An appraisal of the extension of bargaining council agreements to minority stakeholders in South Africa

by

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AN APPRAISAL OF THE EXTENSION OF BARGAINING COUNCIL AGREEMENTS TO MINORITY STAKEHOLDERS IN SOUTH AFRICA

Summary

The purpose of this dissertation is to assess whether the South African model of extending majority-support bargaining council agreements is constitutional and whether it passes scrutiny when compared to the norms of the International Labour Organisation ("the ILO") and to comparative models. In conducting the study, a social justice perspective is followed as both the Constitution of the Republic of South Africa, 1996 and the Labour Relations Act 66 of 1995 direct those who apply the law to do so in a manner that will promote and achieve social justice.

This study uses the relevant ILO conventions, recommendations and norms to assess whether the extension of majority-support collective agreements is supported on an international law basis. The ILO conventions, recommendations and norms provide the background to assess whether the South African model of extending collective agreements complies with international law obligations.

The historical development of the extension of bargaining council agreements since the Industrial Conciliation Act 11 of 1924 is considered with a view to establish the original rationale of this mechanism and whether such rationale is still relevant today. A historical perspective of the extension mechanism further provides a valuable insight into the formulation of the current extension mechanism.

In assessing the extension of bargaining council agreements the different types of extension mechanisms are considered, as the extension mechanism itself (and the procedural prerequisites thereof) is informed by the question whether or not a majority numerical requirement had been met. Relevant case law is also considered to determine the South African courts' stance on the majoritarian principle and the extension mechanism.

In the international comparison, the models for establishing uniform conditions of employment are assessed with reference to Namibia, Australia and the Netherlands. These models provide interesting alternatives to and considerations for the South African system.

The South African labour law system is premised on the principles of voluntarism and majoritarianism. The study assesses whether the application of the majoritarian principle in the extension of bargaining council agreements should exclude minority non-party interests and participation. The conclusion and recommendations deal with the question whether the extension mechanism remains valid and necessary, and whether there are any aspects in respect of which the extension mechanism may be varied to ensure greater compliance with international norms and South Africa's international law obligations.

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List of Abbreviations

AMCU	Association of Mineworkers Union
AU	African Union
BCEA	Basic Conditions of Employment Act 75 of 1997
BLRA of 1953	Black Labour Relations Act 48 of 1953
BLRRA of 1973	Black Labour Relations Regulation Act of 1973
CC	Constitutional Court
CCMA	Commission for Conciliation, Mediation and Arbitration
CFA	Committee for Freedom of Association of the ILO
COSATU	Congress of South African Trade Unions
DCS	Department of Correctional Services
ECC	Employment Conditions Commission
ECOSOC	Economic and Social Council of the United Nations
FFCC	Fact-Finding and Conciliation Commission on Freedom of Association
FMF	Free Market Foundation
FWA	Fair Work Act 28 of 2009
FWC	Fair Work Commission
GG	Government Gazette
GN	Government Notice
ICA of 1924	Industrial Conciliation Act 11 of 1924
ICA of 1956	Industrial Conciliation Act 28 of 1956
ILJ	Industrial Law Journal
ILO	International Labour Organisation
ILR	International Labour Review
LAC	Labour Appeal Court
LC	Labour Court
LRA	Labour Relations Act
LRAB of 2017	Labour Relations Amendment Bill of 2017

NES	National Employment Standards
NP	National Party
NUM	National Union of Mineworkers
NUMSA	National Union of Mineworkers of South Africa
PAJA	Promotion of Administrative Justice Act 3 of 2000
POPCRU	Police and Prisons Civil Rights Union
SACOSWU	South African Correctional Services Workers Union

Note to the Reader

The research done in this dissertation reflects the position as at 31 August 2018. At the time of writing section 32 of the Labour Relations Act 66 of 1995 was due to be amended in certain aspects by the Labour Relations Amendment Bill of 2017.

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Chapter One: Introduction

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1. Introduction

South Africa is a country of many languages, cultures and ethnic groups – a country of plurality. South Africa also has a history of apartheid and minority rule.[1] Due to the extent, duration and inequalities inherent to minority rule, particularly the statutory inequalities between minority white and majority black employees, the principle of majority rule enjoys preference in South African labour relations today.[2]

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1 See Ch 3 in general.
2 See, in general, Godfrey *et al* (2015) 40–79; Van Niekerk and Smit (2017) 12; and Bendix (2015) 44–78.

