applied to trades and occupations that were provided for in the schedule of the Act. These included occupations such as tailoring, dressmaking, harness making, soap and candle making and matchmaking and matchpacking.
[43] S 3 of the Wage Act. Bhorat, Van der Westhuizen, Goga (2007) DPRU Report 4.
[44] Budeli (2009) *Fundamina* 63. Although the Wage Act did not allow for distinction of wages amongst races, there were noticeable advantages for White workers. Any benefit to African workers were only to ensure that they did not undercut White workers.
[45] The Board of Trade and Industry Act 33 of 1924.In terms of this Act the Minister was empowered to establish a Board of Trade and Industry. The duty of the board was to advise government on matters relating to the economic development of natural resources. In making recommendations to the government, the Board had to take into consideration the impact that such considerations would have on the consumer and those persons employed in the specified industry.

The Minister was given significant discretionary powers in setting these determinations as well as granting of exemptions.[47] A number of the determinations provided "built in" exemptions for certain types of employees, such as managers, as well as exemption for small and newly established businesses.[48]

A look into the conditions and wages set by these determinations indicated that they were often far less favourable than those set by collective bargaining in the industrial councils.[49]

2.2.4 The Industrial Conciliation Act of 1937

In 1937 the ICA 1924 was replaced by a new act, the Industrial Conciliation Act[50] (ICA 1937). The Industrial Legislation Commission Report of 1935 (the Van Reenen Commission)[51] raised concerns over certain shortcomings in the ICA 1924 and the 1930 amendments.[52] One of the main concerns raised was that unskilled workers were largely under-represented as the majority were African workers and therefore did not have access to the industrial councils. This in turn caused a significant wage gap between the skilled White workers and the unskilled African workers. In order to continue the exclusion of African workers from regulated collective bargaining, the Van Reenen Commission proposed that two government officials be elected to guard these workers' interests.[53]

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[46] S 2(a)-(f) of the Wage Act. S 3 of the Wage Act provided that the Board could elect not to make recommendations if the Board could not set a suitable wage whereby the employees would be "able to support themselves in accordance with civilized habits of life." In such cases the Minister could direct the board to make such recommendations as they deem fit. It is submitted that in such cases the Board was probably unable to provide for a suitable minimum wage while staying in line with the considerations listed in s 2 of the Wage Act.
[47] S 10 of the Wage Act. Exemptions could be granted if the conditions set by the employer were more advantageous to the employee, the employee suffered from a physical disability that prevented them from performing the work, or there were other special circumstances that justified the granting of an exemption.
[48] Standing, Sender and Weeks (1996) 144.
[49] *Ibid* 145.
[50] Act 36 of 1937.
[51] Report of the Industrial Legislation Commission, UG 37, 1935.
[52] The Van Reenen Commission highlighted three main concerns: the lack of national industrial councils; the wide wage gap between skilled (White) and unskilled (African) workers; and noncompliance. See Godfrey, Maree, Du Toit and Theron (2010) 47.
[53] Du Toit, Bosch, Woolfrey, Godfrey, Cooper, Giles, Bosch and Rossouw (2006) 8.

After World War II, African workers' unions gained some traction on being recognised as bargaining parties. However, the racial segregation brought on by the National Party after its election to power in 1948 quickly dwindled any hopes in this regard. The Botha Commission[54] was appointed to ensure that the country's labour practices fell in line with the apartheid policies.[55]

The Botha Commission confirmed that the wage gap between African and non-African workers was concerning. It was apparent that the only real solution to the wage differential was to allow African unions to represent their members at industrial councils.[56] Despite this obvious solution, the fear of African unions' potential power to influence the industry to the detriment of non-African workers, prevented legislation from acknowledging African unions.[57] The Botha Commission suggested that industrial council agreements should be referred to a "coordinating body", which would examine the terms of the agreement and refer it to the Minister for extension.[58]

In 1956 a then new Industrial Conciliation Act[59] (ICA 1956) was promulgated. The ICA 1956 repealed the ICA 1937 in its entirety with the main aim of strengthening racial segregation in the labour market.[60] The ICA 1956 prohibited the registration of "mixed" unions (where White workers shared a union with "Coloured" or Indian workers) unless the number of White workers was insufficient to form a separate union. Existing "mixed" unions were required to open separate braches for White workers and "Coloured" or Indian workers.[61] The ICA 1956 furthered the racial

[54] The Industrial Legislation Commission of Enquiry, UG 62 – 1951.
[55] Godfrey, Maree, Du Toit and Theron (2010) 50. Du Toit, Bosch, Woolfrey, Godfrey, Cooper, Giles, Bosch and Rossouw (2006) 8.
[56] Steenkamp, Stelzner and Badenhorst (2004) *ILJ* 948. See also Godfrey, Maree, Du Toit and Theron (2010) 50.
[57] Godfrey, Maree, Du Toit and Theron (2010) 50.
[58] Du Toit, Bosch, Woolfrey, Godfrey, Cooper, Giles, Bosch and Rossouw (2006) 8. Godfrey, Maree, Du Toit and Theron (2010) 51. The ideology behind the coordinating body was to supervise the recommendations. The body was responsible for considering the interests of all parties involved, as well as those of the public at large. Du Toit *et al* argue that the true purpose of the "coordinating body" was to rationalise the wage disparity between African and White workers.
[59] Act 28 of 1956. (Later renamed the Labour Relations Act 28 of 1956).
[60] Godfrey, Maree, Du Toit and Theron (2010) 52. Bendix (2010) 69.
[61] Du Toit, Bosch, Woolfrey, Godfrey, Cooper, Giles, Bosch and Rossouw (2006) 9. Godfrey, Maree, Du Toit and Theron (2010) 52.

divide by prohibiting mixed unions and setting certain job reservations for the benefit of White workers only.[62]

Political protests were rife in the 1970s as African militant opposition parties pushed against the oppressive National Party policies.[63] The pressure for political reform was greatly influenced by the African National Congress (ANC) and labour unions, in particular the federation trade union, South African Congress of Trade Unions (SACTU).[64] The pressure for reformation was met with the banning of the ANC and the like; the state increased the oppression of Africans, causing a decline in real wages paid to African workers and fewer strike actions.[65]

> If the unions of the 1940s grew out of the war and the opportunities that it brought to African workers, then the unions of the '50s and '60s grew out of the increased polarisation of South African society.[66]

In 1973 one of the largest strikes in South African history took place in the textile and engineering sector in Durban when 61 000 African workers downed tools.[67] In an attempt to address the African labour unrest without abolishing the racial segregation contained in the labour laws of the time, the government proposed an amendment to the Bantu Labour (Settlement of Disputes) Act[68] by introducing works committees.[69] After the failure of the works committees, government appointed yet another commission to investigate the South African labour market.[70]

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[62] Venter, Levy, Conradie and Holtzhausen (2009) 43.
[63] *Ibid* 44.
[64] MacShane, Plaut and Ward (1984) 31. SACTU held that only fighting for economic freedom of African workers and not for political freedom "would condemn the trade union movement to uselessness and to a betrayal of the interest of the workers". Godfrey, Maree, Du Toit and Theron (2010) 53.
[65] Godfrey, Maree, Du Toit and Theron (2010) 54.
[66] MacShane, Plaut and Ward (1984) 30.
[67] Venter, Levy, Conradie and Holtzhausen (2009) 44.
[68] Act 48 of 1953. The Bantu Labour (Settlement of Disputes) Act was originally entitled the Native Labour (Settlement of Disputes) Act. The name was changed by the Bantu Labour Relation Regulation Amendment Act 70 of 1973.
[69] Du Toit, Bosch, Woolfrey, Godfrey, Cooper, Giles, Bosch and Rossouw (2006) 10. African workers were encouraged to form part of "works committees" instead of forming trading unions. The ideology behind "works committees" was an attempt to further the disenfranchisement of African workers by ignoring the plights of unregistered African unions by "bleeding them to death", as stated by the Minister. See Jones (1985) *MDE* 161 and Benjamin in Davidov and Langille *eds* (2011) 209.
[70] Bendix (2010) 77.

2.2.5 The Wiehahn Commission

The Wiehahn Commission[71] was appointed in 1977 and marked a turning point in African collective labour rights. The Wiehahn Commission report was released in 1979 and provided a number of positive recommendations for reformation. The most significant recommendation was the de-racialising of the labour legislation by including Africans in the definition of "employee."[72] The Commission recommended that both trade unions and individuals be granted full freedom of association, irrespective of race, colour or gender.[73]

The abolishment of job reservations was another crucial recommendation made by the Wiehahn Commission.[74] The Commission addressed the sensitivity over the removal of job reservations and noted that summary removal may lead to labour unrest.[75] It was consequently recommended that the Department of Labour "phase out" the existing job reservations.[76]

Government responded positively to most of the recommendations made by the Wiehahn Commission.[77] Changes to the labour legislation took place over a period of four years and also led to the name change from the ICA 1956 to the Labour

[71] The Commission of Inquiry into Labour Legislation 1982.
[72] Godfrey, Maree, Du Toit and Theron (2010) 56.
[73] Wiehahn (1982) 80. The final Wiehahn Commission report also made provision for members of the Commission to give minority recommendations. One such recommendation was that of Commissioner Nieuwoudt, who suggested that African workers be prohibited from joining any trade union, that government continue their pursuit to promote and create job opportunities for African workers in or near their own states and that White, Coloured and Asian labour be used more effectively. It is submitted that Commissioner Nieuwoudt's recommendations serve as a prime example of the difficulty experienced in the hearts of men during the transformation into an open and democratic South Africa.
[74] Godfrey, Maree, Du Toit and Theron (2010) 56. Venter, Levy, Conradie and Holtzhausen (2009) 45. The Commission further recommended that a National Manpower Commission be established, comprising of employers' organisations, trade unions and state representatives. The purpose of the National Manpower Commission would be to analyse the labour industry on an on-going basis and keep up with international labour trends. The Wiehahn Commission further proposed that Industrial Tribunals be replaced with an Industrial Court. The function of the Industrial Court would include the interpretation of labour laws and wage determinations, adjudicating disputes relating to strikes, lockouts and cases relating to labour rights.
[75] Wiehahn (1982) 80.
[76] *Ibid* 88.
[77] Venter, Levy, Conradie and Holtzhausen (2009) 47.

Relations Act (LRA 1956).[78] Government hoped that the inclusion of African workers in industrial council regulations would tame the African unions.[79]

The Wiehahn Commission also recommended the establishment of Industrial Courts to adjudicate unfair labour practices.[80] The Industrial Courts played an important role in the development of South African labour law through case law. It also introduced international labour standards to the South African labour framework, with a greater emphasis on fairness and the protection of workers' rights.[81]

Union membership grew rapidly after the reforms introduced by the Wiehahn Commission. The growing union membership added to the appeal of centralised bargaining as unions recognised the opportunity to build solidarity among workers.[82] The Federation of South African Trade Unions (FOSATU) approached the industrial councils with caution and strongly advocated the continued use of established plant-level negotiations.[83] However, pressure from the mining industry forced FOSATU to recognise the need for centralised bargaining.[84]

The newly found labour freedom did not, however, bring about political change. As a result, African workers relied heavily on the power of trade unions and unions, in turn, joined forces with anti-apartheid political organisations to place pressure on the apartheid government. The Congress of South African Trade Unions (COSATU), which was formed in 1985, aligned itself closely with the African National Congress (ANC) and played a key part in aligning African Unions in the struggle against apartheid.[85]

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[78] The Industrial Conciliations Amendment Act 94 of 1976 and 95 of 1980 provided for this name change.
[79] Du Toit, Bosch, Woolfrey, Godfrey, Cooper, Giles, Bosch and Rossouw (2006) 10.
[80] Wiehahn (1982) 85. Jones (1985) *MDE* 162.
[81] Budeli (2007) *Fundamina* 71.
[82] Du Toit, Bosch, Woolfrey, Godfrey, Cooper, Giles, Bosch and Rossouw (2006) 12. Godfrey, Maree, Du Toit and Theron (2010) 60.
[83] MacShane, Plaut and Ward (1984) 39.
[84] Anstey (2004) *ILJ* 1840. See also Godfrey, Maree, Du Toit and Theron (2010) 60. FOSATU's policies indicated that, although they distrusted the industrial councils, their members were not prohibited from joining a council, and further provided that industry negotiations should not impede on plant-level negotiations.
[85] Venter, Levy, Conradie and Holtzhausen (2009) 48. Du Toit, Bosch, Woolfrey, Godfrey, Cooper, Giles, Bosch and Rossouw (2006) 12.

3. THE LABOUR RELATIONS ACT OF 1995

3.1 Introduction

During the middle to late 1980s the struggle against apartheid escalated as the ANC placed pressure on the government through numerous strike actions. COSATU also challenged certain principles in the LRA 1956 on grounds of obstructions against the internationally recognised right to freedom of association.[86] By 1992, then state president F.W de Klerk called for the release of ANC president Nelson Mandela, and talks of peace commenced through the Convention for a Democratic South Africa (CODESA). An Interim Constitution was drawn up as part of the peace negotiations, and would later become the framework for the final Constitution.[87]

COSATU played a major role in the fight for freedom and were in a politically advantageous position that allowed them to make claims against the legislature to protect labour rights.[88] South Africa's commitment to enforcing and enabling centralised bargaining went against the popular international trends, which favoured decentralised bargaining.[89] This can be attributed to the support and debt that the new government owed to interest groups such as COSATU.[90] As is clear from the discussion above, South Africa's political history cannot be seen in isolation from its labour policies.[91]

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[86] See Saley and Benjamin (1992) *ILJ* 731, 738. After the 1988 amendement to the LRA 1959 COSATU lodged a complaint with the ILO on grounds that the LRA 1959's policy on collective labour law infringed upon the ILO's principle of freedom of association. The ILO did indeed find provisions in the LRA 1959 that were inconsistent with the principles of freedom of association and recommended that the parties, in a tripartite structure, negotiate to address these shortcomings. This ILO report later played a key role in the drafting of the new LRA.

[87] The Constitution of the Republic of South Africa, 1996. Du Toit, Bosch, Woolfrey, Godfrey, Cooper, Giles, Bosch and Rossouw (2006) 16. Venter, Levy, Conradie and Holtzhausen (2009) 48.

[88] Du Toit, Bosch, Woolfrey, Godfrey, Cooper, Giles, Bosch and Rossouw (2006) 16. Godfrey, Maree, Du Toit and Theron (2010) 80. Budeli (2012) *CILSA* 459-460 states that, in Africa, trade unions generally played an important political role in providing a platform for joining forces against colonialism and in the fight for independence.

[89] Vettori (2001) *De Jure* 344. Baskin (1998) *ILJ* 986.

[90] Anstey (2004) 1841. See Vettori (2001) 342-343.

[91] Banuri (1990) 58-59: "You can be lucky if people do not demand democratic or other rights. If people are conscious of rights and demand them through political organisations and mobilisation, then you can ignore them only by risking a permanent dislocation of the economy. Government policy cannot be used to transform one set of labour institutions into another, whether or not they contribute to economic growth. Proposed institutional changes have to be consistent with the historical experience of each country in order to be feasible." In Baskin (1998) 990.

After re-joining the ILO in 1994, South Africa set out to ratify the core ILO standards, including the conventions on freedom of association and the right to organise.[92] International standards set by the ILO and the newly formed Constitution greatly influenced the development of South Africa's policy on collective bargaining. South Africa signed the Right to Organise and Collective Bargaining Convention 98 in 1996. This Convention protects workers against victimisation in exercising the right to organise.[93] Article 4 of Convention 98 also states that measures must be taken to "encourage and promote the full development and utilisation of machinery for voluntary negotiation" between the parties.[94]

3.2 The Constitutional Right to Collective Bargaining

The drafting of the Labour Relations Act[95] (LRA) was largely shaped by the then Interim Constitution, which provided for a number of labour rights, including the right to form and join a trade union, to strike and to engage in collective bargaining.[96]

Section 23 of the Constitution provides that everyone has the right to fair labour practices.[97] This right includes the right of workers and employers to form and join a trade union or an employers' organisation and to take part in union or employers' organisation activities respectively.[98] The section also provides that every trade union and employers' organisation, has the right to determine its own administration, programmes and activities; to organise; and to form or join a federation.

Section 23(5) of the Constitution provides that any trade union, employers' organisation or employer has the right to engage in collective bargaining; it provides

[92] Van Niekerk, Christianson, McGregor, Smit and Van Eck (2012) 20.
[93] Convention 98, Article 1 and 2.
[94] *SA National Defence Union v Minister of Defence & Others* (2006) 27 *ILJ* 2276 (SCA). In the case Conradie JA held that the Constitution does not make provision for a duty to bargain. He referred to the ILO Conventions which favour a voluntary negotiation process. See 2282 Par [9]-[10].
[95] Act 66 of 1995.
[96] S 27 of the Interim Constitution. S 23 of the 1996 Constitution.
[97] Cheadle indicates that this section must be read as a whole and thus "everyone" in this context refers to everyone within a labour relationship. Cheadle in Cheadle, Davis and Haysom *eds* (2006) 18.
[98] "[W]orker" in this context includes members of the National Defence Force. In the case of *SA National Defence Union V Minister of Defence & other* (1999) 20 *ILJ* 2265 (CC), the court, with reference to international standards, confirmed that members of the National Defence Force are regarded as "workers" and that "workers" have the right to form and join a trade union. The court also noted that this right may be limited, if justifiable, in terms of s 36 of the Constitution.

that national legislation may be enacted to give effect to this right. In its preamble, the LRA provides that one of the aims of the LRA is to provide for a collective bargaining process, giving effect to section 23 of the Constitution.

In view of the Constitutional right to engage in collective bargaining, the question arises whether this right presents a "duty to bargain". Cheadle argues that this is not the case and provides that the duty to bargain requires policy consideration as to the form and levels of collective bargaining, which may result in an overly complicated system of bargaining. Cheadle also states that international labour standards prefer voluntary collective bargaining.[99]

The explanatory memorandum on the LRA draft bill note that, upon consideration of the duty to bargain, the Task Team unanimously agreed that the duty to bargain should be excluded from the LRA and that, in its stead, the LRA must make provision for organisational rights that can be utilised to promote collective bargaining in the workplace.[100] The reason for opting for a voluntary approach to collective bargaining is to avoid prescribing rigid models for bargaining, so as to allow the "South African economy to adapt to the changing requirements of a competitive international market".[101]

As mentioned, in lieu of a statutory duty to bargain, the LRA Task Team elected to include organisational rights that allowed for recognition in a particular workplace to sufficiently representative trade unions. These organisational rights are:

- trade union access to the workplace;
- deduction of trade union subscription fees;
- the appointment of a trade union representative in the workplace (shop steward);

[99] Cheadle in Cheadle, Davis and Haysom *eds* (2006) 18-27.
[100] Explanatory Memorandum (1995) *ILJ* 292. The other considerations were the inclusion of a statutory compulsory model in which the levels at which bargaining should take place would be set out, as well as the issues on which parties must bargain. The second model considered was similar to the former, but required the judiciary to determine the levels and issues for collective bargaining.
[101] Explanatory memorandum (1995) *ILJ* 293.

- leave for trade union officials and office bearers and disclosure of relevant information.[102]

These organisational rights are enacted to provide trade unions with the means to persuade an employer to engage in collective bargaining.[103]

It is submitted that, although the idea of voluntary collective bargaining is better suited to the principle of collective *laissez-faire*, it may be judicious to consider the possible benefits that such a duty may provide. For instance, compulsory wage negotiations might aid in warding off labour unrest and can support the continued collective labour relations in industries where membership numbers are dwindling.[104]

3.3 Drafting the Labour Relations Act

During the drafting of the LRA, South Africa was still new to its democratic freedom. The previously disenfranchised needed to be given back their sense of dignity; in order to do so, it was vital that the inherent inequality of the labour policy was addressed. The new labour legislation was to be formulated on the tripartite negotiations between social partners, labour unions and business.[105] To this purpose government established the National Economic Development and Labour Council (NEDLAC).[106]

In July 1994 government appointed a Ministerial Task Team, headed by the then Minister of Labour, Tito Mboweni, to reconstruct the labour legislation and prepare a "negotiating document in draft Bill form to initiate a process of public discussion". The team was appointed to formalise a new industrial relations legislation in which

[102] S 12-16 of the LRA.
[103] Du Toit, Bosch, Woolfrey, Godfrey, Cooper, Giles, Bosch and Rossouw (2006) 213. See further Mischke (2004) *CLL* 51.
[104] Brassey (2012) *ILJ* 18 states that in light of the decline in trade union membership, the jurisprudence of the duty to bargain should be revisited. See further Godfrey, Theron and Visser (2007) DPRU Working Paper 106.
[105] Benjamin and Theron (2007) DPRU Working Paper 1.
[106] NEDLAC was established by the National Economic, Development and Labour Council Act 35 of 1994. There are some authors that argue that the intended social dialogue was not as effective as envisioned. Parsons (2007) *SAJE* 12 states that the envisioned tripartite accord never took place and that the various features of the labour legislation were introduced and negotiated separately. See further Cheadle (2006) DPRU Working Paper 3.

the "patchwork" of legislation, Industrial Court decisions and collective bargaining systems were properly addressed.[107] After investigating the existing collective of labour legislation and practices, the Task Team concluded that "[t]here is no existing statutory framework which can properly accommodate and facilitate an orderly relationship between bargaining at the level of industry and at the level of the workplace."[108]

The Task Team consequently set out to draw up a new labour law suite. In this process a number of interest groups gave their perspectives on the form the new LRA should take, with the construction of collective bargaining being the most pertinent topic.

The ANC voiced their recommendations through the Reconstruction and Development Programme (RDP). The RDP emphasised the importance of organised labour and the empowerment of workers. In order to give effect to the RDP it suggested a multi-level bargaining process where matters could be negotiated on a national, industrial and workplace level.[109] It further supported the extension of collective agreements across the industry.[110]

COSATU took a far more specific position on collective bargaining. They strongly supported collective bargaining structures and campaigned for bargaining processes to be formed in all sectors for purposes of industry-level negotiations.[111] COSATU also advocated the importance of employers engaging in collective bargaining and even went as far as to support a compulsory collective bargaining structure.

[107] Godfrey, Theron and Visser (2007) DPRU Working Paper 8,
[108] Explanatory Memorandum (1995) *ILJ* 291.
[109] RDP (1994) par 4.8.7. Du Toit, Bosch, Woolfrey, Godfrey, Cooper, Giles, Bosch and Rossouw (2006) 17.
[110] RDP (1994) par 4.8.8.
[111] Baskin (1994) COSATU Discussion Paper 7. COSATU provided six arguments for centralised bargaining: it can be utilised to set basic minimum wages and labour standards; it is a more effective means of bargaining; it allows unions to promote equality; it can provide access to medical and provident funds that can benefit both employers and employees; it increases the power of both parties and it is essential for proactive strategic unionism.

COSATU also supported the RDP's view of multi-level bargaining and cautioned against bargaining on the same issues at different levels.[112]

With regard to minimum wage it suggested that these issues could be improved upon at workplace negotiations. COSATU stated that "[t]he purpose of centralised bargaining is not to determine every detail centrally but to avoid extremes of labour exploitation by setting a realistic minimum floor of conditions".[113] Although this statement by COSATU provides for a more flexible approach to wage negotiations, it is submitted that this approach is not often observed in practice.[114]

A number of employers were opposed to the centralised bargaining structure proposed by COSATU and supported a more flexible, plant-level bargaining system. Small-to medium-sized businesses (SMEs) preferred the inclusion of blanket exemptions in order to stimulate growth and improve on job creation. The proposed exemption application procedure was not regarded as a viable solution by the SMEs.[115]

The National Labour and Economic Development Institute (NALEDI) supported COSATU's policy on centralised bargaining and suggested some form of compulsory bargaining. They, however, suggested that collective agreements be concluded at an industry level on certain issues only, and that some terms and conditions of employment be negotiated on a workplace level.[116] As for SMEs, NALEDI rejected the notion of blanket exemptions: they suggested instead that a special schedule be set for those firms where concessions can be made for small and medium sized

[112] Baskin (1994) COSATU Discussion Paper 14. In order to ensure sufficient flexibility, COSATU set out three levels of collective bargaining: national, industrial and plant, each with its own bargaining function.
[113] *Ibid* 16.
[114] See Bendix (2010) 295. See further discussion in Chapter 6 par 3.3.
[115] SMEs argued that the proposed exemption procedure was not effective and that the old industrial council system was unfriendly towards smaller enterprises. However, no real evidence could be provided to support these claims. Du Toit, Bosch, Woolfrey, Godfrey, Cooper, Giles, Bosch and Rossouw (2006) 21. The Sunnyside Group, an organisation that lobbied the interests of SMEs argued that the extension of collective agreements was unconstitutional as it infringed on the right to freedom of association. See Godfrey, Maree, Du Toit and Theron (2010) 88-89.
[116] Godfrey, Maree, Du Toit and Theron (2010) 83.

firms.[117] It is submitted that this view by NALEDI on the stance of SMEs are to be preferred, as it still provides for some flexibility whilst ensuring protection from exploitation.

In 1995 the President established the Commission to Investigate the Development of a Comprehensive Labour Market Policy (the Commission).[118] The Commission was instructed to examine the integration between rapid and sustainable economic and employment growth.[119] The Commission advocated a flexible yet secured labour market; it strongly supported collective bargaining as a tool to set realistic minimum conditions, as it directly involves the affected parties.[120]

The Commission correctly envisioned a centralised bargaining structure in which certain bargaining frameworks could be set, but noted that due to changing global conditions, certain sectors may need to be flexible in order to rapidly respond to changing markets.[121] For this reason the Commission suggested that minimum standards be set at industry level and that increases to the minimum be negotiated at enterprise level.

The ideology behind this was that bargaining councils will "set realistic minima for the less profitable enterprises", and that larger firms, through plant level negotiation, would set increases.[122] The Commissioner accurately held that:

> The imposition of higher minimum wages on less productive firms threatens jobs. There is clearly conflict of interest between higher wages for some and employment for others.[123]

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[117] Godfrey, Maree, Du Toit and Theron (2010) 84. Business South Africa (BSA) supported a more self-governing and voluntary approach to collective bargaining. BSA also did not support a multi-level bargaining approach.
[118] Commission Report (1996).
[119] The Commission report was published in 1996 and is entitled *Restructuring of the South African Labour Market.*
[120] Commission Report (1996) par 54 and 166.
[121] *Ibid* par 172. See Brown (1995) 983 in his discussion of the global decline of centralised bargaining. Brown notes that enterprise bargaining has become more popular due to the flexibility it allows employers. He states that international competitiveness has had a large impact on the pressures felt by business and that with an "ever-increasing range of goods and services, wages can no longer be 'taken out of competition'". He ends off by stating that the greater South Africa's integration into the global economy, the greater the pressure to change will become.
[122] Commission Report (1996) par 173.
[123] *Ibid* par 175.