South Africa's modern collective labour laws are premised on twin pillars, namely, the principles of majoritarianism and voluntarism. Voluntarism can be described as a model in terms of which the parties (employers, employers' organisations, employees and trade unions) may elect whether to participate in collective bargaining.[3] Voluntarism implies that there is little, or no, interference by the government in the collective bargaining process between the participating parties.[4] The principle of voluntarism is a departure from the previous labour relations dispensation in terms of which a duty to bargain was imposed by the former Industrial Court.[5]

The Labour Relations Act[6] ("the LRA") is the enabling legislation enacted in terms of the South African Constitution, 1996, which establishes the right of every trade union, employers' organisation and employer to engage in collective bargaining.[7] Through collective bargaining, employees may best match the power of their employer by acting collectively and, in doing so, improve their bargaining position.

Section 1(a) of the LRA describes the purpose of the Act as giving effect to the fundamental rights contained in the Constitution. The LRA furthermore establishes the institutional framework in which parties may engage in and promote orderly collective bargaining.[8] The importance of the right to participate in collective bargaining has been confirmed by the Constitutional Court in *SANDF v Minister of Defence and Others*[9] where it was stated that collective bargaining in effect prevents a recurrence of the past. The court held that:[10]

> "It is clear that at the minimum section 23(5) confers a right on trade unions, employers' organisations and employers to engage in collective bargaining that may not be abolished by legislature, unless it can be shown that such abolition

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3 Collective bargaining is a reciprocal process in terms of which labour and management establish the relationship between them by making use of pressure and counter pressure (the threat of strikes and/or lock-outs). In the process of collective bargaining, parties acknowledge their commonalities, interdependency and conflict of interests and agree to establish procedures to regulate the relationship. Bendix (2015) 187–189.

4 Bendix (2015) 38.

5 Explanatory Memorandum to the Draft Labour Relations Bill, Ministerial Task Team, January (1995) 16 *ILJ* 278.

6 66 of 1995.

7 S 23(5) of the Constitution, 1996.

8 S 1(c) and 1(d)(i) of the LRA.

9 (2007) 28 *ILJ* 1909 (CC).

10 *SANDF* para 50.

> passes the test for justification established in section 36 of the Constitution. In recognising this, we should remember that in the past, black workers and trade unions that represented them were prohibited from engaging in collective bargaining. Preventing a recurrence of this historical injustice is one of the purposes of section 23(5)."

The ultimate result to be achieved from engaging in collective bargaining is the conclusion of collective agreements.[11] As noted by Snyman, the objective in a process of collective bargaining is to conclude a collective agreement. Once the agreement has been concluded it will enjoy special status and priority (above other agreements and labour laws).[12] Collective agreements may be concluded at workplace or plant level,[13] or at a bargaining council.[14] Once concluded, a collective agreement binds all the parties as well as their respective members and employees who are either identified in the collective agreement or expressly bound thereby.[15] One of the main purposes of concluding a collective agreement is to regulate substantive employment conditions to establish uniformity with the conditions so established, most often superseding similar provisions in the Basic Conditions of Employment Act (the "BCEA").[16]

One of the objectives of the LRA is to promote collective bargaining on sectoral level.[17] The problem is that, because parties are free to elect whether to take part in collective

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[11] S 213 of the LRA defines a collective agreement as a written agreement concerning terms and conditions of employment or any other matter of mutual interest concluded by one or more registered trade unions, on the one hand, and one or more employers, registered employers' organisations or a combination of the two on the other. It has been noted by the courts that the LRA refers to "matters of mutual interest" so that the term can be interpreted as widely as possible. In *De Beers Consolidated Mines Ltd v CCMA & Others* (2000) 5 BLLR 578 (LC), it was held that the term "matters of mutual interest" should be interpreted in such a manner as to refer to any issue concerning employment and should be given a wide interpretation.

[12] Snyman (2016) *ILJ* 868.

[13] S 23 of the LRA.

[14] S 31 of the LRA.

[15] Ss 23 and 31 of the LRA. Note that external employers and employees are not bound by the terms of a collective agreement.

[16] See Bendix (2015) 225 and s 49(1) of the BCEA which provides that a collective agreement concluded in a bargaining council may alter, replace or exclude any basic condition of employment if the agreement is consistent with the purposes of the BCEA. Terms and conditions contained in collective agreements enjoy preference over less favourable terms and conditions contained in individual contracts of employment in terms of s 23(3) of the LRA and can be seen as a departure from the principle of contractual freedom. Collective agreements often contain enforcement procedures in the event of non-compliance, or alternatively, disputes surrounding enforcement can be referred to the relevant bargaining council in terms of s 33A of the LRA.

[17] "Sector" is defined as an industry or service in s 213 of the LRA. According to Bendix (2015) 198–200, broad centralised bargaining units established at industry or sectoral level hold a number of advantages, including the determination of wage levels and benefits to all employers and employees and decreasing the likelihood of spontaneous strike action.

bargaining, not all employers in an industry engage therein. Collective agreements are generally only applicable to those parties who took part in the conclusion thereof, as well as their members and employees. Collective agreements cannot (on their own) be applicable to those parties in a sector who had not participated in the conclusion of the collective agreement in question. Regarding the extension of collective agreements concluded in bargaining councils, Godfrey *et al* note as follows:[18]

> "Within the broad objective of promoting 'orderly collective bargaining', it prioritises bargaining at 'sectoral level'. Sectoral bargaining by means of bargaining councils, largely replicating the industrial councils instituted in terms of the previous Act, is at the heart of the system. Of critical importance to this model is the power of bargaining councils to have their agreements extended to all employers and employees within their sector."

The extension mechanism is not unique to South Africa, nor by any means new. As mentioned by Hamburger in 1939:[19]

> "[T]he extension of collective agreements possesses an importance which goes far beyond the mere regulation of working conditions. It constitutes the first chapter of a new legislative technique, that of legislation by accord. It shows that legislation can remain democratic even if, in order to secure rapid settlement and elasticity, it is drawn up without recourse to parliamentary procedure."

To promote collective bargaining on sectoral level, despite the principle of voluntarism, the LRA provides for two mechanisms for the extension of collective agreements concluded in bargaining councils in order to make collective agreements applicable to non-parties and achieve industry-wide uniformity.[20]

The first mechanism is mandatory and applies when one or more trade unions and one or more employers' organisations, both of whose members constitute the majority

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18 Godfrey *et al* (2010) 23.

19 Hamburger *ILR* (1939) 194.

20 One or more trade unions or employers' organisations may establish a bargaining council for a specific sector and area by adopting a constitution and registering it with the Department of Labour. The establishing of a bargaining council is voluntary, as is becoming a party to the bargaining council. The parties who established the bargaining council will be the parties to the specific bargaining council. Bargaining councils are *inter alia* empowered to conclude and enforce collective agreements. Bargaining councils are one of the most significant tools with which sectoral bargaining is promoted and their roles therefore are significant for the purpose of the study. See ss 25–29 of the LRA for further information.

of the members of the bargaining council parties, vote in favour of such an extension and direct an application for extension to the Minister of Labour ("the Minister").[21] When all the prerequisites are met the Minister has no option but to extend the collective agreement.

The second mechanism for the extension of collective agreements is discretionary and applies when the parties to a bargaining council are sufficiently representative within the registered scope of the bargaining council, and the Minister is satisfied that the failure to extend a collective agreement may undermine collective bargaining at sectoral level or in the public service as a whole.[22] This discretionary extension only occurs once the Minister has received a request to extend a collective agreement, but subsequently realises that the bargaining council does not meet the numerical targets set for constituting a majority.[23] In these circumstances the Minister exercises a discretion whether to extend the collective agreement or not.

The above mechanisms for the extension of collective agreements to non-parties on application by applicants who constitute a majority, or which parties are sufficiently representative, are an indication of the LRA's advancement of the majoritarian principle. Both the extension of collective agreements and the publication of sectoral determinations[24] have the purpose of enhancing employee rights and welfare whilst promoting labour peace.

Looking further than national legislation that promote collective labour rights, South Africa is also a member state of the International Labour Organisation (the "ILO").[25]

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21 S 32(1) of the LRA.

22 S 32(5) of the LRA.

23 *Free Market Foundation v The Minister of Labour & others* (2016) 37 *ILJ* 1638 (GP).

24 S 51 of the BCEA provides that the Minister of Labour may make a sectoral determination establishing terms and conditions of employment for employees in a sector or area not covered by a bargaining council. Ss 51–58 of the BCEA determine the process to be followed to publish a sectoral determination. The process includes a thorough assessment of the effect that the sectoral determination might have on the sector.

25 See in general Van Niekerk and Smit (2017) 24 and Du Toit *et al* (2015) 76. The ILO was established in 1919, but after the Second World War there was a need for the establishment of minimum labour standards. The ILO became the United Nation's first specialised unit and South Africa was a member state until its forced withdrawal during 1964. The Republic of South Africa became a member state of the ILO again on 26 May 1994 and has since ratified all ILO core conventions. See Ch 2 in this regard.