The concern raised by the Commission corresponds closely to the proposal made by COSATU in their discussion paper. The ideology behind centralised bargaining was not to set actual wages but to prevent exploitation by setting realistic minimums. Unfortunately wages set through bargaining councils rarely function as minimum wages, but instead reflect the actual wages larger firms are willing to pay.[124]

The Commission further supported the extension of collective agreements but raised concern as to the effect these extensions would have on non-parties. They noted that the Minister's power to extend must be more discretionary and less administrative, and that less focus must be placed on the representivity of the council and more on the effect that the extension will have on non-parties and job-creation.[125]

The view taken by the Commission on collective bargaining provides a fair and rational approach in providing for self-regulation within a global context. The concerns raised by the Commission highlights the possible shortcomings of centralised bargaining in overlooking its true purpose: to prevent exploitation of workers by providing a tool for self-regulation to set real minimum conditions.

The Task Team submitted the Labour Relations Draft Bill (Draft Bill) in 1995.[126] The Draft Bill retained the voluntary and self-governing nature of the industrial councils, as well as the extension of collective agreements – with specific provision made for exemption applications.[127] In order to address the concerns raised by SMEs, the Draft Bill required that the bargaining council constitution make special provision for the representivity of small- and medium-sized firms.[128]

[124]See Cheadle (2006) DPRU Working Paper 40, in which he provides that instead of setting minimum entry-level wages, collective agreements provide for set wages for all categories of work in a workplace regardless of whether the levels set are suitable for each individual workplace.
[125] Commission Report (1996) par 177. The position of the council on the extension of collective agreements is similar to the approach taken in France. See Chapter 7 par 3.3.3.5 for more details on the French extension procedure.
[126] Government Gazzette 16259/1995.
[127] S 35(3)(d) of the Bill.
[128] S 28(1)(b) of the Draft Bill.

The final LRA was published in December 1995 and commenced almost a year later on 11 November 1996. There are some marked differences between the Draft Bill and the final LRA, but not many significant amendments were made to the provisions relating to collective agreements.[129]

One exception is the provision relating to exemptions that is included in the final LRA. The Draft Bill provided that a collective agreement must make provision for the "expeditious granting of exemption to non-parties from the provisions of the agreement by an independent body on the grounds of undue hardship".[130] The final LRA provides that the collective agreement must make provision for an independent body to hear any *appeals* brought against the bargaining council for refusing to allow an exemption.[131]

Collective bargaining remains a voluntary process and is available at multiple levels. The LRA introduced mechanisms to encourage employers to engage in collective bargaining by providing trade unions with certain organisational rights and providing protection against certain forms of industrial action.[132]

The final LRA also retained the bargaining council's ability to extend collective agreements to non-parties and thereby bind them to the terms set in the agreement. Non-parties are thereby encouraged to become members of the council in order to participate in the negotiation processes. Together with the extension of collective agreements, the LRA also provides for exemption from collective agreements.[133]

[129] The Draft Bill contained a provision for the representativeness of bargaining councils that was not included in the final LRA. Other provisions also excluded from the final LRA included the admission of parties to a bargaining council, the winding up of a variation council and the cancellation of the registration of a bargaining council.
[130] S 35 (3)(d) of the Draft Bill.
[131] S 32(3)(e) of the LRA. S 30(1)(k) of the final LRA also included a provision stating that the bargaining council's constitution must include a procedure for exemption from collective agreements.
[132] Du Toit, Bosch, Woolfrey, Godfrey. Cooper, Giles, Bosch and Rossouw (2006) 29.
[133] S 32 of the LRA. Du Toit, Bosch, Woolfrey, Godfrey. Cooper, Giles, Bosch and Rossouw (2006) 30.

4. UNEMPLOYMENT IN SOUTH AFRICA

South Africa's history of racial oppression has left a deep scar in its economic development. On their own, the end of apartheid and the right to equality set out in our Constitution and labour laws can do little to remedy the disadvantages of the past.

In drafting the LRA, government had to take cognisance of the economic circumstances of the country. During the twenty years preceding the new LRA the country saw a gradual decrease in gross domestic produce, resulting in an increased unemployment rate. In 1994 the country's unemployment rate was at a staggering height of 30%. These factors – together with South Africa's re-admission into the global economy, which exposed firms to greater competition – placed increased pressure on the labour administration to strike the difficult balance between workers' rights and economic growth.[134]

As Baskin puts it, "[o]ur country faces a truly awesome unemployment challenge".[135] The current StatsSA figures indicate that South Africa has an unemployment rate of 25.6%.[136] However, the Centre for Development and Enterprise[137] (CDE) reports that this figure is somewhat optimistic, as it only takes into consideration those adults who are employed or actively looking for employment.[138] Consequently, it is more accurate to say that South Africa has a 25.6% job seekers rate. The CDE report estimates that, more realistically, only 41% of the working-age population has a job, formal or informal.[139]

Unemployment rates also indicate a clear racial divide, with Africans at a high of 29.1% and Whites at a low of 6.1%.[140] These figures are indicative of our past inequalities. African residential areas are often further away from economic hubs,

[134] Du Toit, Bosch, Woolfrey, Godfrey. Cooper, Giles, Bosch and Rossouw (2006) 18.
[135] Baskin (1998) *ILJ* 988.
[136] StatsSA Quarterly Labour Survey, Quarter two, 2013. Currently 32 352 000 of the population is between the working ages of 15-65.
[137] CDE Report (2010).
[138] The StatsSA Quarterly Labour Survey also provides for the definition of "unemployed", stating that unemployed persons are those between the ages of 16-64 actively looking and available for work.
[139] CDE Report (2010) 2.
[140] StatsSA Quarterly Labour Survey, Quarter Two, 2013. Indians and Asians have an unemployment rate of 13.4% and Coloureds a percentage of 25.1%.

making job-seeking and retention more difficult.[141] Whites and Indians are also more often successful in their job search: 50% of Africans and Coloureds will still be looking for work after six months of searching, while the same only applies to 30% of Whites and Indians.[142]

The racial divide in unemployment is indicative of an oppressive and unequal historical development. As discussed above, African workers were in the past often restricted to unskilled or semi-skilled positions. Education amongst Africans was also limited in order to provide a pool of cheap labour. The consequence of this neglect means that a large number of African labourers are either forced out of the labour market due to lack of skill, or forced to remain in unskilled or semi-skilled positions.[143] Although apartheid laws have been repealed, the majority of the poor and unemployed are black Africans who are largely excluded from participation in the professional and capital-intensive formal economy.[144]

5. CONCLUSION

South Africa's current labour regulation is largely built on correcting the inequalities of the past. The drafting and enactment of the LRA was not merely a necessary task in the course of a changing government, but rather a significant step to empowering the previously disenfranchised.

Labour legislation prior to 1995 was rigged with discrimination and oppressive provisions. From the enactment of the ICA 1924 to the release of the Wiehahn Commission Report in 1979, African workers were, for the most part, excluded from participation in collective bargaining, as well as from certain skilled-job categories.

After the first South African democratic elections in 1994, government immediately went to task rewriting the country's labour legislation. Organisations, such as

[141] Banerjee, Galiani, Levinsohn, McLaren and Woolard (2008) *ET* 717.
[142] *Ibid* 733.
[143] Benjamin in Davidov and Langille *eds* (2011) 220. Education amongst Africans was kept to the minimum to ensure that they remained "hewers of wood and drawers of water."
[144] See Von Broembsen (2012) *LDD* 9.

COSATU – who played a key role in the fight against apartheid – and the ILO, played an essential role in setting the new labour policies. After deliberations around the best way forward, the final LRA was assented to in 1995.

The political influence that trade unions had during the drafting of the LRA may have overshadowed some of the concerns raised by employer interested groups and by the Commission. The provisions contained in the final LRA relating to the extension of collective agreements does not provide for any precautionary measures in ensuring that minimum wage levels are not set unreasonably high; nor are there any other provisions within the LRA to address the concerns raised by these interest groups.

The extreme racial inequality that was ingrained in South Africa's labour law echoes in the current unemployment statistics and skill shortage. These conditions cannot be disregarded in determining labour policies; any clear legal obstruction to job creation must be evaluated and amended where possible.

The arguments and recommendations made in this thesis will be based on the balance between the protection of workers' rights and the prevention of exploitation on the one hand, and the need for job creation and economic development on the other.

CHAPTER FIVE

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1. INTRODUCTION

South Africa's labour legislation provides for multi-level collective bargaining. The Labour Relations Act[1] (LRA) sets out the function and procedure of these bargaining levels and provides for the enforcement of agreements concluded within these bargaining structures.[2] Although the LRA does provide for enterprise-level bargaining, centralised bargaining – through registered bargaining councils – has become the main form of wage negotiation and minimum employment conditions setting within specific industries.

Agreements concluded in these bargaining councils are automatically binding on the parties to the agreement. They may, however, through application to the Minister of Labour, be extended to non-parties. Both the procedural elements and the implications of the practice of extension have received some criticism.

Section 23 of the Constitution provides for the right to freely engage in collective bargaining. This right has further been confirmed by the Constitutional Court in *In re Certification of the Constitution of the Republic of SA, 1996*[3] in which the court held that the right to collective bargaining entails the right "of those who engage in collective bargaining to exercise economic power against their adversaries".[4] The court further held that the right to collective bargaining also recognises that "employers enjoy greater social and economic power than individual workers".[5]

The protection of the right to engage in collective bargaining is indisputable; however, the manner in which this right is put into practice may be subject to criticism or change.[6]

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[1] Act 66 of 1995.
[2] S 23 of the LRA.
[3] (1996) 17 *ILJ* 821 (CC).
[4] At par 64.
[5] At par 66. Also see Cheadle (2005) *LDD* 147. The freedom to engage in collective bargaining can also be regarded as a negative right whereby government is prevented from passing legislation that prohibits or limits the right.
[6] In *In re Certification of the Constitution of the Republic of SA, 1996* at par 65 the court provided that the right to collective bargaining does not require a particular mechanism for this right to be exercised, but merely provides that the right needs to be protected. It is therefore submitted that the form in which such protection is given effect to, is subject to debate.

In this chapter, the various levels of collective bargaining in South Africa will be discussed by looking at the establishment and function of bargaining councils; the extension and exemption of collective agreements; and the use of collective bargaining as a form of minimum wage fixing. This chapter will set out the collective bargaining mechanisms provided for in South Africa's labour legislation, as well as provide a brief overview of the various levels of collective bargaining, and a short description of each. Centralised bargaining is the main form of collective bargaining in South Africa and therefore this form of wage negation will be discussed on more detail.

This chapter will also provide an exposition of the procedure and implications of the extension of collective agreements to non-parties.

2. LEVELS OF COLLECTIVE BARGAINING

2.1 Introduction

The collective bargaining structures introduced by the Labour Relations Act[7] (the LRA), such as workplace forums and bargaining councils, support a move away from the adversarial collective bargaining evident in the 1980s and 1990s.[8] In South Africa collective agreements may be concluded at enterprise-level (decentralised bargaining) or industry-level (centralised bargaining). The LRA does not provide the procedure for concluding a collective agreement at enterprise-level but does make provision for the legal effect of such an agreement.[9]

Section 213 of the LRA defines a "collective agreement" as a written agreement containing terms and conditions of employment, concluded between one or more registered trade unions – whether majority or minority unions – and either one or

[7] Act 66 of 1995.
[8] Nel, Swanepoel, Kirsten, Erasmus and Tsabadi (2005) 184. Also see Godfrey, Theron and Visser (2007) DPRU Working Paper 3.
[9] S 23 of the LRA. S 31 of the LRA regulates collective agreements concluded in a bargaining council.

more employers, one or more employers' organisations or a combination of employers and employers' organisations.[10] Employees may not conclude a collective agreement, as defined by the LRA, outside of a registered trade union.[11]

As discussed in Chapter 4 above, the LRA supports central bargaining mechanisms.[12] Centralised bargaining provides various advantages that include relatively low costs, setting of competitive floors, providing general employment conditions that may be improved upon at individual workplaces, and reducing the frequency of strikes and lockouts.[13]

2.2 Bargaining Units

When discussing bargaining units, it is important to differentiate between centralised and decentralised bargaining. A bargaining unit constitutes those employees that fall within a specific class and that will be covered by an agreement concluded by the bargaining representatives in that specific unit.[14] A bargaining unit can consist of one or more employers and one or more trade unions.[15]

The scope or jurisdiction of a bargaining unit can be determined in various ways. A bargaining unit may, for example, cover all the employees of a specific employer or a certain type of employee at various employers.[16] For the purpose of effective collective bargaining, most bargaining units are defined according to the method of payment. Hourly-rated workers are therefore typically differentiated from monthly

[10] S 213 of the LRA defines a trade union as "an association of employees whose principal purpose is to regulate relations between employees and employers, including any employers' organisation". Although the LRA does require a trade union to be registered in order to enjoy statutory organisational rights, or to establish a bargaining council, a trade union may technically exist without prior registration. See Grogan (2009) 312.
[11] It is submitted that employees may, however, conclude an informal agreement with their employer, as the LRA does not restrict the conclusion of agreements between interested parties. These agreements, however, will not be regarded as a "collective agreement" as determined by the LRA.
[12] See Chapter 4 para 3. Also see Godfrey and Bamu (2012) *AJ* 220.
[13] Cheadle (2005) *LDD* 148. See Finnemore (2009) 194.
[14] Bendix (2010) 265.
[15] A bargaining unit is ordinarily specified in such a way as to ensure effective labour relations, reduced bargaining fragmentation and a combination of employees with similar workplace interests. See Finnmore (2009) 233.
[16] Bendix (2010) 265. See Cassim (2009) *ILJ* 795.

salary earners.[17] Although the law does not restrict managers from the benefits of collective bargaining, in practice market forces normally determine the employment conditions for these classes of employees.[18]

2.3 Enterprise-level Collective Bargaining

With reference to the definition of a collective agreement in the LRA, a single employer may conclude a collective agreement with a representative trade union at the specific workplace. A minority union would generally only be able to act and bargain on behalf of its own members.[19] The LRA provides specific powers that are available to majority unions only and thereby considerably narrows the scope of bargaining for minority unions.[20]

There is no duty to engage in collective bargaining in South Africa.[21] Even if a trade union is granted some or all of the organisational rights provided in the LRA, the employer may still refuse to bargain with the trade union.[22] Such refusal, however, may be difficult for an employer if the particular trade union is well recognised at the workplace – and even more so if the trade union is a majority union.[23] When an

[17] Grogan (2009) 351. Bargaining units are set according to different categories of employees regarding skill and/or position. Managerial employees and unskilled workers are often in separate bargaining units. See Bezuidenhout and Buhlungu in Buhlungu, Daniel, Southall & Lutchman (2007) 252. See further Godfrey, Maree, Du Toit and Theron (2010) 198 in which they discuss the inclusion of "flexi-timers" or casual workers, within a set bargaining unit.
[18] Grogan (2009) 351. Grogan notes that the employment level covered by collective agreements has been on the increase. He raises caution to this trend, as unions may find they are left with no one but shareholders to negotiate with. See *Independent Municipal & Allied Trade Union v Rustenburg Transitional Council* (2000) 21 *ILJ* 377 (LC) in which the court held that employees in senior managerial positions cannot be prevented from taking part in their right to freedom of association by joining a trade union. However, the court did caution against the possible conflict of interest that can arise from such participation.
[19] S 23(1)(d) of the LRA provides that the employees that are not members of the registered trade union that is party to the agreement, will only be bound by the collective agreement if such employees are identified in the agreement; the agreement expressly binds the employees and the trade union, or trade unions, party to the agreement; or have as its members the majority of the employees at the workplace.
[20] Finnemore (2009) 233. See s 14 and s 16 of the LRA, which provide the right to appoint a trade union representative and the right to disclosure of information to majority unions only.
[21] See Chapter 4 para 3.2. See *South African National Defence Union v Minister of Defence* (2006) 27 *ILJ* 2276 (SCA) in which the Supreme Court of Appeal, with reference to International standards, confirmed that the Constitution does not provide for a duty to bargain.
[22] S12- s16 of the LRA. See Chapter 4 para 3.2 on the development of collective labour law in South Africa for further discussion on organisational rights.
[23] Bendix (2010) 298.

employer refuses to recognise a union, the union can also engage in industrial action to compel recognition from the employer.[24]

If the employer chooses to recognise the trade union as a bargaining representative, an agreement is concluded. Such an agreement is acquired by a trade union through a request, in terms of section 21 of the LRA.[25] The recognition agreement acknowledges the trade union as collective bargaining representative for some or all of the employees at the workplace and thereby creates a bargaining unit.[26]

Such a recognition agreement confirms the bargaining unit; stipulates the nature of the relationship; provides for the procedures to be followed; and clarifies the confines of the union's bargaining powers. In essence, the recognition agreement resembles that of a bargaining council constitution.[27]

A trade union can, by agreement with the employer, set a representivity threshold for the workplace which, if the threshold is high, ensures that only one trade union is active at the specific workplace.[28] The parties may also agree that the trade union concerned has sole bargaining rights for the specific bargaining unit or even at company level, although the latter form is inadvisable.[29]

2.4 Workplace Forums

Chapter five of the LRA makes provision for the establishment of workplace forums upon the request of a representative trade union at a workplace with more than a

[24] See *National Union of Metalworkers of South Africa v Bader Bop (Pty) Ltd* (2003) 24 *ILJ* 305 (CC), in which the Constitutional Court held that a minority trade union does have the right to strike in order to obtain the right to appoint a trade union representative at the workplace. However, the court noted that this does not entail that the trade union's representative must be recognised by the employer, but merely that the trade union does have the right to strike on a matter relating to the appointment of a shop steward. See par [45] of the judgement.
[25] S 21 of the LRA provides for the procedure to be followed by a trade union for the acquisition of organisational rights. See Grogan (2009) 362 in which he notes that although, s 21 of the LRA relates to the acquisition of organisational rights, the collective agreement referred to in this section would include a recognition agreement. However, the CCMA will not be able to force the employer to recognise the trade union as a bargaining unit. See Chapter 4 para 3.2 for discussion on organisational rights.
[26] Bendix (2010) 298. Also see Finnemore (2009) 230.
[27] Grogan (2009) 360.
[28] Venter, Levy, Conradie and Holtzhausen (2009) 373.
[29] Bendix (2010) 300.

hundred employees.[30] The function of the workplace forum is to promote the interests of employees; to enhance workplace efficiency; to provide for consultation with the employer on specified matters; and to make provision for joint decision-making on certain issues.[31]

The LRA further provides that regular meetings must be held between the employer and the workplace forum where matters such as the employer's financial and employment situation are discussed, as well as any matter that may affect the employees in the workplace.[32] Although minimum wages cannot be set though workplace forums, they do provide an avenue for improving industrial peace.

In his article on works councils in Germany, Weiss emphasises the benefits offered by workers' participation in the councils. One of the benefits highlighted is the ability of the works councils to oversee the enforcement of collective agreements, especially in instances where enforcement mechanisms are ineffective or non-existent.[33] A further benefit of works councils is the creation of opportunities for trade unions to focus on centralised collective bargaining, and to leave the oversight of day-to-day company arrangements to the works councils.[34]

Despite the benefits workplace forums offer, they did not obtain the recognition hoped for. Wood and Mahabir argue that the failure of workplace forums in South Africa can be connected to the nature of collective bargaining in the country. The authors note that workplace representatives may be slow to bind themselves to a

[30] S 80 of the LRA. S 78 of the LRA provide that "employee" in this Chapter means any person employed at the workplace, other than senior managers. S 78 of the LRA further provides that a "representative trade union" means a registered trade union, or two registered trade unions acting jointly, that have the majority of the employees employed at the workplace as its members. S 213 of the LRA defines a "workplace" as any place or places where an employee of the employer works, including any operations held by the employer that can be regarded as "independent" with reference to the size, function or organisation.
[31] S 79 of the LRA. See Finnemore (2009) 222. It is important to note that workplace forums do not replace the role of trade unions. The aim of workplace forums is to allow parties to actively participate in the workplace through consultation and joint decision-making. See Grogan (2009) 332.
[32] S 83 of the LRA. See Steadman (2004) *ILJ* 1170. Workplace forums were specifically included in the LRA to give effect to the democratisation of the labour market and to allow employees to play a greater role in workplace decisions.
[33] Weiss (2005) *LDD* 162.
[34] *Ibid* 164. See Hepple (1999) *ILJ* 12. The article by Hepple was published before the full realisation of the failure of workplace forums in South Africa. Hepple optimistically notes that trade unions must utilise workplace forums in order to address flexibility in the workplace and to ensure the protection of all workers in the workplace.

formal workplace-participation structure for fear of being seen as collaborators. The authors further note that trade unions are wary of the system, as it enables employees to bypass union representivity and approach the employer directly.[35]

Although minimum wage cannot be set through workplace forums, it is submitted that this valuable avenue can go a long way in creating industrial stability in a workplace. The process of joint consensus-seeking proposed by the LRA can help built the much-needed trust between an employer and his workers.[36]

3. BARGAINING COUNCILS

3.1 Introduction

The LRA makes provision for centralised bargaining though the establishment of bargaining councils. Bargaining councils are established by a registered trade union and a registered employers' organisation for a specified sector and area.[37] A bargaining council may also be registered for the public sector.[38] For purposes of this thesis only private sector bargaining councils will be considered.

Bargaining councils have become essential to South African labour relations. It is a voluntary process and has practically no state involvement, other than the regulation of the formation of a bargaining council and the extension of collective agreements. The ideology behind this is to enable trade unions and employers' organisations to self-regulate.[39]

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[35] Wood and Mahabir (2003) *IRJ*. See further Bendix (2010) 344. See Du Toit (2007) *ILJ* 1476. Du Toit notes that the fear of workplace forums overshadowing the role of trade unions made it unwelcome. He states that despite the LRA providing trade unions with almost absolute power over workplace forums, it did not abate the perception that workplace forums "would inevitably serve as cats' paws for the employers and sow division among workers". Finnemore (2009) 222. See Steadman (2004) *ILJ* 1175. See Klerck (1999) *Transformation.*

[36] See Lehulere (1995) *SA Labour Bulletin* 42 in which it is suggested that legislation should link bargaining councils with workplace forums so that there can be proper enforcement of industry-level agreements at the workplace.

[37] S 27 of the LRA.

[38] S 27(2) of the LRA.

[39] Theron (1993) *SALB* 58.

The LRA provides that the Minister of Labour may extend a collective agreement concluded within a bargaining council to non-parties.[40] This Ministerial power is controversial, due to its ability to overshadow the common law principles of freedom of contract.[41]

3.2 Establishing a Bargaining Council

Section 27 of the LRA provides that one or more registered trade unions and one or more registered employers' organisations may establish a bargaining council for a sector or an area. In order to do so, parties must adopt a constitution for the bargaining council that meets the requirements set out in section 30 of the LRA and register the bargaining council in terms of section 29.[42]

The LRA provides certain compulsory provisions that must be addressed in a bargaining council's constitution including:

- the procedure for the election of representatives, office-bearers and officials;
- representation of small and medium enterprises;
- the procedure for conducting meetings, including quorum requirements;
- dispute resolution;
- the procedure for exemption from collective agreements;
- administration of funds; and
- procedures for changing the constitution or winding up the bargaining council.[43]

The parties may apply for the registration of a bargaining council by submitting to the registrar[44] a copy of its constitution, the completed prescribed form[45] and any other information that may assist the registrar in the registration process.[46] The section

[40] S 32 of the LRA.
[41] Godfrey, Maree, Du Toit and Theron (2010) 109.
[42] S 27(2) of the LRA provides that the State may also be a party to a bargaining council if it is an employer in the sector and area of the established bargaining council.
[43] S 30(1)(a)-(q) of the LRA.
[44] The registrar refers to the registrar of labour as appointed in terms of s 108 of the LRA.
[45] Form 3.3 as provided in the LRA.
[46] S 29 of the LRA.

further provides that the registrar must publish the application in the Government Gazette and that any interested parties may object to the registration of the bargaining council.[47] These objections must be sent to the registrar, following which the applicant will be given fourteen days to respond to the objection.[48]

As soon as possible thereafter, the registrar must send the application, together with any objections and responses, to the National Economic Development and Labour Council (NEDLAC)[49] for consideration. Before registering the bargaining council, the registrar has to consider, *inter alia:*

- whether provision has been made for the representation of small- and medium-sized enterprises;
- whether the parties are sufficiently representative of the sector and area; and
- whether there are other councils registered for the same sector and area.[50]

The LRA also makes provision for the establishment of statutory councils for sectors where trade unions or employers' organisations are not sufficiently representative.[51] Statutory councils may be regarded as "beginner bargaining councils" as they may later be converted into a bargaining council.[52] Statutory councils were enacted to satisfy government's concern that bargaining councils will not be able to solely promote centralised bargaining.[53] For purposes of establishing a statutory council, a

[47] See *Ninian & Lester (Pty) Ltd v Crouse NO & Others* (2009) 30 *ILJ* 2889 (LAC) in which the court held that any member of the general public may object to the registration of a bargaining council in terms of s 29(3) of the LRA. The court further held that if a bargaining council has already been registered only persons with *locus standi* are entitled to appeal against the registrar's decision, in accordance with s111(3) of the LRA.
[48] S 29(6) of LRA.
[49] NEDLAC is establish by the National Economic, Development and Labour Council Act 35 of 1994.
[50] S 29(11)-(13). Also see Explanatory Memorandum 125. The Task Team specifically included provisions allowing NEDLAC to establish criteria for demarcating a sector and area in order to improve on the coherence of sectoral level bargaining.
[51] Part E of Chapter III of the LRA.
[52] S 48 of the LRA. See Bendix (2010) 132. Section 44 of the LRA provides for Ministerial determinations. If a statutory council is not sufficiently represented, it may submit a collective agreement to the Minister. The Minister must approach the agreement in the same way as a recommendation made by the Employment Conditions Commission in terms of the Basic Conditions of Employment Act 75 of 1997. See Chapter 6 para 2.3 for further detail on sectoral determinations and the Employment Conditions Commission.
[53] See Godfrey and Bamu (2012) *AJ* 224.

trade union or employers' organisation will be regarded as representative if it represents or employs at least 30% of the employees in the sector and area.[54]

To date only three statutory councils have been registered since 1996 and consequently they play a relatively small role in the centralised bargaining structures in South Africa.[55]

3.3 Functions of a Bargaining Council

One of the main functions of a bargaining council is to facilitate the conclusion of collective agreements through collective bargaining. By its very nature a bargaining council is a centralised system of collective bargaining. Bargaining councils also facilitate labour peace by creating a forum where parties can negotiate on wages and working conditions.[56]

The functions of a bargaining council include:

- the conclusion and enforcement of collective agreements;
- the prevention and resolution of disputes;[57]
- the promotion and establishment of training schemes;
- the development of proposals for submission to NEDLAC; and
- the provision of industrial support services within a sector.[58]

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[54] S 39(1)(a)-(b) of the LRA. The LRA states that a trade union *or* an employers' organisation may apply to the registrar to establish a statutory council. Thus, a trade union and an employers' organisation need not act jointly in order to apply for the establishment of a statutory council. S 41(6) and (7) of the LRA states that, if the applicant is a trade union or an employers' organisation and there is no respective employers' organisation or trade union party to the council, the Minister must appoint a suitable person to represent the relevant parties as an alternative.

[55] There are currently three registered statutory councils: Statutory Council for the Printing, Newspaper and Packaging Industry of South Africa, Amanzi Statutory Council and Statutory Council for the Squid and Related Fisheries of South Africa. See http://www.labourguide.co.za/general/bargaining-councils-updated-april-2010-129 accessed on 28 December 2012. See Godfrey and Bamu in Rycroft and Le Roux *eds* (2012) 224. Godfrey and Bamu note that only one of the statutory councils has been able to enlist a significant number of employees and is capable of being reorganised into an established bargaining council.

[56] Bendix (2010) 293. Bendix notes that the wide functions provided to a bargaining council reaffirm the legislature's intent to provide for a wider scope for self-regulation.

[57] S 51 of the LRA provides for the dispute resolution function of a bargaining council. A bargaining council does not have the power to resolve disputes unless they have been accredited to do so by the CCMA as provided in s 52 of the LRA. See *Mandhla v Belling & another* [1997] 12 BLLR 1605 (LC) 1608.

Bargaining councils are self-governed, thus the State has no influence over decisions taken within a bargaining council. For the most part, a bargaining council's constitution provides for the membership and representation of employers and trade unions. The manner in which a collective agreement is to be concluded is also contained within a bargaining council's constitution.[59]

3.4 Role Players and Representation

3.4.1 Introduction

The two main role players in a bargaining council are trade unions, or trade union federations, and employers' organisations. Each represent their members' interests through the collective bargaining process. Section 30(1)(o) of the LRA provides that the constitution of a bargaining council must provide for the admission requirements of additional trade unions or employers' organisations.[60] An employer may not become a party to the bargaining council directly and must register with an employers' organisation to be part to the bargaining process.[61] If a trade union or an employers' organisation wants to register as a party of the bargaining council they

[58] S 28 of the LRA.
[59] S 30(1) of the LRA provides that the constitution of a bargaining council must include a procedure on how decisions will be made. For example, Annexure E item 2 of the Constitution for the Metal and Engineering Industry Bargaining Council provides the negotiation procedure for the conclusion of a collective agreement: a party that wishes to bring a proposal to the council must submit it to the Secretary of the Council, whereafter it must be circulated to the relevant parties within 45 days of receipt thereof and, once circulated, a meeting will be called in order to negotiate on the claims raised in the proposal.
[60] A trade union or employers' organisation whose application for admission is refused may apply to the Labour Court for an order to admit the party to the council in terms of s 56(6) of the LRA. In the case of *Public Servants Association of SA v Safety and Security Sectoral Bargaining Council* (2007) 28 *ILJ* 1300 (LC), the court held that a bargaining council may refuse admission to a minority trade union. The court noted that the trade union's ability to influence decisions made within the bargaining council is an important factor to consider in the admission of a minority union. See further *Fuel Retailers Association of SA v Motor Industry Bargaining Council* (2001) 22 *ILJ* 1164 (LC), in which the court provided certain considerations in determining whether to make an order in terms of s 56(6) of the LRA. These considerations include: whether the applicant falls within the scope of the bargaining council concerned; representivity of the applicant; stability of the industry; and whether the admission of the applicant would contribute to the promotion of effective collective bargaining.
[61] S 56(1) of the LRA states that a "registered employers' organisation" may apply to the council to be admitted as a party. See Grogan (2009) 336.

must bring a written application to the council in accordance with section 56 of the LRA.[62]

Representivity is an important aspect of collective bargaining, as a collective agreement cannot be extended to non-parties if the bargaining council does not have the required representivity.[63] Employers that are members of these employers' organisations will be regarded as party to the collective agreement concluded within the bargaining council's structure. A non-party employer is an employer that is registered with the bargaining council but is not a member of the employers' organisation that is a party to the bargaining council.[64] Thus an employer may be recognised as an employer – falling within the registered scope of the bargaining council – without being party to the council agreement.

3.4.2 Trade Unions

Trade unions are defined by section 213 of the LRA as "an association of employees whose principle purpose is to regulate relations between employees and employers, including any employers' organisation". In order to engage in effective collective bargaining, a trade union must be registered with the Department of Labour.[65] Section 95 of the LRA sets out the requirements for the registration of a trade union, which includes the adoption of a trade union constitution.[66]

With regard the need for the establishment of trade unions Bendix states:

> The analysis of the traditional labour relationship revealed that the power of an employer is best matched by a combination of workers who collectively obtain

[62] S 56(2) of the LRA provides that the application must be accompanied by the applicant's constitution, a registration certificate, details of their members within the applicable scope and reasons why they should be admitted as a party.
[63] See paragraph 4 below.
[64] Maree (2011) *SAJLR* 18.
[65] Although registration is not a prerequisite for the existence and functioning of a trade union, most provisions in the LRA require the trade union to be registered in order to claim certain rights, such as the five organisational rights in terms of s 12-16 of the LRA. It is also unlikely that an employer would recognise an unregistered trade union as a bargaining party.
[66] The trade union constitution requirements are set out in s 95(5)-(6) of the LRA.

> concessions which would not otherwise have been and, in doing so, attempt to improve their position, both at the workplace and in society.[67]

Practically, forming a trade union is not the only way in which an employee can engage in collective negotiations with their employer, but it does serve to be the most effective.[68] Having an established and recognised body to act as spokesperson for the employees on an on-going basis provides far better backing to the petitions of the employees than sporadic appearances by a single employee.[69]

The main function of a trade union is to engage in collective bargaining on behalf of their members and to assist their members in disciplinary hearings[70] and consultations regarding possible retrenchments.[71] The trade union membership agreement signed by the employee provides the union with the mandate to negotiate on employees' behalf regarding wages and conditions of service.[72] Members of a trade union do not hold a financial stake in the wellbeing of the union, but rather rely on the trade union to serve the common interests of its members.[73]

In South Africa, majoritarianism applies to trade union representation. This means that the interests of the majority of employees at the workplace take preference over those of the minority.[74] Subsequently, if a union concluded an agreement with the employer that is in the best interests of the majority of employees affected by the agreement, the agreement will be binding on all the employees despite certain

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[67] Bendix (2010) 161. Webb (1911) 1 defines trade unions as "a continuous association of wage earners for the purpose of maintaining or improving the conditions of their working lives".
[68] Employers are further less likely to negotiate with employees directly if there is a registered trade union present at the workplace. See par 2.1 above for a discussion on bargaining units.
[69] Du Toit (2011) *ILJ* 6. Bendix (2010) 161.
[70] S 14(4) of the LRA. See further Item 4(1) of Schedule 8, Code of Good Practice: Dismissal.
[71] S 189 of the LRA. If the employer is contemplating dismissing one or more employees based on operational requirements (retrenchment), he must consult with a consulting party, which includes a trade union whose members are likely to be affected by the dismissal.
[72] Grogan (2009) 316.
[73] See *SA Municipal Workers Union v Jada & Others* (2003) 24 *ILJ* 1344 (W) 1348.
[74] See *Ramolesane & another v Andrew Mentis & another* (1991) 12 *ILJ* 329 (LAC) 336, in which the court held that if a collective agreement was concluded between the employer and a trade union, it will be binding on all the employees concerned, irrespective of their individual consensus to the terms of the agreement, if the agreement is to the benefit of the majority. The court, however, provided that the party that acted on behalf of the union must be able to prove that the agreement was to the benefit of the majority of persons to be affected by the agreement.

employees not having consented or mandated the unions to conclude such an agreement.[75]

It is the trade union's responsibility to ensure that they act in accordance with the best interests of their members. An agreement that was concluded without the members' knowledge, or the knowledge of the appointed representative, could be regarded as invalid.[76]

Du Toit notes that trade union representation can take two forms. Firstly, it can act as a representative of its members, in which case the union is acting as an agent of its members, and the requirements for an agency must be applied. Secondly, the union may be representing the interests of its members and/or other employees. In this instance no specific mandate was given but the union's actions must serve the best interests of its members and, possibly, other non-member employees.[77]

When entering into an agreement with the employer, the trade union acts under the mandate provided by its members. If the members should repudiate the agreement after its conclusion, then the agreement would necessarily become invalid. This ensures that unions are forced to conclude agreements that are truly to the benefit of the majority concerned.[78]

Representivity is vital to the survival of a trade union. Without sufficient representivity, a trade union cannot obtain organisational rights, which are necessary to retain membership. A trade union may also be disqualified from joining alliances with other trade unions if it lacks representivity.[79] In terms of section 11 of the LRA, a trade union will be regarded as a "representative trade union" if the trade union, or

[75] S 23(1)(d) of the LRA provides that employees that are not members of the trade union that is party to a collective agreement, will only be bound by the provision of the agreement if the agreement specifically identifies and expressly binds these employees and the trade union has as its members the majority of the employees at the workplace.
[76] Du Toit (1994) *ILJ* 44. See Du Toit's discussion on the unreported case of *Food & General Workers Union & Others v Sundays River Citrus Co-operative Co Ltd* NHE 11/2/179 (PE).
[77] Du Toit (1994) *ILJ* 51. In the instance where a union purportedly acts in the interest of its members without a specific mandate given, the question is whether the employees did indeed act in the best interests of the majority of the employees. The principle of majoritarianism must be applied to determine this.
[78] *Ibid* 51.
[79] Venter, Levy, Conradie and Holtzhausen (2009) 77.

two or more trade unions acting jointly, are sufficiently representative of the employees employed by an employer at a workplace.[80]

Representivity of both trade unions and employers' organisations is also important for the effectiveness of centralised bargaining. Without majority representation, parties to a bargaining council will not be able to obtain an extension of a collective agreement to non-parties.[81]

3.4.3 Employers' Organisation

The LRA defines an employers' organisation as a number of employers associated together for the purpose of regulating the relationship between the employers and employees or trade unions.[82] The establishment of employers' organisations was necessitated by the increase in trade unions: to a large extent, employers' organisations were formed to enable employers to effectively engage in collective bargaining with the trade unions.[83] As labour law developed in complexity, employers' organisations became more centralised and started to play a more significant economic role in the country.[84]

Section 95 of the LRA sets out the requirements for the registration of an employers' organisation. These requirements are similar to the ones prescribed for the establishment of a trade union.[85] The main function of an employers' organisation is not dissimilar to that of a trade union: to engage in collective bargaining on behalf of its members. Officials of an employers' organisation may also represent their members in deputes before the CCMA or Labour Court.[86]

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[80] S 21(8) of the LRA provides that in order to determine whether a trade union is a "representative" trade union, the commissioner must seek to minimise the proliferation of trade unions at the workplace and to minimise the financial and administrative burden on the employer. See *SACTWU v Marley SA (Pty) Ltd* 2000 (21) *ILJ* 425 (CCMA).
[81] S 32 of the LRA. See Chapter 5 para 3.4 below.
[82] S 213 of the LRA.
[83] Anstey (2004) 1830. Gorgan (2012) 327.
[84] Finnemore (2009) 149.
[85] S 96 of the LRA sets out the process that needs to be followed for the registration of a trade union and an employers' organisation.
[86] Grogan (2009) 328.

3.4.4 Representation

To establish a bargaining council, the registrar must determine whether the parties to the bargaining council are "sufficiently representative" of the sector and area.[87] Representation of the bargaining council is also relevant when applying for the extension of a collective agreement.[88] The LRA, however, does not define the term "sufficiently representative".[89] It is clear that the enquiry would be a circumstantial investigation and that the following factors must be taken into account:

- the number of employers and employees in the sector and area;
- the applicant's representation of these employers and employees; and
- whether a bargaining council has already been registered for the specific sector and area.[90]

The registrar must ensure that the constitution of the bargaining council provides for the representation of small- and medium-sized enterprises (SMEs) before registering the bargaining council.[91] However, the LRA does not provide guidelines as to what such representation should entail. It is arguable that the inquest into the provision made for SMEs is a mere formality rather than an actual consideration. The reasoning behind this provision is to encourage SMEs to be part of the collective bargaining process: to avoid being unilaterally included through the extension of agreements. [92]

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[87] S 29(11)(b)(iv) of LRA.
[88] S 32(1) of LRA.
[89] S 29 of the Labour Relations Draft Bill, Government Gazette Vol 356 No 16259, specifically provided for the representation of a bargaining council. The section stated that a bargaining council will be representative if the trade union has as its members the majority of the employees within the sector and if the employers of one or more of the employers' organisations employ at least "x to the power 5%" of the employees within the sector. It is unclear why this section was not included in the final draft of the LRA.
[90] S 21(8) of the LRA sets out the factors to be considered by a commissioner in determining the representation of a trade union who seeks to obtain organisational rights. Although these factors are not all relevant to bargaining councils, it is submitted that they do provide some guidelines. For example, in determining the representivity of a trade union, the commissioner must seek to minimise the proliferation of trade unions in one workplace. Similarly, when considering an application for the registration of a bargaining council, the registrar should seek to minimise the proliferation of bargaining councils in the specific sector and area.
[91] S 29(11)(b)(iii) of the LRA.
[92] Godfrey, Maree, Du Toit and Theron (2010) 94.

Section 54(2)(f) of the LRA provides that bargaining councils must submit an annual report to the registrar, which sets out the number of employees within the bargaining council's scope that are employed by small enterprises, or are members of trade unions. The report must also indicate: the number of employees employed by small enterprises which have been affected by a collective agreement extended by the Minister; the number of small enterprises that are members of an employers' organisation that is part of the bargaining council; and the number of applications for collective agreement exemption received from small enterprises.[93]

In the Western Cape's clothing industry, small firms would complain about decisions made within the councils, but the agreements would still be concluded on the basis of consensus. Small firms appear to be more likely to submit to the decisions that are made – even if they are not completely satisfied with the outcome.[94] The mere fact that a firm is represented at the council does not mean that they can influence the terms of the agreement. Those with the highest stakes will most likely dominate the negotiations.[95] Although smaller firms are well represented numerically, it does not necessarily mean that their interests are effectively represented.[96]

Godfrey *et al* correctly argues that, even if smaller firms are party to the agreement, they are often still unsatisfied with the result. The reason for this may be that smaller firms do not present their case as strongly as larger firms. Larger firms have the advantage of experience and greater human resources and therefore have the ability to put forward stronger arguments than the smaller firms.[97]

The concern is not only that small business are outnumbered, but that the agreements concluded fail to take into account specific conditions that are unique to small business owners. Concern is raised that, even in industries where a person

[93] Godfrey, Maree and Theron (2006) *ILJ* 744. The authors note that although s 54(4)(f) does not require the council to provide a definition of a "small firm," it is implied by the data required.
[94] Godfrey, Maree and Theron (2006) *ILJ* 745.
[95] Hofman (2009) *Obiter* 200. See Godfrey, Maree and Theron (2006) *ILJ* 745.
[96] Godfrey, Maree and Theron (2006) *ILJ* 749. See further Donnelly and Dunn (2006) *BJIR* 15. Small firms in employers' organisations are often forced to the side-lines by the larger, predominate corporations in collective negotiations.
[97] Godfrey, Maree and Theron (2006) *ILJ* 749. Also see Du Toit (1993) *ILJ* 577 on his discussion of small businesses and industrial councils. Du Toit states that the real problem is not with collective bargaining in itself, but rather those small firms in employers' organisations feel marginalised by the domination of the larger firms.

has been appointed as a small-business-owner representative, it is only a front and small business interests are still not taken into account.[98]

In order to remain effective, a bargaining council must ensure that it attains and maintains representivity in the industry. If an employers' organisation or a trade union loses membership, it will dilute the effectiveness of the bargaining council. This is due to the requirement for the extension of a collective agreement. In order to extend collective agreements, majority representivity is required.[99]

Representivity for purposes of remaining a viable collective bargaining forum creates an unfortunate chain reaction. The failure of employers and employees to sign membership of employers' organisations and trade unions respectively, reduces the bargaining council's chance of extending collective agreements. As a result, employers bound only by the agreement due to their membership of the employers' organisation, resign from the organisation – further diluting the bargaining council's representivity. Godfrey, Theron and Visser note that if a bargaining council "does not have its agreement extended there is a strong possibility that it will collapse in the short to medium-term".[100]

It is highly unlikely that bargaining councils will be able to maintain representation without the extension of collective agreements. Extension of agreements forces non-parties to join an employer's organisation in order to bring their concerns before the bargaining council. Extension of collective agreements also has the benefit of setting some minimum conditions for an otherwise unprotected non-party employee.

Representation of bargaining councils will be discussed further in relation to extension of collective agreements in paragraph 4.3 below.

[98] Venter, Levy, Conradie and Holtzhausen (2009) 385.
[99] Maree (2011) *SAJLR* 18.
[100] Godfrey, Theron and Visser (2007) DPRU Working Paper 16.

4. EXTENSION OF A COLLECTIVE AGREEMENT

4.1 Introduction

Collective agreements concluded though a bargaining council will be binding on the parties that signed the agreement, as well as on members of the respective party trade union and employers' organisation, insofar as the terms relate to them.[101] If the parties to the collective agreement wish to bind non-parties to the agreement, an application for extension of the agreement must be brought before the Minister of Labour.[102] If granted, non-parties will be bound by the agreement, thereby, for all intents and purposes becoming a party to the agreement.[103]

The LRA sets certain requirements to be met for the application for and granting of an extension. The most significant of these is the required bargaining council representivity.[104] The implications of an extension granted by the Minister is that all non-parties falling within the registered scope of the bargaining council will be required to meet the terms and conditions set by the agreement. This extension does not require non-parties to consent to such an agreement, or even have knowledge thereof.

The nature of the extension of a collective agreement necessitates that non-parties – who might not be in favour of the terms and conditions contained within the agreement – are nonetheless compelled to adhere to them. This naturally causes some controversy. Besides the obvious conflict with the principles of common law freedom of contract, smaller establishments often argue that the extension of collective agreements also infringes on their right to freedom of association.[105]

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[101] S 31 of the LRA. See Grogan (2009) 361.
[102] S 32 of the LRA.
[103] See *Kem-Lin Fashions CC v Brunton & another* (2001) 22 ILJ 109 (LAC) para 25 and para 27.
[104] S 32(1) and 32(2) of the LRA. S 32(3) of the LRA provides further provision for requirements to be met before an extension may be granted. See the case of *Valuline CC & others v Minister of Labour & others* 2013 *JDR* 0511 (KZP), in which the court found that the Minister of Labour exceeded her powers in extending a collective agreement to non-parties, as the requirement of representivity was not proved. The court further held that the invalidity of the extension must be applied retrospectively.
[105] Bendix (2010) 295. See further Du Toit (2007) *ILJ* 1420. Extension of collective agreements is also accused of obstructing the growth of small business. The jury is still out on whether this argument has any real factual basis.

Brassey points out that, were it not for the special exemption of collective bargaining in the Competition Act,[106] bargaining-council agreements may have been regarded as anti-competitive.[107] He states that trade unions and well-established employers within an employer's organisations could possibly out-price new businesses, by setting standards that are within their own financial limits but near to impossible for the new businesses to pay.[108]

In the United States, trade unions are excluded from competition laws, but not collective employers, such as employer's organisations. In the US case of *United Mineworkers v Pennington,*[109] the court held that a union forfeits its exemption from antitrust laws if it is established that it concluded an agreement with a set of employers to impose a wage rate on other bargaining units. The court held that employers may not "conspire to eliminate competition from the industry and the union is liable with the employers if it becomes a party to the conspiracy".[110] Brassey argues that, during wage negotiations, employers set the wage at a rate that they can afford but that will ward of any foreign competitors.[111] However, he provides no evidence or examples to support his argument.

It is submitted that, although Brassey makes a compelling and noteworthy argument, the benefit offered by centralised wage negotiations to self-regulation – in order to establish industrial peace within a sector – outweighs the possible misuse of the bargaining system. Furthermore, less drastic measures to limit such practices are available, such as the introduction of an impartial arbitrator.[112]

The extension of collective agreements have been criticised for creating rigidity in the labour market[113] and for allowing larger firms, who dominate collective negotiations, to impose conditions on SMEs.[114] Although the percentage of non-

[106] Act 89 of 1998.
[107] S 3 of Competition Act.
[108] Brassey (2010) *ILJ* 7.
[109] 381 US 657 (1965).
[110] *United Mineworkers v Pennington* 665.
[111] Brassey (2010) *ILJ* 9.
[112] Refer to Chapter 8 for further discussion on the benefits of introducing an impartial arbitrator.
[113] Bhorat, Lundall and Rospabe (2002) ILO Employment Paper 47.
[114] Le Roux (2013) *CLL* 72. See Bhorat, Van der Westhuizen, Goga (2007) School of Economics Report 17.

parties covered by these collective agreements is respectively low, it does not make the provision irrelevant.[115]

The LRA provides for the application for such an extension and provides for certain conditions to be met before the Minister may grant an extension.

4.2 Application for Extension

Sections 32(1) states the following:

> A bargaining council may ask the Minister in writing to extend a collective agreement concluded in the bargaining council to any non-parties to the collective agreement that are within the registered scope and are identified in the request, if at a meeting of the bargaining council –
> (a) one or more registered trade unions whose members constitute the majority of the members of the registered trade unions that are party to the bargaining council vote in favour of the extension; and
> (b) one or more registered employers' organisation, whose members employ the majority of the employees employed by the members of the employers' organisations that are party to the bargaining council, vote in favour of the extension.

The LRA provides that a bargaining council may apply for the extension of a collective agreement if, at the meeting of the bargaining council, one or more trade unions who represent the majority of the employees covered by the bargaining council, and one or more employers' organisations, who represent those employers that employ the majority of the employees, vote in favour if the extension.

The wording of section 32(2) of the LRA provides that the Minister "must" extend the collective agreement within sixty days after receipt of the request by publishing a notice in the Government Gazette that indicates the effective date. The collective agreement will then be binding on the non-parties specified in the notice. However, in

[115] A study conducted in 2006 by Godfrey, Maree and Theron provides that bargaining council agreements cover 32.6% of all employees whilst only 4.6% are covered by way of the extension of collective agreements. On the basis of 7 241 951 total employees in 2006, 333 130 employees are covered by way of the extension of a collective agreement. Godfrey, Maree and Theron (2006) *ILJ* 737.

order for the Minister to extend the agreement, he or she must be satisfied as to the presence of certain conditions provided for in section 32(3) of the LRA.[116]

The Minister must satisfy herself that:

- the bargaining council has met the conditions set in section 32(1);
- the bargaining council represents the majority of the employees to be covered by the extension of the collective agreement;
- the non-parties to which the agreement will be extended to fall within the bargaining council's registered scope;
- an independent appeals body has been established to hear any appeals against the refusal to grant an exemption from the collective agreement;[117]
- the agreement contract's criteria were considered by the independent body in hearing such appeals; and
- the terms of the collective agreement do not in any way discriminate against the non-parties.[118]

If these requirements are met, the Minister must extend the agreement to the non-parties.[119]

The proviso set by section 32(3) requires that the Minister be "satisfied" with the conditions set by the section. The meaning of "satisfied" in a legal context requires an

[116] See *National Employers Association of SA v Minister of Labour* (unreported 3062/2011 LC) par 11. in which the court held that if the requirements of s 32(1) of the LRA have been met, then the Minister "must" grant the extension unless any of the provision of s 32(3) of the LRA precludes it.
[117] S 35 of the Labour Relations Draft Bill required that collective agreements make provision for an independent body to grant exemption to the agreement. This provision was changed in the final LRA to provide that only appeals needed be heard by an independent body.
[118] The meaning of "discriminate" in s 32(3) of the LRA is unclear. Hofman argues that "discriminate" in this context must be given the common law meaning which ensures that there must not be a differentiation in the treatment between parties. See Hofman (2009) *Obiter* 207. It is submitted that this provision prohibits a collective agreement from making any differentiation in treatment between parties to the agreement and non-parties.
[119] In *Kem-Lin Fashions CC v Brunton & another* (2001) 22 *ILJ* 109 (LAC) para 23 the court held that these considerations contained in the LRA are indicative to an awareness that in certain cases, subjecting non-parties to a collective agreement "may operate too harshly against them". In *National Employers Association of SA & Others v Minister of Labour & Others* (2013) 34 *ILJ* 1556 (LC) par 11, the court held that, if the majority requirement has been met, the Minister *must* extend the agreement to non-parties.

objective consideration of the particular circumstances.[120] In *Valuline CC v Minister of Labour*, Koen J provides a detailed overview of the legal meaning of "satisfied".[121] Prior to the constitutional dispensation "satisfied" was utilised to provide a wider discretion to the adjudicator. However, section 33(1) of the Constitution[122] provides that everyone has the right to just administrative action, which implies that, even when discretion is used, it must be based on factual assumptions.

In the case of *Walele v City of Cape Town & Others*[123] the court held that when a decision needs to be "satisfied" the decision maker's opinion may be challenged on the existence of "subjective preconditions". The court held that "[t]he decision-maker must now show that the subjective opinion it relied on for exercising power was based on reasonable grounds".[124]

It is thus submitted that, in satisfying him-or herself as to the conditions set by section 32(3) of the LRA, the Minister must apply his or her mind objectively to the circumstances of each application.[125] However, this does not denote that the Minister must be satisfied beyond reasonable doubt, but rather that, given the circumstances, there is no real evidence that majority status has not been obtained.

4.3 Representation of the Bargaining Council

The requirement set by section 32(3) is clearly more burdensome, as it requires the bargaining council to be able to give the Minister a valid estimation of the number of employees within the sector as a whole, and not merely the number of employees represented within the bargaining council. This requirement poses some practical problems. The Minister may not grant the extension if he or she is not satisfied that the majority of the employees to be covered by the extension are already represented by the bargaining council.

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[120] Hofman (2009) *Obiter* 205.
[121] *Valuline* case par 54.
[122] The Constitution of the Republic of South Africa, 1996. Hereinafter the Constitution.
[123] 2008 (6) SA 129 (CC).
[124] *Walele v City of Cape Town & Others* 2008 (6) SA 129 (CC) par 60.
[125] *Valuline* case par 58.

In *Valuline CC v Minister of Labour,* a number of employers brought an application to the KwaZulu-Natal High Court on the grounds that the Minister failed to fully satisfy herself as to the representivity of the bargaining council. In the alternative, the applicants requested that section 32 of the LRA be declared unconstitutional and that the extension be accordingly set aside.[126]

After confirming its jurisdiction,[127] the court held that the factual question to be addressed was whether the Minister had duly applied her mind to the representivity requirement set by section 32(3). The court noted that the number of employees within an industry is constantly fluctuating and thus the number of employees at any given time is best determined by objective evidence placed before the Minister upon the application for extension.[128] In this case, the Minister relied upon the certificate provided to her by the registrar in terms of section 49 of the LRA.[129] The certificate, however, was later shown to be inaccurate and the court held that the Minister could not have been "satisfied" that the conditions set in section 32(3)(c) were met.[130]

What must be put to question is whether the requirement to be "satisfied" places a duty on the Minister to question the representivity as provided for in the section 49 certificate. This would thus require a further investigation, by the Minister, into the representivity of the bargaining council, and a restriction to rely purely on the section 49 certificate. It is submitted that this could not have been the intention of the LRA. However, should information be placed before the Minister in order to raise question as to the accuracy of the section 49 certificate, such information must be taken into account within reason.

Nonetheless, the majority requirement is quite problematic to fulfil, as it requires an accurate measurement of all the employees employed in the sector. It is also

[126] *Valuline* case p 3 par 6.
[127] At par 14 to par 38 the court deliberated as to whether the High Court was the correct forum to hear the matter. The court held that the LRA does not require a dispute of this nature to go to the Commission for Conciliation Mediation and Arbitration (CCMA) or to the Labour Court.
[128] At p 27 par 58.
[129] S 49(3) of the LRA provides that a bargaining council must, upon the request of the registrar, provide the registrar with the number of employees within the registered scope, the number of employees which are members of the trade unions that are party of the bargaining council, and the number of employees employed by the members of the employers' organisation party to the bargaining council.
[130] At page 31 par 67.

important to note that the LRA does not require a majority representivity of the *employers* within the sector. This aspect may be detrimental to SMEs, as the LRA's representivity requirement will be met if the employers' organisation consists of mainly larger firms who employ the majority of the employees.

Godfrey *et al* note that if representation of employers is set as a requirement for the extension of collective agreements, it could incentivise bargaining councils to canvass more small firms and to be more accommodating regarding their specific interests in order to maintain representation.[131] Such an inclusion could easily address the concerns of marginalisation raised by the smaller firms. It also adds to the sense of fairness towards non-parties affected by extensions.[132]

A further concern about the requirement for representivity is the decline in trade union membership.[133] Should trade union membership drop below the majority requirement, bargaining councils may be unable to extend the agreements to non-parties.[134] The failure to extend could in turn impact on centralised bargaining as a whole.

In terms of the representivity of the council, section 49(1) of the LRA provides that the registrar may "regard the parties to a council as representative in respect of the whole area, even if a trade union or employers' organisation, that is party to the council has no members in part of that area". Thus, it is possible for a bargaining council to have jurisdiction over areas in which it has no members. Although this might not seem problematic, the effects thereof could be undesirable. A majority urban bargaining council may then set employment conditions for employees and employers of rural areas. Such a council is also unlikely to have insight into the needs of these employees and the ability of these employers to pay.

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[131] Godfrey, Maree, Du Toit and Theron (2010) 92. See Godfrey and Bamu in Rycroft and Le Roux *eds* (2012) 225 in which the authors found that only 41% of employers are members of employers' organisations.
[132] In the case of *Public Servants Association of South Africa v Minister of Safety and Security and Others* (2010) 31 *ILJ* 1471 (LC) at par 17, the court held that s 32 of the LRA was never intended to apply in instances where there is only one employer.
[133] Du Toit, Bosch, Woolfrey, Godfrey, Cooper, Giles, Bosch and Rossouw (2006) 42-43.
[134] In terms of s 32(5) of the LRA, the Minister may still extend a collective agreement if parties to the bargaining council are "sufficiently representative". See par 4.4 below for further discussion on s 32(5).

4.4 The Power of the Minister to Extend Collective Agreements

Some concern has been raised as to the Minister's authority to extend. Those that are against the extension of collective agreements argue that, at the very least, the Minister's authority to extend should be discretionary and that more restrictions or considerations need to be in place.[135] Cheadle accurately argues that the setting of a collective agreement is a form of minimum standard setting and as such the Minister must be provided with a wider discretion in extending these agreements. Less emphasis should be placed on the representivity of the council and more on the agreement's compatibility with the government's labour policies.[136]

As discussed in Chapter 4 above, the LRA 1956 provided the Minister with the discretion to extend a collective agreement if the parties to the council were "sufficiently representative" of the sector.[137] The current LRA introduced a "majority representivity" requirement, but once it is achieved, together with a few formal requirements, the Minister has no discretion in extending the agreement. If the bargaining council does not meet the majority representivity requirement, an application in terms of section 32(5) of the LRA can be brought to the Minister.[138]

Section 32(5) provides the Minister with a wider discretion to extend a collective agreement if the parties to the bargaining council do not comply with the majority requirement. Section 32(5) states that the Minister may extend the collective agreement if the parties to the bargaining council are sufficiently representative in the registered scope of the bargaining council and "the Minister is satisfied that failure to extend the agreement may undermine collective bargaining at sectoral level or in the public service as a whole."[139]

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[135] Cheadle (2006) DPRU Working Paper 41.
[136] *Ibid*. Cheadle supports his argument by providing that this discretion, is not an open discretion as it must be guided by the labour policies as negotiated at NEDLAC and that the widening of the Minister's discretion should be "carefully introduced" following set codes and guidelines.
[137] See Chapter 4 para 2.2.4 above.
[138] See Hofman (2009) *Obiter* 206. Hofman states that due to the nature of s 32 of the LRA, the power to extend a collective agreement to non-parties lies in the hands of the bargaining council and not the Minister.
[139] S 32(5)(a) &(b) of LRA. In *Valuline* (fn 104) par 45 the court noted that in applying s 32(2) of the LRA the Minister does not have any discretionary powers, whereas s 32(5) provides the Minister with a wide discretion. The court, however, held that in extending the collective agreement, the Minister did not rely on s 32(5) and thus had to ensure the requirements of s 32(3) were met. See further *National Employment Association of SA v Minister of Labour* (unreported case JR 3062/11 LC) in which the

As is evident from section 32(5), the Minister may grant an extension if the bargaining council are only "sufficiently representative." This provision therefore provides for a lighter representation requirement than section 32(3). The LRA is, however, silent on the meaning of "sufficiently representative" and it is submitted that the Minister is free to determine the threshold.[140]

The second requirement posed by section 32(5) is that the Minister must be satisfied that the failure to extend the agreement will undermine collective bargaining at sectoral level. This requirement is open-ended and also provides the Minister with a wide discretion.[141] As Godfrey, Theron and Visser correctly state "the failure to extend a sectoral collective agreement will almost *always* undermine bargaining at that level."[142] The second requirement posed by section 32(5) of the LRA is therefore of no real substantive value.

Research done by Godfrey, Theron and Visser suggests that the Minister is not easily persuaded to extend collective agreements to non-parties in accordance with section 32(5) of the LRA. The research conducted indicate that in certain instances a council with representivity as low as 40% would not be regarded as "sufficiently representative."[143]

It is submitted that the Minister's power must be discretionary, providing his or her with the power to oversee the conditions that are to be extended to non-parties and to ensure that they are fair and sufficiently flexible. For these purposes the Employment Conditions Commission (ECC) can be consulted to review the wages and conditions

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court allowed the Minister's order to extend an agreement in accordance with s 32(2) to be suspended in order for her to determine whether the agreement can be extended in accordance with s 32(5).

[140] Godfrey, Theron and Visser (2007) DPRU Working Paper 17.

[141] *National Employers Association of SA & Others v Minister of Labour & Others* (2013) 34 *ILJ* 1556 (LC) par 11. The court held that if the Minister extended an agreement in terms of s 32(2) of the LRA then she must satisfy herself that the bargaining council has a majority representation for the sector and area. However, if the Minister decided to extend a collective agreement in terms of s 32(5) of the LRA, majority representivity need not be proven.

[142] Godfrey, Theron and Visser (2007) DPRU Working Paper 17. Own emphasis.

[143] *Ibid* 18.

set by the collective agreement, taking into account similar considerations provided in the setting of sectoral determinations.[144]

A final comment on the extension of collective agreements is whether or not it is constitutional. Recently the Free Market Foundation (FMF) has filed a case in the Gauteng North High Court challenging the constitutionality of the extension of collective agreements. FMF's arguments are based on two main points: firstly, as members of bargaining councils operate in the private sector, the state cannot delegate its powers of statutory regulation to them; and secondly, the wording in the LRA does not provide a clear view on the provisions for majority rule, thereby allowing minorities to force the majority in adhering to conditions of employment set by them.[145]

5. EXEMPTION FROM A COLLECTIVE AGREEMENT

5.1 Introduction

The exemption procedure provides a mechanism whereby an employer who cannot meet the conditions set by the collective agreement, can apply to the bargaining council to be fully or partially exempted from the agreement. An exemption application allows an employer to be excluded from the application of a collective agreement. The LRA unfortunately does not provide for a specific procedure to be followed when applying for an exemption, but does require that a bargaining council's constitution make provision for the procedure.[146]

One of the requirements for applying to the Minister for the extension of a collective agreement is that the agreement must make provision for an independent body to

[144] Refer to Chapter 6 para 2.2 for an overview of the ECC's function.
[145] CDE Report (2013) 19. At time of writing this dissertation the judgment on this case has not yet been handed down by the court.
[146] S 30(1)(k) of the LRA. It is submitted that due to the need for the inclusion of an exemption procedure in the council's constitution, an employer may apply for an exemption whether the agreement was extended or not. In other words, even if the employer is a party to the agreement he may still request for a complete, partial or conditional exemption from the collective agreement.

hear appeals in the event that an employer's application for exemption is rejected.[147] The LRA also requires the agreement to contain criteria that the independent body must consider when hearing the appeal.[148]

In the Explanatory Memorandum to the draft Bill, one of the important aspects mentioned was that – in extending collective agreements to non-parties – the agreement must make provision for the "speedy determination of exemptions by an independent body on the grounds of undue hardship".[149] Concerns have been raised as to the independence of the body that adjudicates the exclusions. Bendix makes a valid argument that the allowance made for an independent body to hear appeals against refused exemptions does provide some protection against possible abuse of power; however, she proceeds to note that bargaining councils must ensure that they do not get stuck behind the letter of the law, but rather ensure a proper interpretation in light of the spirit of the provisions.[150]

5.2 Application for Exemption

In terms of section 30 of the LRA, a bargaining council's constitution must provide for an exemption application procedure. A number of bargaining councils' constitutions provides that employers that wish to be exempted from the agreement must bring an application for exemption in accordance with the procedure set out in the particular agreement.[151]

The National Textile Bargaining Council's (NTBC) constitution provides for a fair and reasonable procedure. In terms of the NTBC's constitution, any application for exemption must be made to the council secretary in writing. The following information must be provided in the application:

[147] S 32(3)(e) of the LRA.
[148] S 32(3)(f) of the LRA.
[149] Explanatory Memorandum 124.
[150] Bendix (2010) 295.
[151] See for example the Building Industry Bargaining Council's constitution and the Metal and Engineering Industries Bargaining Council's constitution.

- the parts of the collective agreement for which exemption is sought;
- the employees for which exemption is sought;
- the reasons for the exemption;
- the nature and size of the business;
- the duration of the exemption;
- the applicant's business plan; and
- any other information that the council may prescribe form time to time must be provided. [152]

The NTBC's constitution further provides that the exemption committee appointed by the council must hear the exemption application and that the council's secretary must advise the applicant of the outcome within 45 days from date of application. This gives the council sufficient time to consider the application without delaying the outcome for too long.

In *Trafford Trading (Pty) Ltd v National Bargaining council for the Leather Industry of SA and Others,*[153] the court was called to review the appeal committee's refusal to grant an exemption.[154]

The employer maintained that if they were forced to implement the wage increases, their business would not be able to remain viable and they would be forced to retrench a number of employees. In the judgement, the court cited the written submission made by the exemption committee to the employer stating that "the applicant's actions constitutes a social injustice" as it deprived their employees of basic minimum wage, as well as retirement and sick fund benefits.[155] The court concluded that the employer's conduct was indeed an infringement of social justice and that the "low labour cost business practices" gave the employer an unfair

[152] See clause 19.2 of the National Textile Bargaining Council's constitution.
[153] (2010) 31 *ILJ* 761 (LC).
[154] *Trafford Trading* case par 2. The applicant is an employer that was bound by a collective agreement through means of an extension. After threats of being closed down by the bargaining council, the first respondent in the case, the employer requested leave to apply for an exemption.
[155] *Trafford Trading* case par 5.

advantage over local competitors. The appeal board's decision to deny the employers exemption was thus confirmed.[156]

The argument brought by the bargaining council falls in line with the social perspective of labour law, in that the protection of workers' rights should be the principle concern.[157] However, it is submitted that a complete disregard of economic consequences is injudicious, as it may lead to unemployment in the medium to long term. Possible alternatives to accommodate the applicant must be considered, such as partial exemptions.

5.3 Granting of Exemptions

Once an employer has filed an application with the bargaining council, an exemption committee has to determine whether the application bears enough merit to warrant a complete or partial exemption from the collective agreement. The council must use the criteria provided in the collective agreement or published in the council's constitution to make a final decision.[158] Consideration of the criteria set by councils reveals vague and general considerations, such as preventing undue competition and considering whether the exemption will "prejudice the objectives of the bargaining council".[159]

Nattrass makes a compelling – yet unsubstantiated – argument that larger firms produce higher labour productivity and are often more capital-intensive. Larger firms are thus able to pay higher wages than their smaller counterparts. He further argues that since bargaining councils predominantly consist of larger firms, negotiations on wages tend to favour capital-intensive firms and not labour-intensive firms. His argument thus follows that bargaining-council negotiations are not mindful of the impact that compulsory wage increases have on smaller enterprises.[160]

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[156] *Trafford Trading* case par 49-40.
[157] See Chapter 2 par 3.3.3 above.
[158] S 32(3)(f) of the LRA.
[159] See clause 19.8 of the National Textile Bargaining Council's constitution. Godfrey, Maree and Theron (2006) *ILJ* 1373.
[160] Nattrass (2001) *Transformation* 15.

Nattrass further states that "[e]xemptions to bargained agreements remain largely in the hands of the parties to the agreement and wage exemptions are rarely given".[161] Nattrass's argument is supported by Retief,[162] who states that in the Metal and Engineering Industries Bargaining Council (MEICB), councils do not always respond to exemption applications in sixty days and furthermore that, if an application is refused, it is unclear on which grounds the decision is based.[163]

Godfrey, Maree and Theron criticise Nattrass's argument on two accounts. Firstly, according to a study conducted by the authors, bargaining councils consist mainly of small firms.[164] The authors do, however, concede that this does not necessarily imply that smaller firms have a great deal of influence in the collective bargaining process.

Secondly, their study also indicated that a great number of exemption applications brought by smaller firms were in fact granted. Godfrey, Maree and Theron found that of the 24 councils reviewed in 2004, 73% of exemption applications were granted in full and a further 9% were granted partially or conditionally. Thus, according to the study, only 17% of the applications were denied in toto.[165] The authors further found that in 2004, 78% of the applications for exemption brought by smaller firms were granted.[166]

The data obtained by Godfrey, Maree and Theron also indicated that only a small portion of refused exemptions were taken on appeal to the independent body. In 2004, only 8% of refused applications were taken on appeal.[167] The study, however, does not discuss the reason for the low appeal percentage, or whether those that

[161] Nattrass (2001) *Transformation* 15. See Nattrass (2000) *SEE.*
[162] Retief (2012) *Obiter* 566.
[163] *Ibid* 570-572. Retief states that in the metal engineering and industrial industry "the procedure for exemptions…is so fundamentally flawed that one can go as far as to say that it cannot provide an appropriate remedy for the employer".
[164] Godfrey, Maree and Theron (2006) *ILJ* 1369. According to the study conducted, the average size of firms registered with the bargaining councils was 27 employees.
[165] *Ibid* 1376.
[166] *Ibid* 1380. The bargaining councils provided the data obtained for this study. It is submitted that employers' organisations should also be approached for data on exemption applications in order to ensure unbiased research.
[167] *Ibid* 1377.

were refused exemption after the initial application are adhering to the terms of the collective agreement.

Further forms of exemption applied by some of the bargaining councils are blanket exemptions. These exemptions provide that certain employers will be exempted from the agreement by virtue of belonging in a certain category of business.[168] The majority of bargaining councils require that the business be registered with the council in order to fall under the exemption. The employers are thereby incentivised to register with the council.[169]

Roskam argues that blanket exemptions for small businesses undermine the collective bargaining system.[170] The author argues that allowing exemption for small business will affect the representivity of bargaining councils and consequently the effectiveness of the council as a whole. Perhaps a general exemption from collective agreements for all small firms, irrespective of their sector, might lead to this undesirable consequence.[171] It is, however, doubtful that blanket exemptions provided per sector in collective agreements would have the same effect. Bargaining councils can self-regulate in order to ensure that they do not exempt themselves out of the industry.[172]

A possible third option for small business could be to not entirely exempt them from the collective agreement but rather to set less burdensome conditions for those SMEs that qualify. Thereby the employees of these smaller firms would not be entirely without protection.[173]

[168] Godfrey and Bamu (2012) in Rycroft and Le Roux 226.
[169] Godfrey, Maree and Theron (2006) *ILJ 1382.* Registering as an employer with the council does not mean that the employer becomes a member of the employers' organisation.
[170] Roskam (2007) DPRU Working Paper.
[171] Cheadle (2005) *LDD* 155. Cheadle notes that government has also been considering incorporating a general blanket exemption for small business and warns that such a general exemption may weaken the collective bargaining system.
[172] Nattrass and Seekings (2012) CSSR Working Paper 18.
[173] Van Niekerk (2007) DPRU Working Paper 37.

6. CONCLUSION

Collective bargaining is essential in the South African labour market. Although wage negotiation may takes place at various levels, centralised bargaining is the preferred method for fixing minimum wages in the country. The aim of centralised bargaining is to allow parties to self-regulate and set employment conditions that are suitable to a specific industry.

The LRA also provides for enterprise bargaining, although little reference is made to the procedure for concluding such agreements. Workplace forums are introduced to afford employers and employees a framework for joint-decision making at the workplace. However, these forums are largely underutilised in South Africa. Although minimum wages cannot be set at workplace forums, it is unfortunate that this avenue provided by the LRA is not used more effectively for creating better workplace relations between employees and their employer.

Bargaining councils are established by one or more trade unions and one or more employers' organisations. Representivity of a bargaining council is vital, both for the establishment thereof and for the purposes of extending collective agreements to non-parties. In order to successfully extend a collective agreement, the bargaining council must represent the majority of the employees in the sector. If the bargaining council cannot extend agreements to non-parties, it runs the risk of becoming redundant.

The LRA does not require a majority representivity of the *employers* within the sector. This may be detrimental to SMEs, as the LRA's representivity requirement will be met if the employers' organisation consists mainly of a few large firms who employ the majority of the employees. If representation of employers was a requirement for the extension of collective agreements, it would incentivise bargaining councils to canvass more small firms and to be more accommodating to their specific interests in order to maintain representation.

With regard to the Minister's function in the extension of collective agreements, it is submitted that the decision to extend must be discretionary. In allowing the Minister

to apply his or her mind to the conditions set by the collective agreement, the Minister can ensure that they are reasonable in relation to the needs of employees and feasible in relation to the ability of an employer to pay. In order to fulfil this function, the Minister can call on the Employment Conditions Commission (ECC) to investigate the conditions of the sector and to provide recommendations as to the extension of the agreement.

It is quite clear that the LRA intends to protect and promote collective bargaining. In light of the fact that our law provides for voluntary collective bargaining, we must consider whether collective bargaining can survive without extensions. Non-extension of collective agreements may incentivise party employers to withdraw their membership in order to evade being bound by conditions – which non-party employers are not bound by. Thus, a complete removal of extensions, without providing some alternative form of compulsory bargaining, may in the long-term lead to the complete deterioration of centralised bargaining.

The question must therefore be posed whether the provision on extension of collective agreements can be suitably amended, or if it should be replaced by the introduction of compulsory collective bargaining. It is submitted that these two are not mutually exclusive. An inclusion of a duty to bargain can take on a liberal form by not requiring the conclusion of a collective agreement. It is submitted that extension of collective agreements must remain in force, but with some amendments, such as the inclusion of Ministerial discretion.

Lastly, it is submitted that the exemption procedure provided for by the LRA should not be viewed as the solution for inflexibility in collective agreements. Exemptions should only be used in exceptional circumstances, where an employer can show good cause for not being able to meet the minimum standards.

CHAPTER SIX

MINIMUM WAGE FIXING IN SOUTH AFRICA

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1. INTRODUCTION

In South Africa minimum wage legislation was introduced in the early 1920s with the enactment of the Wage Act.[1] Other than the statutory minimum wage set by the wage boards in terms of the Wage Act, industrial councils could set industry minimum wages that may then be extended to non-parties at the Minister's discretion.[2]

The current minimum wage regulation in South African is not dissimilar to those of the early 1900s. There are two avenues for setting minimum wages in South Africa: by way of sectoral determination or through collective bargaining. The Minister of

[1] Act 27 of 1925. Refer to Chapter 4 par 2.2.3 for further discussion of the Wage Act.
[2] S 9 of the Industrial Conciliation Act 11 of 1924. Refer to Chapter 4 par 2.2.2 for further discussion of industrial councils.

Labour may set sectoral determinations for unorganised sectors, which will regulate the employment conditions as well as minimum wages.[3]

The setting of minimum wages can take place either centrally, or be decentralised. However, in South Africa centralised bargaining by way of bargaining councils is the mechanism most utilised for setting minimum wages. As discussed in Chapter 5 above, collective agreements concluded in a bargaining council can be extended to non-parties by way of application to the Minister of Labour.[4]

In this chapter, the procedure for setting sectoral determinations will be discussed briefly with reference to the role of the Employment Conditions Commission (ECC) and the power of the Minister. This chapter will also consider the practice of setting minimum wages by way of centralised bargaining and consider possible shortcomings thereof.

2. SECTORAL DETERMINATIONS

2.1 Introduction

Chapter 8 of the Basic Conditions of Employment Act[5] (BCEA) provides for the setting of sectoral determinations. A sectoral determination set by the Minister of Labour arises from research and consultation between employers and employees of the relevant sectors, officials of the Department of Labour and the ECC.[6] A sectoral

[3] The conditions set by the Minister provide minimum employment conditions that are industry-specific and take preference over the conditions set by the Basic Conditions of Employment Act 75 of 1997. See Finnemore (2009) 334.
[4] See Chapter 5 par 4 for further discussion on the extension of collective agreements.
[5] Act 75 of 1997.
[6] S 53 of the BCEA provides for an investigation to be conducted by the Director-General of the Department of Labour by obtaining information from employers and employees in the sector and area being investigated. Once the investigation is completed, s 54 of the BCEA requires the Director-General to submit a report to the ECC that needs to be taken into account when making a sectoral recommendation to the Minister.

determination may set minimum employment conditions – including minimum wages – for a given sector and area.[7]

Sectoral determinations regulate the minimum wages payable per hour, per week or per month and for some sectors the wages vary according to geographical areas. The purpose of sectoral determinations is to provide each sector with its own particular set of standards, in order to better accommodate the needs of the sector.[8] This is done through an investigation into the sector by the Employment Conditions Commission (ECC). Without minimum wage legislation, non-organised sectors are left without regulated minimum wages and are thus unprotected from possible exploitation.

2.2 The Basic Conditions of Employment Act of 1997

In terms of section 51 of the Basic Conditions of Employment Act[9] (BCEA) the Minister of Labour may set certain sectoral determinations for those sectors not covered by a bargaining council. These sectors are regarded as vulnerable market segments in light of the fact that certain sectors are more prone to exploitation, especially if they are unorganised.[10]

Godfrey and Witten note that although the BCEA has an extensive scope and plays a key role in labour-market regulation, it does not receive the same level of attention as the LRA. The authors continue by highlighting that the BCEA "is supposedly the most complete statement of the government's concept of 'regulated flexibility'."[11] The BCEA sets the minimum standard for employment conditions and regulates minimum leave days, maximum hours of work and termination periods.[12] The BCEA

[7] See Bhorat, Van der Westhuizen and Goga (2007) DPRU Report 15 for further discussion on sectoral determinations.
[8] Godfrey and Witten (2008) *ILJ* 2410.
[9] Act 75 of 1997.
[10] Naidoo, Klerck and Manganeng (2007) *SAJIR* 28. The authors also note that certain sectors are more prone to exploitation, due to the exclusion of workers from wage-regulation mechanisms. Workers are, in other words, left without a legislative tool to enforce their rights.
[11] Godfrey and Witten (2008) *ILJ* 2407. It is further noteworthy that the BCEA does apply to members of the South African National Defence Force (SANDF), persons that were expressly excluded by the Labour Relations Act. The exclusion of the SANDF was lifted by the Intelligence Services Act 65 of 2002 and confirmed in *Bongo v Minister of Defence & others* (2006) 27 *ILJ* 799 (LC).
[12] See Chapter II, III and V of the BCEA.

further provides regulations relating to the payment of remuneration, but does not provide for minimum wages.

The BCEA further provides for the establishment of the ECC.[13] Section 59(2) provides that the function of the ECC includes: advising the Minister on sectoral determinations; any matter relating to basic conditions; and on collective bargaining trends which undermine the purpose of the BCEA. [14] Section 61 of the BCEA further allows the ECC to hold public hearings, whereby the members of the public are provided an opportunity to make oral representations on matters that are being considered by the ECC.

A further function of the ECC is to administer income differentials. In terms of section 27 of the Employment Equity Act[15] (EEA) 1998 a designated employer[16] must submit a statement to the ECC on the remuneration and benefits received in each occupational category and level of the employer's workforce. Section 27(2) of the EEA further provides that if a disproportional income differential is evident, the designated employer must implement measures to reduce the differential.[17] It is submitted that this information should form part of the ECC's investigation in drafting a report to the Minister in terms of the BCEA.

Section 52 of the BCEA requires the Minister to instruct the Director-General to conduct an investigation into the sector before setting or amending a sectoral determination. It is the Minister's responsibility to determine the terms of reference

[13] S 59 of the BCEA. The Wage Board, which was established by the Wage Act 27 of 1925, was replaced by the ECC. In examining the function and powers of the Wage Board and the ECC, it is clear that the two bodies have a number of similarities. An important distinction between the two, however, is that in terms of the Wage Act, the Minister can only accept or reject the recommendations made by the Wage Board. The BCEA does not provide that the Minister may adjust the recommendations made without the approval of the ECC. See Baker (1999) *SAJE* 19.
[14] Barker (2007) 79.
[15] 55 of 1998.
[16] S 1 of the EEA defines a "designated employer" as a person who employs more than fifty employees, a person who employs fewer than fifty employees but has an annual turnover above the prescribed threshold amount (determined according to industry); a municipality; an organ of state; or an employer that is regarded as a designated employer in terms of a collective agreement.
[17] See Grogan (2009) 123 in which he notes that it is presumed that the ECC will determine when an income differential is disproportionate. S 27(3) of the EEA provides that the measures implemented by the employer may include collective bargaining, compliance with sectoral determinations, applying the norms and benchmarks set by the ECC and other relevant measures as contained in skills development legislation. S 27(6) of the EEA further allows the ECC to make the information obtained available to parties engaging in a collective bargaining process.

for the investigation.[18] Once the Minister has established the terms of reference, it must be published in the Government Gazette for written public comments.[19]

In order to conduct a proper investigation into the specified sector, the Director-General may obtain information from relevant persons.[20] After the completion of the investigation, the Director-General must prepare a report for submission to the ECC. The ECC must then consider the report and advise the Minister of the recommended sectoral determination to be made.[21] Section 54(3) provides that the ECC must consider the following factors:

- the report prepared by the Director-General;
- the ability of the employers to carry on a successful business;
- operations of small, medium or micro-enterprises, or possible new enterprises;
- the average living cost;[22]
- the alleviation of poverty;
- employment conditions;
- inequality and wage differentials;
- the possible impact of the proposed conditions on current and future employment;
- the possible impact of the proposed conditions on the health, safety or welfare of the employees; and
- other relevant factors.[23]

[18] S 52(2) of the BCEA. The term of reference for the investigation must include: the sector and area to be investigated; the category or class of employees to be included; and the matters to be investigated. See s 55(3) of the BCEA for the matters that may be included in the investigation.
[19] S 52(3) of the BCEA.
[20] S 53 of the BCEA. S 53(2) of the BCEA goes as far as to compel a person to answer relevant questions posed by the Director-General.
[21] S 62(1) of BCEA. The section further requires that the members of the commission must attempt to prepare a unanimous report. If this is not possible, each member may have their own views reflected in the report.
[22] In order to determine suitable minimum wages, it is important to appreciate the minimum subsistence levels of South Africa. Each area may also be different as the cost of living varies markedly in different areas. The Bureau of Market Research in South Africa determines the minimum-financial requirement for a family to provide for their basic needs. See Barker (2007) 112. The concept of "basic needs" is a problematic notion to define, as it has various meanings within society. The factors taken into account to determine minimum living-standards are also often under dispute.
[23] S 54(3)(a)-(j) of the BCEA.

The Minister may reject the recommendations made and refer the ECC to matters that need to be reconsidered. After the submission of further reports by the ECC, the Minister may make a sectoral determination.[24] As the BCEA provides that the Minister "may" make a sectoral determination, it appears that the Minister may therefore deviate from the recommendations made by the ECC. Nothing in the BCEA stipulates that the Minister is bound by the recommendations made by the ECC.[25]

Although the Minister should be granted discretion in making a sectoral determination, it is submitted that the Minister should not be allowed to deviate from the recommendations made by the ECC. If the Minister is not satisfied with the ECC's recommendation, or if further information was brought to the Minister's attention that may have an impact on the recommendation, the ECC must be requested to resubmit the relevant recommendation. Previously, in terms of the Wage Act,[26] the wage boards made the final recommendation; the Minister had no power to deviate from it, but only to allow or disallow the wage proposal handed down by the wage boards.[27]

2.3 Sectoral Determinations

Minimum wages for farm workers, forestry and domestic workers were set for the first time by sectoral determinations.[28] The farming sector was one area that was excluded from labour regulation during the apartheid era. After 1994 and with the adoption of international instruments, labour laws were also extended to the agricultural sector. Without a collective bargaining structure to support the industry, it was deemed important to set sectoral minimums in order to prevent the exploitation of farm workers.[29]

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[24] S 55(2)-(3) of the BCEA.
[25] Baker (1999) *SAJE* 19. In ss 55(1) and 55(3) of the BCEA it is provided that "after considering" the ECC's report, the Minister "may" make a sectoral determination. Thus, although the Minister would in all likelihood use the recommendation made by the ECC as a basis for setting a sectoral determination, nothing prevents the Minister from using his or her own initiative in deviating from the recommendation.
[26] Act 27 of 1925.
[27] Baker (1999) *SAJE* 19. In terms of the Wage Act, see Chapter 4 par 2.2.3 above for further discussion of the Wage Act.
[28] Naidoo, Klerck and Manganeng (2007) *SAJIR* 28.
[29] *Ibid*. The Wage Act did not cover domestic workers. If one considers the domestic workers sector, it is apparent that, since the sector's regulation by sectoral determination in 2002, the real wages of

A sectoral determination may cover a wide array of employment conditions, including: a minimum rate of remuneration; regulation or prohibition of payment in kind; setting minimum standards for housing and sanitation; and regulating training and education schemes.[30] The sectoral determinations make provision for both task-based and time-based pay.[31]

In 2009 approximately 4,1 million workers were covered by sectoral determinations.[32] At the end of 2009 the total labour force was approximately 17 138 000.[33] Therefore only 23,9% of the 2009 labour force was covered by sectoral determinations. There are currently eleven sectors that are regulated by these determinations.

Table 1: Sectoral Determination by Sector[34]

Sectoral Determination	**Number of Employees**
No. 1 Contract Cleaning Sector	35,000
No. 2 Civil Engineering Sector	27,000
No. 5 Learnerships	16,000
No. 6 Private Security Sector	165,000
No. 7 Domestic Worker Sector	800,000
No. 9 Wholesale and Retail Sector	1,200,000
No. 10 Children in the Performing Arts[35]	± 5,000
No. 11 Taxi Sector	75,000
No. 12 Forestry Sector	32,000

these workers have increased while the hours worked per week have decreased. See Hertz (2005) DRPU Working Paper 30.

[30] S 55(4) of BCEA. S 55(5) of the BCEA provides that a sectoral determination may not change the conditions relating to maximum working-hours, the hiring of child labourers, and forced labour.

[31] An example of time-based pay is sectoral determination 13, which provides for hourly, weekly and monthly rates. An example of tasked-based pay is sectoral determination 4 for the clothing and knitting sector, which provides an hourly, weekly and monthly wage payable for various tasks, such as assistant head cutter, head cutter, driver and watch-person. Sectoral determination 4 has been repealed as this sector now falls under a bargaining council. See Godfrey and Witten (2008) 2415.

[32] Report by the Department of Labour (2010) 13.

[33] StatsSA, Labour Force Survey, Quarter four 2009.

[34] BCEA. The table with the number of employees were sourced from Godfrey and Witten (2008) *ILJ* 2411.

[35] In terms of s 55(6)(b) the Minister may make a sectoral determination regarding the use of children under the age of fifteen used in advertising, as well as in artistic and cultural activities. The sectoral determination regulating this form of child labour, determination 10, does not, however, prescribe a minimum wage payable in these instances.

No. 13 Farm Worker Sector	700,000
No. 14 Hospitality Sector	650,000

Saget states that these sectors form the bulk of informal wage employment. The author also suggests that work in these sectors is largely performed by black persons, and the wage regulation of these sectors is aimed at addressing income inequalities inherited from the past apartheid regime.[36]

Section 55(7)(a) of the BCEA specifically prohibits the Minister from setting sectoral determinations for employees or employers covered by a bargaining council. The Minister may also not set sectoral determinations for a sector that is regulated by a statutory council.[37] Sectoral determinations only cover those industries not governed by a bargaining council and, therefore, employment conditions for sectors covered by a bargaining council may go unregulated. A bargaining council may have limited power to regulate all workers in its sector: if an agreement is not extended to all workers in the sector, or an exemption provided, it may leave a number of workers without any regulation.[38]

Benjamin suggests that, in order to address this loophole in protection, the Minister must be allowed to set minimum wages for informal sectors operating within the jurisdiction of a bargaining council. Thereby, the workers not covered by a collective agreement will still have protection under a sectoral determination.[39] Although this suggestion does offer some protection to workers, it is submitted that a national minimum wage would offer better comprehensive protection for all workers and will be easier to regulate.[40]

The conditions set by a sectoral determination remain binding until they are amended or suspended by the Minister. If a collective agreement is concluded,

[36] Saget (2006) 13.
[37] S 55(7)(c) of the BCEA. There are currently three statutory councils in South Africa. See Chapter 5 para 3 for a further note on statutory councils.
[38] Benjamin (2008) *ILJ* 1594. A collective agreement takes preference over a sectoral determination, but a sectoral determination takes preference over conditions set in the BCEA and conditions that are less favourable in an individual agreement. See Grogan (2009) 12.
[39] Benjamin (2008) *ILJ* 1954.
[40] See par 4 below for further discussion on the benefits offered by a national minimum wage.

covering the sector in respect of which a sectoral determination was previously issued, the determination ceases to be binding on the employees for that sector now covered by the collective agreement. In other words, the collective agreement will take preference.[41]

The wages set by sectoral determinations have had a significant impact in the farming and domestic-worker sectors in particular. According to Barker the impact on other sectors is relatively low.[42] Minimum wages determined by bargaining councils are far higher than those set in sectoral determinations. The average difference is fifty persent.[43]

3. CENTRALISED BARGAINING

3.1 Introduction

With reference to the discussion on centralised bargaining in South Africa in Chapter 5, it is clear that South Africa follows a self-regulated system of collective negotiations. The LRA provides a framework for collective bargaining and the establishment of collective bargaining structures, but leaves the process of concluding collective agreements and the setting of minimum wages to the devices of the parties involved. Even with the extension of collective agreements, once all required conditions have been met, the Minister of Labour has no discretion to deny the extension of the collective agreement.[44]

In August of 2010, two Chinese-owned clothing factories were closed down in Newcastle due to their non-compliance with the minimum wage conditions set in the National Bargaining Council's (NBC) collective agreement. These factories were bound by the NBC's collective agreement as a result of its extension to include them. During the same period, 45 other factories were issued compliance orders by NBC

[41] S 56 of the BCEA.
[42] Barker (2007) 80.
[43] *Ibid* 111. See Magwaza (2008) *Agenda* 87. Some domestic workers, who fall under the protection of sectoral determinations, have indicated that the increase in conditions set by these determinations has had a negative impact on their relationships with their employer.
[44] See Chapter 4 par 4.4.

on threat of closure. As a result, 43 factories closed down voluntarily, due to an inability to meet the demands set by the NBC. The closures of these factories led to the unemployment of an estimated 1200 workers.[45]

The incident in Newcastle serves to illustrate the possible shortcomings of centralised bargaining in South Africa. It is, however, important to understand the argument in favour of collective, multi-level bargaining. The question posed is not whether centralised bargaining should be disregarded altogether, but whether there are possible amendments that can prevent such incidences. In addressing this issue, centralised bargaining will be discussed under three topics: the global trend towards decentralisation; the benefits of enterprise bargaining; and the impact on job creation.

3.2 Global Trend towards Decentralisation

Until the 1960s, centralised bargaining was the preferred method for all collective negotiations in Europe. It was the change in the British system that sparked a shift away from centralised bargaining in Europe. Increased incidents of unrealistic wages set by industry agreements led towards the general shift to workplace negotiations. By the 1990s, industry-wide agreements covered only a few private-sector employees in Britain.[46]

Over time, many European countries adopted the decentralisation trend set by Britain.[47] Although Germany did not follow suit and is an exception to this shift, there have been an increasing number of works council negotiations that have persuaded

[45] Maree (2011) 2. It is important to note the conditions particular to the clothing Industry: the clothing and textile manufacturing industry has spread globally, with developing countries hosting half of the textile exports and nearly three quarters of the clothing exports; and wages paid by clothing and textile manufacturers are notoriously low due to the competitive global market, with the result that clothing and textile manufacturers tend to operate in "export processing zones" (EPZ). EPZ are zones where production and tariff cost are low and trade unions are prohibited. Workers submit to these terms for fear of the manufacturer relocating. Due to the global context of clothing and textile manufacturing, the labour conditions in this sector are not always comparable to those of other, more structured sectors. See Hamm in Cragg *ed* (2012) 222, 225-226.
[46] Brown (1995) *ILJ* 982.
[47] Bruun in Blanpain *ed* (2003) 11. Denmark, Finland and Norway have all made the shift towards decentralisation.

some employers' associations to relax their industry agreements in order to ensure continued relevance.[48]

The same trend can be observed in other continents. Australia serves as a prime example of the shift away from centralised bargaining and was strongly influenced by the Thatcher administration.[49] Canada's close proximity to the United States has also persuaded the country to reconsider their collective bargaining structures.[50]

It is important to question why so many countries have made the shift away from centralised bargaining and whether the same trend can be observed in developing countries.

Brown argues that the development of the world economy plays an important part in this migration. Industry wide agreements cannot be exported and are therefore only relevant in a particular country. Consequently, agreements limited by national borders lose their appeal in light of a competitive global market. Brown rightly states that "[f]or an ever-increasing range of goods and servies, wages can no longer be 'taken out of competition'."[51]

The changing world of industrialisation also plays a big part in the global context. Technological advancement has greatly impacted on the world of work. Firstly it has opened the labour field, as national labour resources no longer bind a business to a single location.[52] Secondly, technological advancements have also provided access to the global market for small- and medium-sized enterprises (SMEs). Finally, the process of mass production, that provides a large number of low skill jobs, has taken a backseat to the new technological era.[53]

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[48] Brown (1995) *ILJ* 982. See Weiss and Schmidt (2008) 244, in which the authors discuss the inclusion of "open clauses" in collective agreements, whereby works councils are allowed to substitute or amend certain conditions set by the collective agreement.
[49] The Australian labour system is discussed in more detail in Chapter 7.
[50] Brown (1995) *ILJ* 982.
[51] *Ibid* 983.
[52] Vettori (2001) *De Jure* 345. India's popular domestic call centres serve as a prime example of international labour supply. In 2009 India's Business Process Outsourcing recorded that an estimated 768 000 jobs had been created by international outsourcing. See Taylor, D'Cruz, Noronha and Scholarios (2013) *IJHRM* 436.
[53] Vettori (2001) *De Jure* 345.

These changes in the global economy have brought about a change in the labour market. The same shoe no longer fits everyone – a principle on which centralised bargaining relies heavily. South Africa is not excluded from the global market and its labour market can therefore not function independently. It is submitted that these global changes should have a real impact on the way in which collective bargaining is to be approached at present.

3.3 Benefits of Enterprise Bargaining

Centralised bargaining is often criticised for its inflexibility, as wages and other employment conditions can be set throughout the industry without obtaining consent from all employers. The alternative to centralised bargaining is decentralised – or enterprise-level – bargaining. It is necessary to ask which of these two systems is to be preferred and whether they are mutually exclusive.

Centralised bargaining does place certain restrictions on the flexibility of the labour market by setting certain minimum conditions that are enforceable against any employer within the sector and area covered by the council. As the need for a more flexible labour market increases, centralised bargaining decreases.[54] Nevertheless, from an employee-protection perspective, centralised bargaining is preferable.[55]

Enterprise bargaining, in theory, should be able to provide support to employees, provided that it is properly regulated by both legislation and centralised structures.[56] According to a study done by the Development Policy Research Unit, workers covered by bargaining councils earned nine persent more than non-covered workers.[57]

The main advantage offered by enterprise bargaining, is that it allows for increased flexibility – because each individual employer can negotiate and agree on the

[54] Anstey (2004) *ILJ* 1830. See Brown (1995) 980 where he discusses the decrease in unionisation in Britain, Japan and the United States between 1980 and 1995.
[55] Hepple (1995) *ILJ* 306 states that only in acting collectively can employees offset economic inequalities.
[56] Vettori (2001) *ILJ* 347. In Japan, for example, workplace bargaining is the main form of bargaining but the process is coordinated by a centralised structure. See Soskice (1990) *OREP* 41.
[57] Bhorat, Goga and Van der Westhuizen (2011) 12.

conditions of employment best suited to his or her business. It also allows an employer to respond speedily to changes in the business environment and for the setting of performance-based pay.[58]

Enterprise bargaining has an important role to play in the establishment of wage bargaining. If bargaining councils set real minimum wages at industry level, they could be improved upon by enterprise bargaining. Bendix states that:

> The original purpose of extending agreements was to prevent the exploitation of non-unionised employees. This presupposes that councils established only minimum-level wages and conditions of service. The Basic Conditions of Employment Act now establishes relatively satisfactory employment conditions, and it is to be doubted that wage levels set by councils (particularly those dominated by large employers) are minimum-level wages.[59]

The Metal and Engineering Industries Bargaining Council (MEIBC) made room for a more flexible market by allowing certain larger firms to negotiate their own wage rates.[60] This makes practical sense, as the larger firms – who might be able to afford higher wages – can more easily engage in collective bargaining, as employees enjoy greater force due to their numbers. Larger firms in collective bargaining may also utilise the extension of collective agreements to price out smaller competitors.[61]

These agreements are referred to as "framework agreements", whereby certain basic minimum conditions are set for the industry as a whole and then improved upon at plant level. These agreements also offer the flexibility requested by smaller firms. Godfrey *et al* argue that party employers will resist the implementation of such

[58] Vettori (2001) *De Jure* 348. The author argues that the best way in which productivity can be improved upon is through monetary incentives. Brown argues that one of the drawbacks of enterprise-level bargaining is the misconception of the advantages offered by performance-based pay. He argues that performance-based pay has a negative impact on productivity due to employees' being demotivated by pay differentials. Brown does not provide any support for this argument other than experience. It is submitted that this argument holds little merit, as logic suggests that the only workers that will be demotivated by pay differentials are those producing less than their colleagues. See Brown (1995) *ILJ* 986.
[59] Bendix (2010) 295. The author also criticises council agreements in which additional funds and levies are included, and where employees, that may not be interested in accessing these funds, are nonetheless compelled to contribute.
[60] Maree (2011) SAJLR 19.
[61] Brassey (2010) *ILJ* 4.

agreements, as they would require them to negotiate on two levels.[62] This argument seems feeble in comparison to the benefits that these types of agreements can offer. Avoiding the enforcement of often harsh and unreachable conditions on smaller firms outweighs the burden on party employers to negotiate at enterprise level.

Although decentralisation of collective bargaining provides more flexibility in the workplace, it is essential that these mechanisms remain effective in providing adequate protection for workers' rights. The legislature, and trade unions, must ensure that decentralisation does not lead to the "old-fashioned exploitation" of workers.[63]

3.4 Impact on Job Creation and Unemployment

When it comes to the setting of any labour regulation, the impact on the job market must always be addressed. Improved work standards for those who are employed should, as far as possible, not be gained at the expense of those searching for work. The concern here is the need to balance "more jobs" with "better jobs"[64] – for South Africa in particular, this balance is vital.[65]

In the Gauteng building industry, the introduction of increased labour costs and complicated employment conditions have led to an increase in informal or non-regulated employment. The inability of employers to meet the standards set by the Gauteng Building Council (GBC) resulted in an increase in the outsourcing of labourers through subcontracting, or the hiring of unregistered workers.

The GBC failed in the enforcement of these agreements partly due to the nature of the industry and partly due to "the agreement simply [flying] in the face of market realities".[66] Baskin convincingly points out that, ironically, the extension of collective

[62] Godfrey, Maree and Theron (2006) *ILJ* 751.
[63] Brown (1995) *ILJ* 989. See Barker (1999) *SAJE* 26 in which the author argues that the South African labour policies must make provision for "wage moderation" in order to improve on employment levels. In order to achieve such ends, enterprise bargaining must be encouraged, as it provides for more flexibility.
[64] Baskin (1998) *ILJ* 986.
[65] Refer to Chapter 4 par 4 for a review of South Africa's unemployment statistics.
[66] Baskin (1998) *ILJ* 993.

agreements, which was enacted to support centralised bargaining, may ultimately undermine its purpose, due to the lack of incentives for incorporating more flexible conditions. By being able to extend a collective agreement to non-parties, without the need for approval by an independent body or person, bargaining councils are able to bully non-parties into complying with terms set by collective agreements, irrespective of their possible inability to comply.[67]

It appears that both government and councils have lost sight of the true purpose of bargaining councils when the system of extension is used to control the entire industry to serve their own purposes instead of on protecting employees. This narrow-minded approach may indeed influence job creation and lead to job losses;[68] employees have the difficult choice of "choosing to be exploited or not to be employed at all!"[69]

A paper published by Magruder in 2011 indicates that areas where centralised agreements are applied for a particular industry will see an average 10% - 21% increase in wages, but a 8% – 13% drop in employment after one year. The author also states that there are indications of firms jumping across borders to avoid these agreements, resulting in further job losses.[70]

South Africa needs a different approach to the setting of minimum wages. The enforcement of basic employment standards does not necessitate the exclusion of low-wage employment. In allowing for low-wage employment, the needs of low-skilled workers are accommodated.[71]

Perhaps a more flexible labour market can provide a solution in the on-going struggle between better jobs and job creation. Should South Africa succumb to the global pressure or would that merely open the door for unscrupulous employers wishing to profit from cheap, minimally regulated labour?[72] South Africa's domestic

[67] Baskin (1998) *ILJ* 993.
[68] Bendix (2010) 295.
[69] Baskin (1998) *ILJ* 994.
[70] Magruder (2011) Paper 5.
[71] CDE Report (2013) 24.
[72] Baskin (1998) *ILJ* 990.

policies cannot be determined in isolation of the global economy and we must continually remain aware of the influence the global market has on our own market.[73]

4. NATIONAL MINIMUM WAGE IN SOUTH AFRICA

The inclusion of minimum wage policies can have a large impact on improving the lives of low-paid workers.[74] According to political experts, the introduction in the United Kingdom of a national minimum wage in 1999 is regarded as the most successful government policy in thirty years.[75] The introduction of a national minimum wage that covers all workers, regardless of sector, with possible provision for wage differentials in different areas, goes a long way towards improving wage inequalities.[76]

In 1993 the Macroeconomic Research Group (MERG) compiled a report on macroeconomic policy in South Africa. In their report, MERG proposed the introduction of a national minimum wage in South Africa to prevent the paying of exploitative low wages. The MERG stated that the primary aim of introducing a national minimum wage would not be to increase wages rapidly across the board, but rather to improve wages earned by the lowest-paid workers.[77]

In response to the MERG's proposal, Nattrass[78] warns that increased wages may result in South Africa being priced out of low-cost manufacturing. In her article she refers to what occurred in Singapore, where, in order to facilitate structural change, the government increased the minimum wage levels. The difference, however, is that Singapore has a relatively high-skilled labour force and could therefore afford a shift

[73] Vettori (2001) 344.
[74] Devereux (2005) *JID* 910.
[75] This was reported by BBC News in 2010 and cited in Besler and Sobeck (2012) *IJRL* 46. See http://www.bbc.co.uk/news/uk-politics-11896971?print=true, accessed on 12 October 2013, for the article published by BBC News.
[76] Belser and Sobeck (2012) *IJLR* 109.
[77] MERG Report (1993) 163.
[78] Nattrass (1994) *JSAS* 517.

away from low-cost manufacturing; South Africa has a large pool of unskilled labourers and therefore cannot afford to price itself out of the international market.[79]

Although Nattrass makes a valid argument against setting minimum wages too high, the proposal made by the MERG specifically states that, should a national minimum wage be incorporated, wage levels must be conservative and with the purpose of providing minimum living standards to each worker.[80] Thus, the impact that the setting of a minimum wage might have on employment must be taken into consideration in determining an appropriate wage level.

Since these early debates following the MERG report, relatively little research has been done on the possibilities and advantages of a national minimum wage in South Africa. In 2012, however, the Congress of South African Trade Unions (COSATU) released a discussion paper, in which the possibility of a national minimum wage is re-introduced.[81]

In this paper, COSATU states that, during the formulation of the new labour legislation, the lack of more robust debate over the introduction of national minimum wages was in all likelihood due to the fear that it would:

- undercut worker militancy;
- compromise the higher minima provided in certain sectors; and
- place unrealistic demands on the economy.[82]

International trends have proved that national minimum wages and wages set by centralised bargaining *can* coexist.[83] The benefit of a national minimum wage is that it protects basic human rights; prevents a "self-destructive race to the bottom"; and can be utilised in the distribution of wealth and the alleviation of poverty in all sectors

[79] Nattrass (1994) *JSAS* 524.
[80] See Sender (1994) *JSAS* 541, in which the author points out that Nattrass misinterpreted the MERG's proposal.
[81] COSATU Discussion Paper (2012).
[82] *Ibid* 11.
[83] Belser in Pons-Vignon (2011) 118. In Brazil, the introduction of a national minimum wage is credited for the rapid reduction in poverty and inequality in the country.

and areas.[84] An increase in minimum wages has a positive affect on poverty reduction and can furthermore serve as a beacon of fairness providing a "lighthouse effect" for unregulated informal sectors.[85]

A study conducted in 2006 found that bargaining council agreements covered 32,6% of all employees and 4,6% more were covered by the extension of collective agreements.[86] Thus a total of 37,2% of employees were covered by collective agreements. Although not entirely accurate – due to the two-year time difference – if the 23,9% of employees covered by sectoral determinations are added, a total of only 61,1% of employees are currently covered by a minimum wage in South Africa.

If labour regulation is viewed in the light of the need for social protection, a national minimum wage is essential. The only real argument against a national minimum wage is the economic implications of setting the levels too high: for this reason it is important that cognisance be taken of the global market as well as employers' ability to pay, while still providing wages that are not exploitative.[87]

5. CONCLUSION

The two mechanisms which have been put into place for the setting of minimum wages in South Africa, are sectoral determinations and collective bargaining. Of these, centralised bargaining is the primary form. Sectoral determinations are set by the Minister of Labour and only apply to industries not covered by bargaining councils.

Prior to publishing a sectoral determination, the ECC must submit a recommendation to the Minister, setting out the recommended minimum wages and conditions of employment. In making the recommendations, the EEC must take various factors into consideration, including: the average living cost; alleviation of poverty; and the

[84] COSATU Discussion Paper (2012) 12.
[85] Devereux (2005) *JID* 910.
[86] Godfrey, Maree and Theron (2006) *ILJ* 737.
[87] MERG Report (1993) 165. It is important that knowledgeable, well-qualified researchers are appointed, to ensure that the setting of a national minimum wage does not negatively impact on employment levels.

possible impact on the creation of future employment. The Minister has a discretion in publishing the sectoral determination; the Minister may deviate from the recommendations provided by the ECC if he or she deems it appropriate to do so.

An estimated 23,9% of the labour force is currently covered by one of the eleven sectoral determinations. Centralised bargaining agreements cover an estimated 37,2% of the labour force – this leaves an estimated 39,9% of the labour force with unregulated wages.
The setting of minimum wages and employment conditions by way of centralised bargaining has lost support globally. The global economy increases the pressure for flexibility in the labour market and thus forces wage policies to be adaptable. An employer no longer competes with local business only, but has to remain viable in an international market. Similarly, job seekers have to compete internationally in the sale of their labour.

For this reason, a number of countries have shifted towards the setting of minimum conditions through enterprise bargaining, as it provides more flexibility in the ever-changing global market. The benefit of enterprise bargaining is that an employer can conclude agreements best suited to the needs of the business; however, if enterprise bargaining is not properly regulated, it may lead to the exploitation of workers.

It is suggested that framework agreements may offer a viable solution in this regard. Bargaining councils should set realistic minimum wages for the industry, which can then be improved upon by way of enterprise bargaining. Framework agreements can offer a safety net to prevent the exploitation of workers, whilst providing sufficient flexibility for smaller firms. Trade unions would have to provide better support for workers in larger firms in order to obtain improved wage agreements.

The link between minimum wage setting and unemployment is largely unexplored in South Africa. The closing-down of factories, due to employers' inability to pay set minimum wages, is a precedent that should duly be noted and avoided at all costs. Viable alternatives for increased flexibility in the market must be considered. Labour regulations are just one of South Africa's policies that must be adjusted to alleviate our high level of unemployment.

The introduction of a national minimum wage should be considered to prevent exploitation and provide basic living wages for all workers. It is, however, vital that minimum wage levels are not set too high and that provision is made for unskilled labourers wanting to enter the job market. Labour policies must, as far as possible, be conducive to job creation. For this reason a thorough investigation must be conducted before determining the appropriate levels for national minimum wages.

CHAPTER SEVEN

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1. INTRODUCTION

Globalisation has unlocked the broader legal sphere and consequently forces societies to look beyond their own realities. There are lessons to be learnt from the

manner in which other countries manage similar matters.[1] The Constitution of South Africa provides that when interpreting the Bill of Rights the court must consider international law and may consider foreign law.[2] As the right to fair labour practices – which includes the right to associate and organise – is contained in the Constitution, the consideration of foreign law must play a key role in the development of South African labour legislation.[3]

When examining the industrial relations of various countries it becomes evident that no two are alike. A country's industrial relations develop alongside its socio-economic and political dictates. Past inequality and former struggles greatly affect the measures whereby states govern industrial relations within their borders. Each country's labour legislation needs to be considered against its historical and political context. Regard should be given to the socio-economic conditions of each country to place in context its industrial relation principles.

There are two broad views relating to the analysis of comparative labour law systems, namely "convergence" and "divergence." Convergence suggests that as more countries become industrialised, a unification of labour law frameworks will be seen and more common characteristics found in the relevant laws.[4] Divergence holds the opposite view in that, although some similarities might be evident, it is improbable that labour law systems will become identical due to diversity in the political, socio-economical and historical needs of a particular country.[5]

The theory of convergence was first developed in 1960 by Kerr, Harbison, Dunlop and Myers[6] and was formulated on the basis of the development of technology and the effect that it has on the need for more high skilled manpower. The authors argue that industrialised systems are analogous to large organisations in urbanised areas resulting in an industry regulated by a single large entity.[7] This theory is based on

[1] Bendix (2010) 751.
[2] S 39 of the Constitution of the Republic of South Africa, 1996 (the Constitution).
[3] S 23 of the Constitution. See further s 18 of the Constitution which provides for the right to freedom of association.
[4] Bamber and Pochet in Blanpain (2010) 2.
[5] *Ibid* 4.
[6] Kerr, Harbison, Dunlop & Myers (1960) *ILR* 236.
[7] *Ibid* 239. Kerr *et al* note that in order for industry to survive, it must reach "consensus" in a broader group.

the presumption that all societies will become industrialised and that their ideological differences will consequently fade as "the culture patterns of the world intermingle and merge".[8] The theory suggests that the pressure exercised by globalisation will force society to meet concurrent international standards.[9]

Weiss notes that in Europe the rationale for setting minimum standards across borders is not to create one singular approach to labour legislation, but rather to ensure social protection in neighbouring states.[10] Weiss cautions, however, that global economic pressures may result in a convergence to lower minimum standards and could thus result in a "race to the bottom".[11]

Divergence supposes that due to the diversity of societies it is unlikely that convergence will take place. Each society formulates its own regulatory framework in the light of its unique circumstances and development.[12]

It is submitted that, although convergence is evident in certain instances and on certain levels, it is doubtful that it will be a commonly accepted theory. Convergence between developed industrialised countries may be more generally observed, but it is unlikely that the same phenomenon will be present in comparisons between developed and developing countries. However, in light of the argument made by Weiss in relation to the European Union, it may serve to be a possible solution for the protection of labour rights in the Southern African Development Community (SADC).[13]

In this chapter the historical development and current legislative framework relating to the setting of minimum wages in Australia and France will be considered, as well

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[8] Kerr, Harbison, Dunlop & Myers (1960) *ILR* 248.
[9] See Kerr, Harbison, Dunlop & Myers (1960) *ILR* 238 in which the authors argue that by the middle of the twenty-first century industrialisation would, in most part, supersede pre-industrial societies and that "industrial society knows no national boundaries; it is destined to be a world-wide society".
[10] Weiss (2007) *CLLPJ* 485. Weiss refers to the example of freedom of service and how the establishment of minimum cross-border standards has curtailed social dumping as a means of achieving a competitive advantage.
[11] *Ibid* 470.
[12] Bamber and Pochet in Blanpain (2010) 4.
[13] See Weiss (2007) *CLLPJ* 469-486 in which he discusses the convergence and divergence of European labour systems. See further Ng'ong'ola (2008) *UBLJ* in which the integration of the legal framework within the SADC region is discussed.

as how their structures compare to those in South Africa. Both Australia and France experienced extreme pressure from neoliberals for the reformation of labour law to allow for a more flexible labour market – a problem to which South Africa can relate. However, these countries have responded to these pressures in different ways and have, accordingly, produced different results.

2. AUSTRALIA

2.1 Introduction

Prior to the Fair Work Act of 2009 (FW Act), the Australian labour law system was almost completely flexible as prescribed by the 2005 Work Choices legislation. Trade unions were left with little to no power and employers were free to conclude individual contracts with their employees on terms that best suited the employer's needs, often to the considerable detriment of the employee.[14] With the introduction of the FW Act, the government tried to remedy a number of shortcomings in the previous regime, and endeavoured to provide the necessary flexibility for employers whilst also protecting the interests of employees.[15]

It is important to note that Australia is a Federal State and, as such, each state has the authority to govern its own internal affairs. However, with the introduction of the Work Choices legislation, the Howard Government initiated a shift towards the centralisation of Australian labour law. The nationalisation of the labour laws was largely effected by the inclusive definition of "employer" in the Work Choices legislation.[16] This definition was incorporated into the definition of a "national system employer" in section 14 of the FW Act.[17]

[14] Murray and Owens in Forsyth and Stewarts *eds* (2009) 53-54.
[15] Forsyth and Stewarts in Forsyth and Stewarts *eds* (2009) 8.
[16] In terms of s 6 of the Workplace Relations Act, an "employer" includes, *inter alia,* a constitutional corporation, a Commonwealth authority, a body corporate incorporated in the Territory. The Victorian employers excluded from the definition were covered by Part 21 of the Workplace Relations Act. See Stewarts in Forsyth and Stewarts *eds* (2009) 23.
[17] See Stewarts in Forsyth and Stewarts *eds* (2009) 19-39 for a more in-depth study on the shift towards a national labour law system in Australia.

2.2 Historical Background

Australia was introduced to collective labour law in 1904, and up until the enactment of the Workplace Relations Act in 1996, their collective labour laws remained mostly unchanged.[18] Between 1904 and 1983, Australia followed an arbitral system.[19] The process followed a tripartite structure whereby the union would place demands on the employer, which would then be referred to a tribunal to make a final "award" as to wages and conditions of service.[20] It regulated the relationship beween employers and employers' organisations on the one hand and unions on the other. The arbitration system did not govern individual employee-employer relationships.[21]

For the setting of minimum wages, the Australian Council of Trade Unions[22] (ACTU) would bring matters before the Australian Industrial Relations Commission[23] (AIRC) for adjudication and awards on minimum wages. Once an award was made it could be extended to cover an entire workforce. These awards covered the majority of employees in Australia and one workplace could be subject to multiple awards.[24] During this time there were a number of forms of compulsory unionisation, or "closed shop" agreements, which boosted union membership.[25]

[18] Cooper and Ellem (2008) *BJIR* 534. During this time certain changes were observed, but none as drastic as those introduced by the Workplace Relations Act.
[19] *Ibid* 534-535. The federation of previous colonies adopted the arbitral system in Australia three years after the creation of the Commonwealth of Australia. The system provided for a compulsory arbitration and conciliation process that granted Parliament the power to pass laws regarding conciliation and arbitration processes to assist in the settlement of disputes beyond any one state's reach. Also see Campbell and Brosnan (1999) *IRAE* 354.
[20] Cooper and Ellem (2008) *BJIR* 535. The arbitration system provided for a set minimum wage for male workers and relied heavily on unionisation. Women were seen as dependants and excluded from the minimum wage protection; low wage for women were sanctioned by the state. Equal pay was only introduced between 1969 and 1972.
[21] *Ibid*.
[22] ACTU was established in 1927 to coordinate national union action and acts at a national level as a confederation trade union. See Gardner and Palmer (1997) 24 and 89.
[23] The AIRC's was established by s 8 of the Industrial Relations Act of 1988. It was formerly known as the Commonwealth Conciliation and Arbitration Commission, whose main functions included the setting of the "living wage … based on the normal needs of the average employee as a human being living in a civilized community." See Boreham (2002) 180 and 182. In terms of s 89 of the Industrial Relations Act, the AIRC's main functions included the prevention and settlement of industrial disputes by way of conciliation or arbitration adjudication of industrial disputes.
[24] Cooper and Ellem (2008) *BJIR* 535. The awards would often extend to matters beyond labour by the inclusion of provisions pertaining to social security. See Campbell and Brosnan (1999) *IRAE* 355.
[25] Cooper and Ellem (2008) *BJIR* 535. Closed shop agreements were concluded with principal unions and were used mostly in larger enterprises. See Lansbury and Macdonald (1994) *ER* 12.

In the 1980s, pressure by employers and employers' organisations increased for the transformation of the award system. The Business Council of Australia published an influential report in which it was argued that the industrial relations in Australia were placing restrictions on productivity potential.[26] In 1983 the ACTU, together with the Australian Labour Party led by Bob Hawke, commenced the dismantling of awards, and bypassed the AIRC by way of the Price and Income Accord.[27] During the thirteen years that the Australian Labour Party was in power, the Accords were used to set certain regulated employment standards and conditions, which included wage setting.[28] The Accord system came to an end in 1996, when a new government took over from the Australian Labour Party.[29]

By 1993 the government promulgated the Industrial Relations Reform Act of 1993, which provided for union-based enterprise negotiations and limited the right to strike.[30] The Industrial Relations Reform Act also introduced a new non-union bargaining system whereby employers could negotiate directly with employees. Despite the freedom of negotiation that the legislation provided to employers, it was not often used as employers did not approve of the power of intervention awarded to unions by the Industrial Relations Reform Act.[31] Employers insisted on a flexible labour market and held that this would not be achieved if unions were allowed to intervene in negotiations.[32]

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[26] Lansbury and Macdonald (1994) *ER* 9. The Business Council of Australia was established in 1983 and consisted mainly of chief executives of the eighty larger firms in Australia. The Business Council of Australia avoided the adversarial approach taken by most critics of the award system, and built its case for the deregulation of the industry by carefully constructed reports. Campbell and Brosnan (1999) *IRAE* 362.

[27] Campbell and Brosnan (1999) *IRAE* 354. Price and Income Accords were agreements concluded between the ACTU and the Australian Labour Party, in terms of which the trade unions would guarantee industrial peace and wage limitations in exchange for the government's protection of real and social wages. See Griffiths (2012) 19.

[28] The Accord system saw the ACTU rise to power but also lead to its demise as criticism was raised that the relationship between the ACTU and government was too close. ACTU strongly supported enterprise level bargaining and in 1993 released Accord Mark VII, in which the focus on wage increases through productivity based workplace bargaining. The Accord, however, made no allowance for the AIRC to make awards to protect lower paid employees or those employees not covered by workplace agreements. See Lansbury and Macdonald (1994) *ER* 9.

[29] Peetz and Bailey (2012) *JIR* 528.

[30] Brooks (2002) in Blanpain *ed* 173. The ideology of enterprise-level bargaining stemmed from the notion that parties must take responsibility for their own industrial relation affairs and reach an agreement appropriate for their specific enterprises.

[31] Cooper and Ellem (2008) *BJIR* 536. Also see McCallum (2011) 2 in which he discusses the development of Australian industrial relations over the past twenty years.

[32] Cooper and Ellem (2008) *BJIR* 537.

In 1996 employers won the battle for an almost completely flexible labour market. The 1996 government, led by John Howard, favoured a neoliberal state, which entails the diminishing of collective bargaining. As such, the state took on the role of regulating employment relations.[33] Howard was of the opinion that the unions ran a bargaining monopoly and that, in order to break their power, they had to be removed from the equation.[34] This approach was supported by a number of government officials and businesses.

The Howard government was determined to move away from union-based collective bargaining, which was effected by the Workplace Relations Act of 1996. The new labour legislation was referred to as "Work Choices" and comprised over 1700 pages of new legislation.[35] Despite data indicating that unionised sectors and workers enjoyed higher wages, government proceeded to dismantle and discourage union-based bargaining. The Workplace Relations Act reduced union rights within the workplace and limited their ability to recruit and represent members. Strong, forceful unions were forced out through legislation and government intervention.[36]

With the introduction of the Australian Workplace Agreements, a new form of employment contract, the Work Choices sidestepped the need for union involvement in the employment relationship. These Australian Workplace Agreements went as far as allowing the employer to bypass unions and to override collective agreement awards.[37]

Under the Work Choices, the Australian Fair Pay Commission took on the function of wage setting. The fundamental changes introduced by this shift were that the

[33] Cooper and Ellem (2008) *BJIR* 532.
[34] *Ibid* 533. Howard was a known admirer of Margaret Thatcher, who dismantled unions in the United Kingdom in the 1970s.
[35] Cooper and Ellem (2008) *BJIR* 543. Also see Sharp, Broomhill and Elton (2012) 1, in which the authors discuss the negative impact Work Choices legislation had on wage equality. Employers did not hesitate to implement the tools provided to them in the Work Choices legislation. For example, one of the provisions held that employers were only required to inform employees when a "protected condition" was removed from their agreement. Cooper and Ellem (2008) *BJIR* 544.
[36] Cooper and Ellem (2008) *BJIR* 538. The government argued that they were not prejudiced towards unions and that they provided the tools for both employers and employees to negotiate on equal footing.
[37] Campbell and Brosnan (1999) *IRAE* 367. Also see Cooper and Ellem (2008) *BJIR* 539-540. See Part 15 of the Workplace Relations Act. See further Quinlan and Johnstone (2009) *IRJ* 429. Due to the powerlessness of unions during this era, membership decreased rapidly. When the Howard government lost office in 2007, union membership was at a low of 18.9%.

Australian Fair Pay Commission authority rested more in those with a predominately business and economic background than the former AIRC, which consisted of those with an industrial relations background.[38] The Australian Fair Pay Commission was responsible for the review of the Federal Minimum Wage and wage awards. However, unlike the required adjustment for low paid workers taken into account by the AIRC, the Australian Fair Pay Commission was not required to consider fairness.[39]

Notwithstanding the support from employers, commentators largely criticised the Work Choices legislation. Despite the promise of improvement of unemployment levels, Cowling and Mitchell noted that the Work Choices legislation failed to show any real result in terms of employment levels and simultaneously created drawbacks in urban equality.[40]

2.3 The Current Legislative Framework

2.3.1 Introduction

In 2007 the Australian Labour Party, headed by Kevin Rudd, won the elections. This was seen as one of the largest swings in government ever experienced in Australia.[41] In the run up to the elections the "Your Rights at Work" campaign played a major role in enhancing the antagonism felt against Work Choices. The campaign was launched by the ACTU and is seen as the game changer in these elections. The election appeared to be won largely on the promise of improved labour rights.[42]

[38] Waring and Burgess (2011) *JIR* 684.
[39] *Ibid* 684. In terms of the Workplace Relations Act, the AIRC function was to make provision for safety net wage increases for those employees not covered by enterprise agreements. The ideology behind this adjustment in wage determination was to ensure that the unemployed were not priced out of the market, and that lower paying jobs would act as a stepping stone to better paying jobs. See Cowling and Mitchell (2007) *JIR* 742-743. A further shortcoming was that increases set by the Australian Fair Pay Commission took effect on various dates, and wage increases would in certain instances not be put into writing or published, which created uncertainty about the wages payable. The wage determinations process followed by Australian Fair Pay Commission were also criticised for its lack of transparency and thus compromised stakeholder confidence. See McCallum, Moore and Edwards (2012) 113.
[40] Cowling and Mitchell (2007) *JIR* 743-745.
[41] Cooper and Ellem (2008) *BJIR* 546.
[42] Caspersz, Gillan and White (2011) *JIR* 632.

The new government was then faced with the question as to how and where the Work Choices legislation was to be amended. Howard argued that, as was the case in Britain, the new government should only "tweak" the existing labour laws to make them more palatable.[43] However, then Workplace Relations Minister, Julia Gillard, strongly advocated that the Work Choices legislation be abolished and that a new fair system of labour rights be introduced.[44]

In 2009 the newly elected Australian Labour Party enacted the FW Act. The FW Act's main purpose was to reverse the imbalance created by the previous government's Work Choices legislation.[45] The new FW Act governs a wide array of issues, including the functioning of trade unions and industrial actions, employment standards, dismissal laws, enterprise-level agreements and workplace discrimination.[46] The new policy framework is aimed at modernising labour relations in Australia without returning to centralised regulation.[47]

The FW Act established Fair Work Australia, renamed Fair Work Commission (FWC),[48] in terms of section 575. This body took over the functions of its predecessors and is consequently entrusted with a wide array of power and responsibilities.[49] These include *inter alia* dispute resolution, approval of collective agreements, setting modern awards, establishing and varying minimum wages, monitoring compliance with various awards or agreements and adjudicating claims of unfair dismissals.[50]

One of the changes brought by the FW Act was the abolishment of Australian Workplace Agreements. The new legislation now makes provision for individual

[43] Howell (2005) 188. Howard referred to the Blair administration that kept Thatcher's individualised principles and provided unions with only a minor role in collective bargaining.
[44] Cooper and Ellme (2007) 546.
[45] S 3 of the FW Act.
[46] See Harpur, French and Bales (2009) for a review on employee protection under the FW Act.
[47] Cooper, Ellem and Todd (2012) 1.
[48] The name of Fair Work Australia was amended by schedule 9 of the Fair Work Amendment Act 174 of 2012, replacing the name with Fair Work Commission.
[49] Steward (2011) *JIR* 564. FWC took over the role of the AIRC, Australian Fair Pay Commission, the Workplace Authority, the Workplace Ombudsman and the Australian Building and Construction Commission. See Forsyth and Stewarts in Forsyth and Stewarts *eds* (2009) 8.
[50] S 576 of FW Act.

flexible agreements.[51] The FW Act requires that all awards or enterprise agreements provide a "flexibility" clause that allows an employer and an individual employee to agree on terms that vary the conditions set by an award or enterprise agreement to meet the needs of both the employer and the individual employee.[52]

FWC has no authority to review the individual flexibility agreement.[53] FWC does, however, have the authority to ensure that the flexibility term in the award or agreement meets specific standards. The FWC can set restrictions on what may be varied in an individual flexibility agreement, and thereby ensures that basic minimum conditions are not circumvented by an individual flexibility agreement.[54]

Section 3 of the FW Act sets out its objectives. The main objective of the FW Act is to bring about a "cooperative and productive workplace," which promotes the national economy and social inclusion. It aims to achieve these objectives by providing legislation that protects the interests of the worker but remains flexible for the business of the employer.[55] The focus of the FW Act with regard to bargaining is mainly on decentralised bargaining at enterprise level.[56]

The FW Act provides for three safety nets to lay the foundation for enterprise-level collective bargaining. These safety nets are the National Employment Standards (NES), modern awards and national minimum wage orders.[57] These safety nets were put in place to address the concern over lack of protection provided for

[51] S 202 and s 144 of FW Act.
[52] In terms of s 144 of FW Act the individual flexibility agreement only effects the arrangement between the employer and the specific employee for whom the agreement has been concluded. S 203 of the FW Act further provides for the requirements to be met by a flexibility term in an enterprise agreement. The employer must guarantee that the employee will be "better off overall" due to the conclusion of the individual agreement.
[53] The FW Act does not make any further reference as to what would be regarded as "better off overall" in the case of individual flexibility agreements. It is submitted that this shortcoming in the FW Act allows for the possible exploitation of employees.
[54] McCallum, Moore and Edwards (2012) 106. The modern award of enterprise agreement may restrict the individual flexibility agreement to cover only a few selected conditions, such as overtime, penalty rates, allowance or leave.
[55] S 3 of the FW Act.
[56] S 3(c) of the FW Act provides that fair working conditions can no longer be undermined by individual employment agreements. S 3(f) provides that productivity and fairness are to be achieved through enterprise-level collective bargaining which is underpinned by good faith bargaining.
[57] See s 3 of the FW Act which provides that one of its objectives is to ensure safety nets are put in place to secure "fair, relevant and enforceable minimum terms and conditions".

employees under the previous Work Choices and to provide a starting point for collective bargaining.[58]

A modern award or enterprise agreement may not exclude provisions set in the NES.[59] The terms that a modern award or enterprise agreement is allowed to regulate are restricted in terms of Part 2-2 of the FW Act.[60] In general, a modern award or an enterprise agreement may supplement the provisions set by the NES, provided that it is not to the detriment of the employee.[61]

Minimum wages are not covered by the NES but are regulated by modern awards and national minimum wage orders. Modern awards may provide additional minimum conditions for a specific industry and includes conditions pertaining to working hours, overtime rates and leave.[62] The principle behind the setting of modern awards is based on the notion that different industries, occupations and enterprises require different minimum terms and conditions.[63]

2.3.2 Setting of Minimum Wages

Australia has three levels of minimum wage setting: the setting of a national minimum wage by the Minimum Wage Panel; the setting of industry minimum wages through modern awards;[64] and lastly, enterprise level collective bargaining.[65]

Parts 2-6 of the FW Act pertains to minimum wages, both the national minimum wage and wages set through modern awards. In order to determine wage rates, the FW Act provides for the establishment of the Minimum Wage Panel, which forms

[58] McCallum, Moore and Edwards (2012) 86.
[59] S 55(1) of the FW Act.
[60] S 55(2) of the FW Act.
[61] S 55(4)(b) of the FW Act.
[62] S 139 of the FW Act provides for ten conditions that may be set through modern awards.
[63] McCallum, Moore and Edwards (2012) 105. To provide business time to adjust to the provisions set through modern awards, a five-year transitional period applies to most modern awards.
[64] These awards are referred to as “modern awards” as they represent the modernisation of the old awards system. When the Australian Labour Party came into power in 2007, they introduced a radical change in the manner in which the AIRC administered the implementation of awards. See Forsyth and Stewarts in Forsyth and Stewarts *eds* (2009) 9.
[65] Waring and Burgess (2011) *JIR* 687. S 5(5) of the FW Act.

part of FWC.[66] The single national minimum wage covers all employees that are not covered by a modern award or an enterprise agreement.

In terms of section 285 of the FW Act, FWC must conduct an annual wage review in which the national minimum wage as well as minimum wages set through modern awards are reviewed. Section 135 of the FW Act provides that in setting, varying or revoking any modern award, FWC must consider the national minimum wage set through a national minimum wage order. FWC must publish the new wage rates to take effect on the 1st of July of each year.[67]

FWC must ensure that persons and bodies concerned have an opportunity to make submissions for consideration in the review.[68] All submissions made must be published by FWC to allow parties a reasonable opportunity to comment on the submissions.[69] The FW Act further provides the President of FWC with discretion to give direction for the investigation and for the compiling of a report regarding the consideration of the annual wage review.[70] After due consideration of submissions and comments, FWC may make one or more determinations in which modern award minimum wages are varied. Such variation must be published on FWC's website or by any other means deemed appropriate.[71]

In making a final decision and order, the Minimum Wage Panel must take into account the minimum wage objectives as provided for in section 284. These objectives provide that FWC must establish and maintain a "safety net" of fair minimum wages by taking into account:

- the performance and competitiveness of the national economy;[72]
- social inclusion;

[66] S 575 of the FW Act provides for the establishment of FWC and the various bodies within FWC, including the Minimum Wage Panel. S 620 of the FW Act provides for the formation and the constitution of the Minimum Wage Panel.
[67] S 285 of the FW Act.
[68] S 289 of the FW Act. The FW Act provides that bodies or persons concerned have reasonable opportunity to submit.
[69] S 289(5) of the FW Act. S 289(6) of the FW Act provides that the publications may be placed on FWC's website or by other means regarded as appropriate.
[70] S 290 of the FW Act read with s 582.
[71] S 292 of the FW Act.
[72] This includes productivity, business competitiveness and viability, inflation and employment growth.

- living standards;
- equal remuneration; and
- the provision of a comprehensive range of fair minimum wages to junior employees and those in training.[73]

The variation or revocation of any modern award minimum wages is finalised by a FWC decision. The 2011-2012 FWC Annual Wage Review provides the factors taken into account in the finalisation of the review, including the economic conditions of the various sectors, relative living standards and principles of equal pay.[74] The national minimum wage is finalised by an order made by the president of FWC. The 2012 national minimum wage is $606.40 per week.[75] This amount equates to R5 526.72 per week at an exchange rate of 9.123.[76]

The national minimum wage applies to an "award/agreement free employee."[77] Apart from the national minimum wage, the order also makes provision for five categories of special minimum wages that cover *inter alia* people with disabilities, junior employees, apprentices and employees to whom training provisions apply. [78]

Stewarts[79] notes that the function of minimum wage setting provided to the Minimum Wage Panel is that of a rule maker and not an adjudicator. In the setting of minimum wages, the Minimum Wage Panel does not resolve disputes but rather holds a public inquest and makes a final and binding decision based on its findings.[80] Apart from national minimum wage orders and minimum wages set through modern awards,

[73] S 284(2) of the FW Act provides that the minimum wage objectives must be taken into account by FWC when exercising its power under "this Part," which is Part 2-6 headed "Minimum Wage," and includes the setting of a national minimum wage.
[74] [2012] FWAFB 5000.
[75] The 2009-2010 national minimum wage was $576.90 per week and increased to $589.30 in the 2010-2011 national minimum wage order. See the FWC website at http://www.fwc.gov.au/index.cfm?pagename=minprevious accessed on 12 December 2012.
[76] Exchange rate calculated on 13 December 2012 at http://www.x-rates.com/table/.
[77] Item 2 of the National Minimum Wage Order [PR062012]. See http://www.fwc.gov.au/index.cfm?pagename=minnatorders accessed on 12 December 2012.
[78] Item 4 of the National Minimum Wage Order [PR062012].
[79] Stewarts (2011) *JIR* 573.
[80] S 620 of the FW Act provides that the decision of the Minimum Wage Panel prevails, unless there is no majority decision in which instance the President of FWC's decision will prevail. No provision is made for an appeal against the Minimum Wage Panel's decision.

employers and employees are able to set minimum wages through collective agreement.

2.3.3 Collective Bargaining

2.3.3.1 Introduction

In terms of the Work Choices legislation, individual statutory agreements were prevalent, which resulted in lower wages and inadequate employment conditions. The FW Act aimed to address these shortcomings by providing for collective bargaining mechanisms.

Section 3 of the FW Act states that the objective of the FW Act in establishing a balanced employment framework will be achieved by:

> (f) … productivity and fairness through an emphasis on enterprise-level collective bargaining underpinned by simple good faith bargaining obligations and clear rules governing industrial action.

Parties are not restricted from concluding an enterprise agreement if a modern award is applicable to the relevant industry. If the majority of the employees, or their representative, want to engage in collective bargaining with their employer, they are free to do so. The FW Act even goes so far as to provide for compulsory collective bargaining in certain instances, such as majority support determinations.[81] Once an agreement has been concluded, it must be approved by FWC before it is valid.[82] The FW Act also provides that an enterprise agreement, as well as modern awards, must contain a flexibility clause that will allow an employer to conclude an individual flexible agreement with an employee.[83]

[81] S 236 of the FW Act.
[82] S 180 of the FW Act.
[83] S 202 of the FW Act.

2.3.3.2 Enterprise Agreements

Under the FW Act, enterprise agreements may be concluded with our without a union. The FW Act refers to "bargaining representatives", thus if a union is the representative for employees, the agreement will be concluded between the union, as a representative of the employees, and the employer.[84] Section 176 of the FW Act specifies who will be regarded as a bargaining representative.

In order to facilitate collective bargaining, the FW Act provides FWC with the role of ensuring that all parties engage in good faith bargaining. The FWC is regarded as an "overseer" of the bargaining process and must be an impartial umpire.[85]

Section 228 provides that bargaining representatives must meet the good faith bargaining requirements. The section provides for six requirements of good faith bargaining, which includes attending meetings, disclosing information, considering proposals, refraining from unfair conduct and recognising other bargaining representatives. The section also specifically provides that good faith bargaining does not entail making concessions or necessarily reaching an agreement. Thus, although engaging in bargaining is compulsory, concluding an enterprise agreement is not.

The FW Act provides for compulsory bargaining for those sectors where employees want to engage but cannot, due to the unwillingness of the employers.[86] There are three instances where an employer can be compelled to engage in collective bargaining: in terms of a majority support determination; a scope order; or a low-pay authorisation.

If an employer (or a group of employers) is not willing to bargain, a bargaining representative of the employees may apply to FWC to make a "majority support determination."[87] This determination requires that the majority of the employees,

[84] S 173 of the FW Act provides that the employer must notify employees that they are entitled to appoint a bargaining representative.
[85] Caspersz, Gillan and White (2011) *JIR* 633.
[86] McCallum, Moore and Edwards (2012) 128.
[87] S 236 of the FW Act.

which will be covered by the agreement, want to engage in collective bargaining with their employer. In making such a determination, FWC must be satisfied that the employer covered by such an order has not yet agreed to bargain.[88]

FWC can also make a scope order in instances where the collective bargaining process is not proceeding efficiently or fairly, because the employees to be covered by the agreement are "not appropriate."[89] FWC may make the order, if satisfied that the representatives are acting in good faith, that making the order will promote efficient and fair bargaining and that the suggested increase in scope has been fairly allocated.[90]

Part 2-4, division 9 of the FW Act makes special provision for low-paid bargaining. The purpose of the provision is to "assist and encourage" low-pay employees and their employers, who do not have access to collective bargaining structures, to make enterprise agreements that meet their specific needs.[91] A bargaining representative may apply for a low-paid authorisation, which, if granted, will subject specified employers to certain rules relating to the agreement that would otherwise not have applied to them.

Part 3-3, division 8 of FW Act provides for protected action ballots. The objective of the division is to set fair, simple and democratic processes in place in order to allow a representative to determine whether employees may engage in protected industrial action.[92] It has been suggested that, due to the good-faith bargaining provisions in the FW Act, industrial action has become superfluous.[93]

[88] S 237(2) of the FW Act. The section further provides that FWC must ensure that the employees covered by the agreement have been fairly chosen.
[89] S 238 of the FW Act. As all parties are free to determine the scope and area of jurisdiction of a collective agreement, some employees may be excluded unfairly. This section allows those employees excluded from the scope to apply that their interests form part of the proposed agreement and that they consequently become part of the negotiation process. See McCallum, Moore and Edwards (2012) 138.
[90] S 238(5) of the FW Act provides that the scope order may specify the employees and employer/s to be covered by the agreement.
[91] S 241 of the FW Act.
[92] S 436 of the FW Act.
[93] McCallum, Moore and Edwards (2012) 175.

This issue was addressed in *JJ Richards & Sons Pty Ltd v Transport Workers' Union of Australia*.[94] In said case FWC held that protected industrial action was allowed in circumstances where the employer refused to engage in bargaining and where the majority support determination order has not been applied. FWC stated that section 443 the FW Act does not require employees to obtain a majority support determination before a protected action ballot can be issued. FWC held that:

> [H]ad the legislature intended that a protected action ballot order should not be available unless bargaining had commenced it would have employed the language of the provisions which the appellants have relied on.[95]

As a protected action ballot is issued before bargaining commences, a determination in terms of good faith bargaining need not be made.[96]

The FW Act mainly promotes single enterprise agreements between one employer and its employees.[97] However, multi-enterprise or multi-employer agreements may be concluded.[98] Section 229(2) provides that an application for a bargaining order must not be made a multi-enterprise agreement unless a "low-paid authorisation" is in operation.

Section 172(3) of the FW Act provides that two or more employers, that are not single interest employers, may make a multi-enterprise agreement.[99] A single-enterprise agreement takes preference over a multi-enterprise agreement. Thus, if a multi-enterprise agreement applies to an employee and subsequently a single-enterprise agreement is concluded that covers the same employee, the single-enterprise agreement will stand and the multi-enterprise agreement will fall away.[100]

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[94] [2011] FWAFB 3377.
[95] [2011] FWAFB 3377 at par 23.
[96] Caspersz, Gillan and White (2011) *JIR* 640.
[97] McCallum, Moore and Edwards (2012) 150.
[98] S 172(5) of the FW Act provides for collective bargaining in instances where more than one employer is involved. If employers are engaged in a joint venture or related body corporates, FWC may make an order that these employers are "single interests employers".
[99] S 172 of the FW Act also provides for a "greenfields agreement" which may be single or multi-enterprise agreement in terms of which the employer is establishing a new enterprise and the employers have not employed any person for that enterprise that will be covered by the agreement.
[100] S 58(3) of the FW Act.

Once parties have consented to the conditions of the enterprise agreement, a bargaining representative must apply to FWC within fourteen days for the approval of the agreement.[101] In order for the agreement to be approved, it has to pass the "better off overall" test, or the BOOT test. This test entails that FWC must determine whether the employees will be better off overall, comparing the conditions provided in the agreement against the conditions set in the modern award.[102] In other words, the conditions, when compared to the conditions set in the safety nets, must be in the employee's favour. The BOOT test does not require that all the terms in the enterprise agreement be in the employee's favour but rather that the agreement as a whole must be. The test does, however, require that each individual employee will be better off and not all the employees collectively.[103]

3. FRANCE

3.1 Introduction

Since the recognition of trade unions in 1884, the French collective labour law framework has remained somewhat unchanged. The French workforce relies heavily on the regulation of the industry through collective bargaining. Although union membership in France is highly diluted, its collective agreements cover over 90% of the workforce. This is mainly due to the extension of collective agreements to non-members.[104]

French labour law is codified in the *Code du Travail,* or Labour Code, which covers all aspects of employment law. An important feature of the Labour Code is its provision for a national minimum wage, which is determined annually by the Minister of Labour.[105]

[101] S 185 of the FW Act. A signed copy of the agreement and required declarations must accompany the application.
[102] McCallum, Moore and Edwards (2012) 164.
[103] S 193 of the FW Act. In order to determine whether the individual employees will be better off overall, FWC may refer to a class of employees instead of assessing each individual employee on his or her own.
[104] Conolly (2012) *Capital and Class* 119.
[105] Despax, Laborde and Rojot in Blanpain *ed* (2011) 124.

Despite the emphasis on centralised collective bargaining, French labour law is still fairly regulated. Minimum employment conditions are set in the Labour Code, which may be improved on by collective agreements.[106] The extension of collective agreements is also subject to the Minister's approval.[107]

3.2 Historical Background

After the French Revolution of 1789, the newly liberated society had strong ideologies against the strength of any organised labour. The *Le Chapellier* (the Chapillier) of 1791 prohibited any form of coalition, which included the right to organise and the right to strike.[108] However, the hardship of workers during the Industrial Revolution forced the recognition of labour rights.

In 1840 Dr Vuillermé presented a report to the Academy of Moral and Political Sciences. He gave an alarming account of the working conditions of labourers in the French manufacturing industry, where workers had little to no protection.[109] This report acted as a vehicle for the development of legal reform. The industrial revolution that gained momentum after 1850 did little to assist in the desperate working conditions of those employed by industries.

Fortunately the attack against the system by workers and other social interest groups brought about some change and protection for the working class. By 1848 certain inroads were made to the advantage of employees, which included the limitation of working hours to ten hours per day and the recognition of the right to work.[110]

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[106] Minimum employment conditions are set by the Labour Code which includes, *inter alia,* working time, vacation leave and duration of fixed terms contracts. See s L.1242-2, L.3121-10, L. 3141-1 of the Labour Code. See Despax, Laborde and Rojot in Blanpain *ed* (2011) 284.
[107] S L. 2261 of Labour Code.
[108] Gaudu in Bermann and Picard *eds* (2008) 395. Despax, Laborge and Rojot in Blanpain *ed* (2011) 194. The *d'Allarde* Decree of March 1791 abolished existing workers organisations and the *Le Chaperlier* Act of June 1791 prohibited free association. See further Gaudu in Bermann and Picard *eds* (2008) 395.
[109] Despax, Laborde and Rojot in Blanpain *ed* (2011) 49.
[110] Gaudu in Bermann and Picard *eds* (2008) 396.

The freedom to form a trade union was eventually recognised by the Act of 21 March 1884 (the 1884 Act).[111] The 1884 Act provided all parties with the right to establish and the freedom to associate with a union.[112] The 1884 Act further ensured the independence of trade unions from the state.[113]

The 1919 Act provided an important stepping-stone for the development of collective bargaining in France. During this time certain provisions were added to the rights of a trade union, including the right to engage in collective bargaining and the conclusion of collective agreements.[114] The earlier legislation did not allow for the extension of collective agreements and followed a strict adherence to the law of contract. As a result, union membership started to decline as employers were not incentivised to conclude collective agreements.[115] It was only in the Act of 24 June 1936 that the extension of collective agreements was enacted by the Minister of Labour.[116]

The Popular Front introduced compulsory arbitration and conciliation for collective disputes and the Act of 24 June 1936 (the 1936 Act) made collective agreements the primary method of setting basic employment conditions. The 1936 Act provided that collective agreements were to be concluded by the "most representative organisation" of the employers and the employees and further introduced France to the extension of collective agreements, in part or in full, to non-parties. The 1936 Act did not allow the Minister of Labour to change the agreement, but it did grant the Minister the discretion to restrict the provision to be extended.[117]

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[111] French legislation does not have a short title. In certain instances important legislation may be referred to by the name of the Minister under which the legislation was enacted. See the Oxford Library Guide at http://ox.libguides.com/content.php?pid=108878&sid=819231 accessed on 12 December 2012 for more information on citation of French legislation.
[112] Gaudu in Bermann and Picard *eds* (2008) 395.
[113] Despax, Laborde and Rojot in Blanpain *ed* (2011) 195.
[114] Sturmthal (1950) *ILRR* 236. See further Gaudu in Bermann and Picard *eds* (2008) 395.
[115] Sturmthal (1950) *ILRR* 237. As collective agreements were based on the principles of the law of contract it was possible for multiple unions with overlapping jurisdictions, in terms of industry and area, to be formed and these could conclude collective agreements to the benefit of their members. As a result, multiple collective agreements could apply to the same enterprise.
[116] Act of 23 December 1946. See Despax, Laborde and Rojot in Blanpain *ed* (2011) 287.
[117] Sturmthal (1950) *ILRR* 238. One of the problems encountered with the 1936 Act was the manner in which "most representative" was to be determined. The Minister appointed an inspector to assist in the determination. Majority membership was, on its own, not sufficient and other factors, such as the age of the organisation and the number of agreements concluded in the past, were taken into account.

In order to stabilise working conditions during the war, a decree in 1940 gave the Minister of Labour the authority to determine wages. This remained unchanged for some time. On 23 December 1946 (the 1946 Act) a new Act came into play, which required the Minister of Labour to approve all collective agreements, and simultaneously extend the agreement. It further prescribed the level at which agreements could be concluded.[118] As a result, collective agreements were increasingly regulated by the state.

Minimum wage determination was left in the hands of the Minister, as it was argued that injudicious wage increases were hampering inflation rates; that wages ought to be carefully determined according to occupation so that workers would be guided into "important channels;" and, lastly, that the state should have economic control over the labour market.[119] As wages were left outside the playing field of collective bargaining, there was little incentive for employers and unions to engage collectively.

Unions placed pressure on the state to provide them with unrestricted scope for collective bargaining. The state was, however, reluctant to let go of their control over the determination of minimum wages. The unions proposed a compromise in terms of which the state would retain its power to set minimum wages, while provision would be made for the increase of wages through collective bargaining. This proposal also received the majority of employers' support.[120]

In 1949 the government made several concessions with respect to the regulation of collective bargaining. The 1949 Act no longer required the Minister to approve an agreement before it was enforceable and, although the setting of minimum wages was still the state's responsibility, collective agreements could contain provisions on wage rates.[121] The Minister, however, retained the discretion to extend collective agreements to non-parties.

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[118] The 1946 Act further provided for the establishment of two new bodies whose roles were to elect representatives in the unions and to examine the possible economic effect of agreements before their approval by the Minister. See Sturmthal (1950) *ILRR* 242.
[119] Sturmthal (1950) *ILRR* 241.
[120] *Ibid* 242.
[121] The 1949 Act provided that, in determining the minimum wage, reference must be made to a typical family budget. See Sturmthal (1950) *ILRR* 241.

Due to the change in structure of wage regulation in France, the government enacted legislation governing the setting of minimum wages. In terms of the legislation government prescribed set minimum wages in order to ensure that employees could provide for their families' basic needs. These wages were referred to as *salaire minimum interprofessionnell garanti* (guaranteed minimum wage) or SMIG.[122]

Although these wages were linked to the basic living cost, they did not keep up with the average increase of real wages being paid. As a result, those subject to SMIG demanded an adjusted wage increase during the political riots of 1968. The SMIG was then increased by 35%, which was far above the average three to four per cent increase of the real wage. In order to ensure that the SMIG remained akin to the real wages, a new Act was introduced on 2 January 1970.[123]

The SMIG was replaced with a new minimum wage system known as the *salaire minimum interprofessionnell de croissance* (minimum wage growth) or SMIC, which is still used today.[124] The SMIC was introduced to ensure that employees already earning the minimum wage would also benefit from the country's economic growth. The SMIC required employers to pay the minimum wage to all employees over the age of 18. Special allowances were made for apprentices and employees between the ages of 16 and 18.[125]

After the election of President François Mitterrand in May 1981, France saw a number of drastic changes to their labour legislation. Within one year, five new labour laws were enacted.[126] These laws were called the *lois Auroux* (Auroux laws) and introduced a shift away from the over-regulation of labour laws by the state to a greater reliance on collective bargaining.[127] The laws focused mainly on the duration

[122] Despax, Laborde and Rojot in Blanpain *ed* (2011) 124.
[123] Bazen and Martin (1991) OECD Report 201.
[124] Despax, Laborde and Rojot in Blanpain *ed* (2011) 124. The new system can be translated to the minimum growth wage.
[125] Bazen and Marin (1991) OECD Report 201.
[126] Glendon (1983) *AJCL* 499. One of the laws enacted was the law of 13 November 1982 on Collective Bargaining and Regulation of Labour Conflict.
[127] Glendon (1983) *AJCL* 500.

of work and made provision for vacations, temporary work, shop rules, representation of employees, collective bargaining and safer working conditions.[128]

Like Australia during the 1980s, France was also pressured by business to introduce more flexible working conditions. As a result the Act of 30 July 1987 introduced regulations pertaining to flexible working time. The French government was, however, cautious not to allow for the complete deregulation of the labour market.[129]

The question of working time was one of the key issues debated under collective bargaining. Between 1998 and 2002 the "Aubry Acts" made provision for a 35-hour workweek, which led to the debate for reduced remuneration.[130] In order to address this issue and to allow for the practical implementation of the new working hours, government left it to the relevant social partners to resolve. In the majority of collective agreements, no allowance was made for reduced remuneration in exchange for the restriction of wage increases for the next one to three years.[131] Three thousand enterprises signed the "Robien agreements," which effectively prevented twenty thousand jobs from being lost.[132]

3.3 Current Legislative Framework

3.3.1 Introduction

The Labour Code regulates all aspects of labour relations, including the setting of the national minimum wage and provisions on collective bargaining. The Labour Code is made up of a collection of acts. In 1973 the Labour Code was divided into three parts, the first comprising acts and the second and third norms handed down by the executive.[133] This Code has not been translated into English and therefore academic writings will be used to set out the legislative framework of the French Labour Code.

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[128] Despax, Laborde and Rojot in Blanpain *ed* (2011) 51.
[129] *Ibid* 52.
[130] Boisard (2004) *Document De Travail* 6.
[131] Despax, Laborde and Rojot in Blanpain *ed* (2011) 53.
[132] These agreements entailed that wage increases be halted for a period of time and were essential for the effective implementation of a reduction in working time. Boisard (2004) *Document De Travail* 7. For further discussion on the "Aubry Acts," refer to the aforementioned report.
[133] Despax, Laborde and Rojot in Blanpain *ed* (2011) 64.

3.3.2 Setting of Minimum Wages

France has a national minimum wage that serves as a protective baseline for all employees. The government determines the national minimum wage, or SMIC, after consultation with relevant bodies and commissions. On the 1st of July of every year, after consultation with the National Collective Bargaining Commission and consideration of the economic circumstances and general economic conditions, the government will establish a new SMIC rate.[134] The SMIC rate also automatically increases if the consumer price index increases by 2%. Apart from these provisions, the government can also increase the SMIC rate at its own discretion.[135]

The SMIC rate is often used as a point of reference in the process of collective bargaining.[136] However, the Labour Code provides that a collective agreement may not contain any provision that stipulates that the wages are linked to the SMIC rate.[137] Despax *et al* point out that despite the explicit prohibition against such practices, it is often ignored.[138]

The French national minimum wage is fairly high compared to other European countries.[139] The current SMIC rate is €1,425.67 per month for an employee who works 35-hours a week.[140] This amounts to R16 118.52 per month at an exchange rate of R11.304 for €1.[141] The SMIC wage level provides the minimum rate at which an employee may be paid. Parties can agree to increase the wage rate either through collective agreement or through an individual contract.

[134] The National Collective Bargaining Commission was formerly known as the Superior Commission of Collective Agreements. The latter body was overhauled and its role enlarged by the Act of 13 November 1982. See Despax, Laborde and Rojot in Blanpain *ed* (2011) 125 and 320.
[135] Bazen and Martin (1991) OECD Report 203.
[136] Hyman and Gumbrell-McCormick (2010) *TERLR* 326.
[137] Despax, Laborde and Rojot in Blanpain *ed* (2011) 125.
[138] *Ibid* 126.
[139] With reference to other European countries, France has the fourth highest minimum wage in Europe, Luxembourg with the highest of €1 801 per month. The United Kingdom is just below France with a monthly minimum wage of €1 138. See European Commission statistics at http://epp.eurostat.ec.europa.eu/statistics_explained/index.php/Minimum_wage_statistics accessed on 12 December 2012.
[140] http://www.service-public.fr/actualites/00812.html accessed on 7 October 2012.
[141] Exchange rate calculated on 13 December 2012 at http://www.x-rates.com/table/.

Caroli *et al* submit that although parties are required to bargain on wages once a year, an agreement is not always reached. Due to the parties' failure to agree on a feasible minimum wage, the SMIC rate is relatively high. In a number of industries the agreed minimum wage is below the SMIC rate and therefore invalid. Employees in such an occupation must be paid the SMIC rate.[142]

Only about 15% of all employees are subject to the national minimum wage. The majority of employees are either subject to an enterprise collective agreement or an individual employment agreement. Most employees' wages are determined by collective bargaining concluded by the industry or enterprise agreement. Collective agreements that may be extended to non-parties must contain wage tables indicating which enterprise and occupation will be covered by the agreement. The French Labour Code also provides for an annual duty to bargain on minimum wages within the industry and sector.[143]

3.3.3 Collective Bargaining

3.3.3.1 Introduction

Minimum employment standards are set by legislation but may be improved upon through collective agreements. Collective bargaining provides an essential part of regulating employment conditions.[144] An employee's wage will always be determined by the "favour principle". In other words, the national minimum wage, the wage set by a collective agreement, and the wage as determined by the individual contract, are considered and the wage that is to the best advantage of the employee must be applied.[145]

[142] Caroli, Gautié and Askenazy in Caroli and Gautié *eds* (2008) 46. It is submitted that the reason the agreed minimum wages are below the national wage rate is because of the infrequency at which these agreements are reviewed.
[143] S L. 2251-1 of the Labour Code. See Despax, Laborde and Rojot in Blanpain *ed* (2011) 125 and 289.
[144] Despax, Laborde and Rojot in Blanpain *ed* (2011) 284. Collective agreements may also be concluded at regional and establishment level.
[145] Gaudu in Bermann and Picard *eds* (2008) 404.

Wage bargaining in France occurs at two levels: first at a multi-employer level, and secondly, in certain instances, it is improved upon at enterprise level. The Labour Code also allows government to extend collective agreements. Despite low union membership, collective bargaining in France covers 90% of the workforce.[146] Enterprise agreements, however, do not reach the same percentile.[147] Despax *et al* note that the cause of the fairly poor utilisation of enterprise agreements may be contributed to the narrow scope of these agreements, which is limited to wage negotiations, profit sharing and working time.[148]

3.3.3.2 Trade Unions and Employers' Organisations

Section L. 2231-1 of the Labour Code regulates employment representation. It provides that one or more employers' organisation, or any other grouping of employers, or even one or more employers acting individually, may conclude a collective agreement. Thus, employers do not have to act collectively in order to be party to a collective agreement. The same advantage is not awarded to employees. Only unions, elected by employees, are entitled to engage in collective bargaining at industry level. The section further provides that an agreement may only be concluded with a representative trade union. Employers are also not allowed to negotiate with work councils.[149]

Since the decree of 3 March 1966, France recognised five trade union confederations at national level: the *Confédération Gelnerale du Travail* (General Confederation of Labour - CGT), the *Confédération française des travailleurs chrétiens* (French Confederation of Christian Workers - CFTC), the *Confédération*

[146] Conolly (2012) *Capital and Class* 119.
[147] Despax, Laborde and Rojot in Blanpain *ed* (2011) 285. During 1999 and 2001, France saw a sharp increase in enterprise agreements. This phenomenon was due to the wage incentive granted by government for employers who concluded an enterprise agreement which allowed for working time below 35 hours a week.
[148] *Ibid* 285. Despax *et al* note that the cause of the fairly poor utilisation of enterprise agreements may be contributed to the narrow scope of these agreements, which is limited to wage negotiations, profit sharing and working time.
[149] Gaudu in Bermann and Picard *eds* (2008) 409. S L. 2323-7 of the Labour Code provides for the establishment and function of works councils. Works councils are mandatory in any enterprise with fifty or more employees. Smaller enterprises may, however, elect to create a works council. Works councils do not have the ability to determine minimum wage or to conclude collective agreements. Their function is more to ensure the social benefit of employees at the enterprise.

française démocratique du travail (French Democratic Confederation of Labour – CFDT), the *Force Ouvrière* (Workers Force – FO) and *Confédération française de l'encadrement - Confédération générale des cadres* (French Confederation of Management - General Confederation of Executives – CFE-CGC).

These unions are presumed to have national repetitive status, which allows them to represent employees in all sectors and industries.[150] A union confederation could appoint a representative at any workplace with more than fifty employees.[151] In 2006 the monopoly created by the five confederation trade unions came under pressure. Talks were initiated to discuss possible reformation of the "presumed representativeness" principle and to strengthen the bargaining power of industry.[152] The suggestion made by the unions was that the employees, through a workplace election, determine representivity.

An enterprise with eleven employees or more must hold an employees' delegation election, which takes place on the same day as the work council election. The function of the employee delegates is to present the employer with individual or collective demands. The number of employee representatives is determined by the workforce of the enterprise.[153]

The Act of 20 August 2008 prescribed new representativeness criteria, which included consideration of the workplace elections.[154] The criteria for determining representativeness of a trade union are set out in section L. 2121-1 of the Labour Codes and include:

- membership numbers and fees;
- financial transparency;

[150] Boulin (2008) *TERLR* 482. Boulin notes that these five confederation unions created a monopoly in that, despite not always having the majority votes, they would succeed in the conclusion of an agreement as well as the extension thereof to disagreeing non-parties. Boulin (2008) *TERLR* 483.
[151] Bryson, Forth and Laroche (2011) *EJIR* 173.
[152] "Presumed representativeness" entailed that the trade unions did not need to prove their membership representivity for an industry in order to engage in collective bargaining on behalf of the employees in the industry. These confederation unions were presumed to be sufficiently representative. See Boulin (2008) *TERLR* 482. See Despax, Laborde and Rojot in Blanpain *ed* (2011) 242.
[153] S L. 2312-1 of the Labour Code.
[154] Boulin (2008) *TERLR* 484. S L. 2122-1, 2122-5, 2122-6 and 2122-9 of the Labour Code.

- independence;
- regard to republican values;
- influence;
- minimum two years' experience; and
- established in terms of workplace votes.

According to section L. 2122-1 of the Labour Code, in order to be representative at an enterprise level, a union must have 10% of the votes at the election of employee representatives.[155] For representivity at a national and inter-trade union level, the union must have obtained 8% of the employee votes.[156] Representivity is not determined by employee votes alone, but it does act as a prerequisite for the conclusion of collective agreements at the various bargaining levels.

The largest inter-professional employers' organisation in France is *Mouvement des enterprises de France* (Movement of Enterprises in France - MEDEF). MEDEF finds its roots in the 1919 National Confederation of Workers. As MEDEF is a confederation of organisations, employers and enterprises do not become members of MEDEF directly but rather through an intermediary.[157]

In France, the small- and medium-sized enterprises have established their own employers' organisations known as *Confédération Générale des Petites et Moyennes Entreprises* (General Confederation of Small and Medium Enterprises – CGPME).[158] This organisation was established in order to address the shortcomings in employers' organisations for the needs of small and medium sized firms.[159] However, it is important to note that not all small- and medium-sized firms belonged

[155] Despax, Laborde and Rojot in Blanpain *ed* (2011) 243. A union may have regional or plant level representivity, but not national representivity. In such an instance the union may only engage in collective bargaining in the arena for which it has the required representivity.
[156] S L. 2122-9 of the Labour Code.
[157] Despax, Laborde and Rojot in Blanpain *ed* (2011) 250.
[158] Woll (2006) *WEP* 495. Other employers' associations for small and medium sized enterprises were also established and include *Union Professionnelle Artisanale* (Professional Craft Union – UPA) and *Union Nationale des Professions Libérales* (Union of Liberal Professions – UNAPL). CGPME, however, is the largest under this classifcation.
[159] Woll (2006) *WEP* 496.

exclusively to these three organisations; for example, MEDEF clientele includes 70% small and medium firms.[160]

3.3.3.3 Industry-level Bargaining

The minimum wage set by industry-level collective agreements covers all the enterprises within the sector, whether small, medium or large. Wages set through industry agreement are usually set at lower rates, which may then be improved upon by the employer. Larger firms may set real wages through enterprise level collective agreements. In most instances, however, the real wage is determined by individual agreements.[161]

Industry-level collective bargaining is the preferred means of engaging in negotiations with employers.[162] Collective agreements may cover a wide scope of employment conditions: their only limitation is that they may not be less favourable than the national minimum conditions set by government.[163] Industry-level wage bargaining covers the entire industry, including employees that were not represented by a union who were party to the agreement.[164]

Once a collective agreement is concluded, all existing individual contracts of employment become subject to the provisions of the agreement, except if the individual contractual terms are more favourable to the employee.[165] Thus, if the existing employment contract is more favourable to the employee, it will remain unchanged.[166] The favour principle is also applied in relation to industry and enterprise level agreements; if the agreement concluded at enterprise level is more

[160] Woll (2006) *WEP* 496.
[161] Gaudu in Barmann and Picard *eds* (2008) 404.
[162] *Ibid* 399.
[163] Despax, Laborde and Rojot in Blanpain *ed* (2011) 293. The Labour Code distinguishes between "collective agreements" and "collective conventions". Collective conventions cover the entire spectrum of employment conditions determined collectively, whilst collective agreements focuses on one specific topic. However, for all intents and purposes they are the same, and thus will be referred to as "collective agreements". See s L.2221-2 of the Labour Code.
[164] Gaudu in Bermann and Picard *eds* (2008) 399.
[165] S L. 2254-1 of the Labour Code.
[166] Despax, Laborde and Rojot in Blanpain *ed* (2011) 291.

favourable to the employee, it will have preference over the industry-level agreement.[167]

Any representative union or employer group may consent to be subject to the collective agreement after its conclusion. Thus, if they were not party to the negotiation process, they may still voluntarily subject themselves to its provisions. The only restriction is that the union or employer must fall within the same scope as the collective agreement.[168]

Collective agreements may regulate any conditions of employment – there are no limitations or requirements.[169] However, if parties want to extend the agreement to non-parties, certain required conditions must be included. Only one collective agreement may be enforced at an enterprise at a time, meaning that the same employer cannot be subject to the conditions of two or more collective agreements. The employers' organisation that who has signed the agreement will determine the applicable agreement.[170]

The *Auroux* Law, Act of 13 November 1982, introduced a duty to bargain at industry and enterprise levels. This duty does not entail a duty to reach an agreement, or even to bargain in good faith, but merely a duty to meet and to make proposals. There is also no sanction in place should a party refuse.[171] This duty is required of all unions and employers' associations linked to an industry. The duty requires parties to engage annually in minimum wage collective bargaining. The Labour Code further sets out other conditions that must be bargained on every three or five years.[172]

Although the French Constitution provides for the right to strike, it is not often utilised. This right is only available to employees; lock-outs by employers are

[167] Boni (2009) *ILR* 84.
[168] Despax, Laborde and Rojot in Blanpain *ed* (2011) 295. S L. 2261-3 of the Labour Code.
[169] S L.2221-1 of the Labour Code.
[170] Despax, Laborde and Rojot in Blanpain *ed* (2011) 304.
[171] S L. 2241-1 of the Labour Code. Gaudu in Bermann and Picard *eds* (2008) 411.
[172] S L. 2241-3 to s L.2241-8 of the Labour Code. The conditions covered by these sections include: the duty to examine job classifications once every three years; the duty to bargain once ever three years on the scope and means of training; to bargain once every three years on the equality between men and women; to bargaining once every three years on the management of jobs and skills and the employment of an old age employee; to bargain once every three years on the employment of people with disabilities; and to bargain every five years on employee saving schemes.

regarded as breach of contract and consequently unlawful. As this right is provided to an individual employee, the exercising of this right is not subject to union approval. Therefore a minority strike is legal. The French right to strike is so broad that employees may engage in strike even if a collective agreement has been concluded on the issue being raised during industrial action.[173]

An industry-wide agreement can be national, regional or local. Regional or local agreements are problematic to those enterprises with more than one establishment, as a collective agreement will only be applicable to the establishment inside the determined scope. An enterprise may thus have to apply different conditions for different establishments in accordance with the agreement that is applicable to it.[174]

Section L. 2231-3 of the Labour Code provides that a collective agreement must be reduced to writing. The Labour Code further requires that the agreement be lodged, both electronically and in hard copy, to the Minister of Labour. The agreement will only be in force on the day that such copies are lodged. The Labour Code further requires that these agreements must be brought to the attention of the employees so affected.

3.3.3.4 Enterprise Agreements

It is the method of extension of a collective agreement that has created France's peculiar circumstance of low union membership but very high collective agreement coverage. Despite the strong support for industry-level bargaining, and the duty to bargaining at industry level, Boni[175] argues that there is a significant shift to decentralised bargaining in France. He notes that the labour laws play a proactive role in the progressive decentralisation of the labour market and that unions have accepted this shift.[176]

[173] Gaudu in Bermann and Picard *eds* (2008) 410. See Conolly (2012) *Capital and Class* 120 in which reference is made to the 1995 and to the 2004 strike actions, and to the strike against government in response to reformation of pensions.
[174] Despax, Laborde and Rojot in Blanpain *ed* (2011) 310.
[175] Boni (2009) *ILR* 69.
[176] *Ibid* 78.

Section L. 2232-11 of the Labour Code provides employees with the right to engage in collective bargaining at enterprise level. Bargaining can take place at enterprise level, a group of establishments that belong to the same enterprise, a single establishment or at a combination of these levels. Bargaining takes place between the head of the enterprise and union delegates.[177]

As in industry-level collective agreements, the parties to an enterprise agreement can determine which conditions will be covered by the agreement. The Labour Code provides a particular standing to enterprise agreements in that the agreement may digress from a branch or sector agreement even if it is not to the favour of the employee. However, this ability is limited by law in that the digression in the enterprise agreements may not diverge from the minimum wage provided for at sector level.[178]

As with industry-level agreements, parties have a duty to bargain annually on wages at enterprise level. This duty applies to all enterprises, regardless of their size, provided that one or more union section exists and one or more delegate has been appointed. There is no duty to reach an agreement, but parties must convene to negotiate on wages.[179]

3.3.3.5 Extension of Collective Agreements

The Minister of Labour is provided with the power to extend or enlarge a collective agreement. If an agreement is extended, the conditions set in the agreement are then enforceable on all employees and employers within the industry, including those who were not party to the collective agreement. If the agreement is enlarged, the scope or area of the agreement is enlarged.[180]

In order for the agreement to be extended, certain conditions must be met. Bargaining and the conclusion of the collective agreement must take place through a commission. The commission comprises an equal number of trade union and

[177] S L. 2232-17 of the Labour Code.
[178] S L. 2253-3 of the Labour Code. Despax, Laborde and Rojot in Blanpain *ed* (2011) 313.
[179] S L. 2242-8 of the Labour Code.
[180] Despax, Laborde and Rojot in Blanpain *ed* (2011) 316.

employers' association representatives, and representatives from the Minister of Labour chair the commission.[181] The Minister of Labour may initiate the commission on his own or by request from one of representatives. In order to ensure that parties are equally represented, the Minister can convene a designated representative to sit in the commission.[182] There is no obligation to reach an agreement, but merely to meet and to negotiate. The Minister may only summon representative trade unions and employers' organisations.[183]

The occupational scope of the agreement is determined by law and is therefore not open for the parties to decide. The conditions covered by the agreement are also prescribed. Section L. 2261-22 and 2261-23 of the Labour Code provides certain provisions that must be negotiated on.[184] However, the Minister still has discretion to extend the agreement if all the conditions are not met.

Once the agreement has been finalised, the Minister may extend or enlarge the agreement. However, even if all the requirements are met, the Minister retains his discretion to extend or enlarge the agreement. If the Minister is satisfied with the agreement, he may verify that the agreement meets the required standards and that it has been concluded in the prescribed manner. The agreement is also reviewed in light of its conformity to labour laws.

The Minister further engages in consultation with the National Collective Bargaining Commission.[185] The Commission – whose functions include consulting with government in the setting of the national minimum wage or SMIC – provides the Minister with advice on the extension of the agreement.[186] The Minister may also withdraw the extension of the agreement.[187]

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[181] S L.2261-19 of the Labour Code.
[182] S L. 2261-20 of the Labour Code.
[183] Despax, Laborde and Rojot in Blanpain *ed* (2011) 317.
[184] There is a wide range of prescribed conditions that must be covered, which includes, but is not limited to: the exercise of union rights; the elements used in the grading and occupational characterisation; conditions relating to wages; and paid vacation and conditions relating to hiring and dismissals. S L. 2261-3 of the Labour Code further provides non-mandatory conditions that include conditions relating to overtime, bonuses and conditions for piece work.
[185] Despax, Laborde and Rojot in Blanpain *ed* (2011) 320.
[186] *Ibid* 321.
[187] *Ibid* 323.

Despax *et al* raise concerns as to the sustainability of the extension and enlargement of collective agreements. The authors note that the Minister's role in the extension process has been largely criticised by liberals and, as a result, the collective bargaining structure in France may become more decentralised.[188]

4. CONCLUSION

Over the last century, Australia has experienced drastic swings in its labour law frameworks. In 1996 Australia succumbed to the pressure exerted by neoliberals for more flexible labour laws, which consequently produced the Work Choices legislation. However, the lack of protection for the working class did not go unnoticed and the Australian Labour Party's "Your Rights at Work" campaign addressed the needs of the people.

The FW Act was enacted in order to give effect to the promise by the Australian Labour Party to re-empower the working class. However, some flexibility was retained, as is evident by the focus on enterprise-level collective bargaining and the substitution of Australian Workplace Agreements with individual flexible agreements.

Australia's three-tier minimum wage fixing system ensures the protection of all workers as well as providing for wage differentials according to area and industry. The national minimum wage acts as a "catch all" whilst modern awards and enterprise agreements provide for increased minimum wages in accordance with the industry standards.

The FWC plays an active role in wage regulation, overseeing all wage regulations. The FWC also acts as an umpire in ensuring all parties engage in good faith bargaining. Although Australian minimum wage setting provides for self-regulation, the state keeps a close watch on collective bargaining through the FWC.

[188] Despax, Laborde and Rojot in Blanpain *ed* (2011) 316.

The Australian labour legislation provides employers with a fair amount of flexibility when it comes to collective bargaining. However, there are three instances where an employer can be compelled to engage in collective bargaining. It is submitted that, in a flexible self-regulatory system, providing for a duty to bargain brings balance into the system.

What is often observed of enterprise bargaining is that the resulting employment conditions are not as favourable as those resulting from centralised bargaining. This can partly be attributed to the inability of smaller employee groupings to engage in effective negotiations. Incorporating a duty to bargain when the majority of employees at a workplace elect to do so provides a tool for smaller employee groupings to assert their demands with.

Unlike Australia, France's labour legislation always favoured greater protection for employees over increased flexibility for employers. Although France has a national minimum wage, centralised bargaining plays a key role in the improvement thereof. Despite extremely low trade union membership, collective agreements cover 90% of the workforce. This is possible due to the manner in which collective agreements are extended.

Representivity is not a requirement for extension of collective agreements in France. Instead, the Minister oversees the conclusion of collective agreements. For an agreement to be extended it must take place under the supervision of a committee consisting of trade union and employer representatives and a commission chair appointed by the Minister. Even if all the conditions are met, the Minister still has discretion in extending the agreement.

In order to make a final decision to extend, the Minister may call on the National Collective Bargaining Commission to advise him or her on the agreement.

France also provides for a duty to bargain, although in a liberal form. The French Labour Code requires parties to meet annually in the determination of certain employment conditions, including minimum wages, but does not require parties to

reach an agreement. This approach to collective bargaining is aimed at incentivising parties to discuss employment conditions in hopes of reaching peaceful consensus.

It is submitted that the setting of a national minimum wage is an important aspect that is overlooked by South African labour law. Both Australia and France rely on an independent body to assist and set the national minimum wage. In both these instances the national minimum wage operates as a safety net for employees who may not be subject to an alternative agreement.

Furthermore, both Australia and France provide for independent oversight in the setting of minimum wages and employment conditions through collective bargaining. Collective bodies are still able to self-regulate, but within certain confines.

In Australia and, to a lesser degree, France wage fixing through enterprise bargaining is well established. It is submitted that the incorporation of a duty to bargain plays a role in this by enforcing employers to negotiate with their employees, thereby also decreasing instances of labour unrest.

Although the Australian labour system is further removed from the South African approach than the French system, certain lessons can be learned from both. A complete adoption of either is not advisable, as the political and labour histories of these countries are vastly different from South Africa's. The divergence of the labour law system is thus evident.

CHAPTER EIGHT

CONCLUSION AND RECOMMENDATIONS

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1. CONCLUSION

The purpose of this dissertation is to examine centralised bargaining as a minimum wage fixing mechanism in South Africa. The core question to this thesis is whether the current formation of centralised bargaining in South Africa is a fitting means of setting minimum wages, or whether possible alternatives should be considered.

In addressing this topic, the purpose of South African labour law is considered and its maturation from industrial relations to an alone-standing discipline of law. Collective labour laws evolved naturally from the development of industrialism. The separation of a worker from ownership of his or her own produce accelerated the formation of trade combinations. Negotiations on wages formed a large part of the original purpose for establishing trade unions.

Furthermore, collective labour serves the ideal in allowing for self-regulation. The principle of collective *laissez-faire* introduced by Kahn-Freund is based on the notion that an industry itself can best determine the conditions that should be applied to it. It brings the determination of minimum-employment conditions closer to home. However, the principles cannot function on their own and therefore it became important for the legislature to step in and provide a regulatory framework for centralised bargaining.

Since the introduction of labour laws, the debate arose as to the economic impact such statutory regulation. Economists caution concerning the negative impact that

labour laws can have on a country's economy, employment levels an global competitiveness, preferring the principles of freedom of contract to prevail.

On the opposite end of the spectrum is the social perspective of labour law.

"Labour is not a commodity" is a phrase often cited in support of a social perspective on labour law. The social perspective highlights the importance of human dignity and the rights of every worker to decent work. Due to the inherent human aspect of labour, a purely economic perspective cannot be preferred, as it fails to consider the role employment plays in the life of a worker.

However, it is submitted that these two perspectives need not be mutually exclusive, as both bear important merits. Labour is inherently linked to both economics and to human dignity, and for this reason a balance between the two perspectives must be sought. If an instance should arise where a compromise must be made, the social perspective should prevail.

The regulation for the setting of minimum wages has a strong social-philosophical background, as its initial aim was to prevent the exploitation of workers. In later years statutory minimum wage fixing was utilised for the distribution of wealth and alleviation of poverty and it is currently applied in the majority of countries globally. The setting of a minimum wage falls within the category of protective legislation, where the state, or a statutorily recognised body, steps in to regulate disproportionate contractual relationships. This purpose plays an important role in the South African context.

South Africa's labour legislation was greatly influenced by the need to address the inequalities of the past. During apartheid, labour laws formed part of the body of legislation enacted to further racial segregation. The link between labour and politics was, and still is, inseparable. African trade unions, such as the Congress of South African Trade Unions (COSATU), played a significant part in the freedom struggle and consequently in the drafting of new labour legislation.

During the drafting of the Labour Relations Act 66 of 1995 (LRA), one of the foremost issues was collective bargaining and the extension of collective agreements to non-parties. During this time a number of interested parties raised concern as to the economic implications of the extension of collective agreements, especially on small- to medium-sized enterprises.

The Presidential Commission, in particular, raised concerns that the extension of collective agreements may create inflexibility in the labour market, which is vital in a global economy. The Commission highlighted the importance ofhat minimum wages set by bargaining councils that should be "realistic minima for less profitable enterprises", and that such wages could then be improved upon by larger, more profitable firms, through enterprise bargaining. However, it seems that these concerns had little influence on the practical application of extensions.

In South Africa, collective bargaining can take place at enterprise level or at industry level, through bargaining councils. Centralised bargaining plays an important role in collective labour negotiations and the extension of collective agreements to non-parties is vital to its continued viability. Centralised bargaining not only provides for the setting of industry specific minimum wages, but aids in maintaining industrial peace.

Although the extension of collective agreements to non-parties is essential to the survival of centralised bargaining, the current legislative provisions need to be revisited. In terms of the LRA, if a bargaining council can satisfy the Minister of Labour that the council represents the majority of employees within the industry, the Minister *must* grant the extension. Thus, the Minister does not have the ability to oversee the agreement but merely serves a mere administrative function.

There is therefore no impartial body or person to ensure that the conditions set by a bargaining council are reasonable and fair. Firms unable to afford the minimum wages set, can then approach the bargaining council for full or partial exemption. The verdict is still out as to the effectiveness of the exemption applications, as there have been conflicting reports. It is submitted that further, more in-depth research

needs to be done in order to determine the possible shortcomings of the exemption applications.

Nevertheless, exemptions should not be regarded as the resolution for an inflexible collective agreement. Bargaining councils must rather take greater care to ensure that the wages set in collective agreements take into account the needs of the employee – as well as the ability of employers to pay – and not merely seek a fast resolve.

In making recommendations to the Minister for the setting of minimum wages through sectoral determinations, the Employment Conditions Commission (ECC) must take certain factors into account. These factors include the alleviation of poverty, the average living cost and wage inequality amongst others. However, it also requires the ECC to consider the ability of an employer to carry on a *successful* business as well as the operations of small- and medium-sized enterprises. These considerations are as important for the setting of a sectoral determination as it is for a bargaining-council collective agreement. However, legislation does not set any prescriptive considerations in the setting of the latter.

Currently, the position of centralised bargaining globally is under threat due to the increased pressure for flexibility. Brown states it best in arguing that, in a global economy, with an increased access to an array of goods and services, wages cannot be taken out of the competition. South African labour economics cannot function in isolation of the global economy and must remain competitive, not only to attract foreign business but also to ensure that the price of products manufactured locally remain market-related.

South Africa's high unemployment rate can also not be removed from the equation. Although the link between the setting of minimum wages and unemployment is often criticised for lack of empirical evidence, it is not an unwarranted concern. South Africa cannot afford any impediment on job growth and thus any policy or practice that may serve as an obstacle must, as far as possible, be scrutinised and, if necessary, eradicated. This does not imply that the setting of minimum wages in

general must be avoided; but rather that the setting and enforcing of unrealistic wages must be addressed.

In Australia, the Fair Work Commission (FWC) acts as an unbiased umpire, overseeing the setting of minimum wages at all levels. Australia has three minimum wage levels: firstly the national minimum wage that acts as a safety net for all employees; secondly modern awards that set industry specific minimum wages; and finally, minimum wages set through enterprise agreements. All three these levels of minimum wage fixing serve a different function. The national minimum ensures that all workers are protected against exploitation, whilst the modern awards and enterprise agreements allow for industry specific wage increases.

In assuring that parties engage in enterprise bargaining, the Australian labour legislation provides for a soft form of compulsory collective bargaining at enterprise level. If the majority of employees at a workplace wanted to engage in collective bargaining then the employer would be required to bargaining with them in good faith. This provision does not require the parties to conclude an agreement, but rather to enter into good faith negotiations.

Whereas the Australian minimum wages system relies heavily on decentralised bargaining, the French system is mainly centralised. France also has a national minimum wage; however, the majority of the workforce is subject to collective agreements. Despite low trade union membership in France, collective agreements cover over 90% of all workers. This is due to the requirements posed for the extension of collective agreements.

In order for a collective agreement to be extended to non-parties, the Minister must oversee the conclusion of the agreement. Employee-representivity is not a requirement for the extension of a collective agreement. A commissioner, appointed by the Minister, must chair the negotiations and conclusion of the collective agreement and only then can the Minister extend the agreement to non-parties. Even if all the conditions are met, the Minister may still decide not to extend the agreement.

South Africa's labour policies have made great strides towards equality, fairness and the protection of employees from exploitation under an imbalance of power. The provisions in law that make allowance for the setting of minimum wages contribute to this purpose and are vital to ensure healthy labour relations. It is submitted that the current formulation of centralised bargaining, which provides for the setting of minimum wages, could be improved upon by making specific amendments to increase its effectiveness.

2. RECOMMENDATIONS

The first question posed in this dissertation is whether the current formulation of centralised bargaining in South Africa is an appropriate means for setting minimum wages. From an employee-perspective centralised bargaining offers optimal protection: it is undisputed that trade unions are best able to organise and bargain collectively on an industry level. However, the accusation of inflexibility inherent in centralised bargaining also bears merit. Centralised bargaining, by its nature, enforces the same employment conditions on all employers within a sector. This is especially true when minimum wages are set on a real wage level rather than a true minimum.

It is generally accepted that larger firms are able to pay higher wages than smaller firms, due to their higher profit margins. It is thus submitted that setting the same minimum wages across the board fails to take into account the economic differences between small and large firms. If bargaining councils set only real minimum wages at industry level, industry employees could be protected without pricing smaller firms out of the market. Larger firms, who can afford to pay higher wages, could then improve upon the minimum wage by enterprise bargaining.

The exemption procedure has become the main solution to the inflexibility of centralised bargaining. A party who cannot afford to pay the set minimum wage must approach the bargaining council and request partial or complete exemption from the collective agreement. There has been some difference of opinion over the effectiveness of this process. Either way, it is submitted that exemption should not

serve as the solution to the failure of the bargaining council to set real minimum wages. Minimum wages set by collective agreements should provide the *lowest* wage payable in order to prevent the exploitation of workers.

In order to regulate bargaining councils in the setting of minimum wages, the extension provisions may need to be amended. It is recommended that the provision on extension of collective agreements should allow the Minister a discretion when granting extensions. This would encourage parties to ensure that wage levels that are not too high. In order to ensure that a fair determination is made, the Minister can be required to consult with the ECC in making a recommendation as to the wages set by the bargaining council.

The French approach to extension provides a good example of the conditional extension of collective agreements; oversight by the Minister, as well as an impartial chairperson which, prevents negotiations from being overpowered by larger, established firms. Ministerial discretion would also ensure that wages set are not based on real wages paid by larger firms, but rather on true minima wages that protect workers against exploitation and ensure acceptable basic living conditions.

A further benefit of the French model of extension is the removal of the majority representivity requirement. In providing the Minister with the discretion to extend, irrespective of the council's representation, centralised bargaining can be supported even if trade union membership numbers decline. It must be emphasised, however, that in the French model the bargaining council must still be recognised and regarded as a representative of the relevant industry.

The second question posed in this dissertation is whether South Africa should consider increasing its promotion of decentralised bargaining. If wages set by bargaining councils served as real minimum wages, enterprise bargaining would serve an even more important function. Currently, however, there is little or no incentive for firms to engage in enterprise bargaining, other than the threat of industrial action.

This issue was addressed in Australia by placing a duty on employers to engage in good faith bargaining, when requested by the majority of employees at the workplace. South Africa has moved away from the duty to bargain, preferring a voluntary approach instead. Introducing a duty to bargain therefore does not seem viable. Instead, the Code of Good Practice could provide guidelines for effective enterprise bargaining, which would inform employees and employers of the benefits of enterprise bargaining and provide for better workplace relations.

Alternatively, or additionally, bargaining councils could include provisions in their collective agreements which place a duty on larger firms to engage in collective bargaining with their employees or representative trade unions. If wages set in a collective agreement reflect real minimums, a duty can be placed on larger firms to further negotiate with their own employees over possible higher wage increases.

The third and final question posed in this dissertation is whether there is a need for the introduction of a national minimum wage in South Africa. If the purpose of minimum wage fixing is to prevent exploitation and alleviate poverty, South Africa cannot afford *not* to have a national minimum wage. It is submitted that the initial debate on the introduction of a national minimum wage was too hastily dismissed.

The advantage of a national minimum wage is that all workers, irrespective of sector or geographical location, are protected to a certain degree from exploitation. Currently, just under 40% of the South African labour force is not covered by any form of minimum wage regulation.

A national minimum wage would not do away with the need for sectoral determinations, but would merely act as a safety net for all workers – as is the case with Australia's national minimum wage and modern award system. A three-tier system would ensure better protection for all workers, while still allowing for sectoral deviations.

In setting a national minimum wage, however, it is vital that wages are not set too high, as this could result in employers being priced out of the global low-cost

manufacturing industry. The ECC can play an important part in setting and reviewing such a national minimum wage.

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