One of the purposes of the LRA is to give effect to South Africa's obligations as a member state of the ILO.[26] The ILO formulates and publishes both conventions and recommendations.[27]

In terms of the ILO's Collective Agreements Recommendation 91 of 1951 ("the Collective Agreements Recommendation") the conclusion and extension of collective agreements are recommended to member states.[28] The reality is that the extension of collective agreements is endorsed by the ILO and there are many countries in the international arena where mechanisms are implemented regarding the extension of collective agreements.[29]

Chapter four of the Collective Agreements Recommendation recommends that measures be adopted to extend collective agreements to all employees and employers within the sector and area of a collective agreement. Due regard must be had to the circumstances of each member state.[30] It is proposed that the collective agreement should already apply to employees who are sufficiently representative prior to its extension.[31] The request for extension is to be made by one or more representatives who are parties to the collective agreement.[32] Finally, potentially affected employers and employees should be granted the opportunity to make representations prior to the extension of the collective agreement.[33]

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26 S 1(b) of the LRA.

27 Van Niekerk and Smit (2017) 25. Conventions are only binding on member states once a member state has ratified the convention. Recommendations do not need to be ratified by member states and provide guidelines regarding their subject matter or guidelines regarding a specific convention if they support a particular convention.

28 Gernigon *et al* (2000) 62.

29 According to Hamburger (1939) *ILR* 162, South Africa was the only country where the extension mechanism was "fully accepted both in theory and in practice" and not influenced by pressing economic conditions as was the case in other countries.

30 Article 5(1) of the Collective Agreements Recommendation.

31 Article 5(2)(a) of the Collective Agreements Recommendation.

32 Article 5(2)(b) of the Collective Agreements Recommendation.

33 Article 5(2)(c) of the Collective Agreements Recommendation. The Recommendation is silent as to whom these representations should be made, but Part VI s 7 provides a most informative suggestion as to whom representations should be directed: "The supervision of the application of collective agreements should be ensured by the employers' and workers' organisations parties to such agreement or by the bodies existing in each country for this purpose or by bodies established ad hoc." This would suggest that in countries with structures like South Africa's bargaining councils (and a Minister of Labour) the representations should be directed at the bargaining council or the Minister.

At first glance, it seems that section 32 of the LRA is, to a large extent, aligned with the Collective Agreements Recommendation. However, the architects of the LRA may not have complied entirely with the recommendations made by the ILO regarding the extension of collective agreements. Among others, this study investigates whether the LRA is aligned to the Collective Agreements Recommendation in so far as potentially affected non-parties are not made aware of the mandatory extension of collective agreement applications under section 32(1) of the LRA, nor granted the opportunity to submit representations to the Minister prior to the extension of the collective agreement.

2. Significance of the Study

The mechanism for the extension of collective agreements under the previous dispensation contained in section 48(1) of the former Labour Relations Act,[34] provided the Minister with wide discretion to grant the extension of collective agreements (previously referred to as industrial council agreements).[35]

Since the implementation of the current LRA, the extension mechanism requires the Minister to grant an extension of a collective agreement once "objectively satisfied"[36] that certain prerequisites have been met. Any unilateral discretion previously granted to the Minister has thus been abolished, save for section 35(5) of the LRA.[37]

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[34] 28 of 1956.

[35] Godfrey *et al* (2010) 70. In terms of s 48 of the former Industrial Conciliation Act 28 of 1956 the Director General of Labour would first measure the representivity of the members to the industrial council, and if the parties were not sufficiently representative the Minister would take into account other factors such as whether certain of the provisions in the agreement would have a restrictive effect on the continued existence of business or impede the establishment of new businesses; whether consultation with non-parties had preceded the negotiation of the agreement and to what extent the representations of the non-parties had been considered; whether wage differentiation had been considered based on area in the negotiation phase; and whether there was provision for the exemption of small or new businesses, amongst others. See Ch 3 for a historical perspective on the extension mechanism in South Africa.

[36] *NEASA v Minister of Labour & others* (2013) 34 *ILJ* 1556 (LC).

[37] The Explanatory Memorandum to the Labour Relations Bill (1995) *ILJ* 278 confirmed that the extensive discretion of the Minister and the Industrial Court's jurisprudence were issues that needed to be addressed in the proposed Labour Relations Bill.

Several court cases have ensued regarding the issue of the extension of collective agreements.[38] Litigants have challenged the extension of collective agreements by relying on the statutory safeguards found in both sections 32 and 206 of the LRA, as well as arguing that the impugned provisions are unconstitutional. Litigants have also questioned the composition of bargaining councils, management committees, the decisions made to extend agreements and the constitutionality of section 32 of the LRA. Advocates against the extension mechanism have not succeeded in this endeavour yet.[39]

In *Free Market Foundation v The Minister of Labour* ("*FMF*"),[40] the constitutionality of section 32 of the LRA was challenged with reference to the free market model.[41] The main arguments centred around section 32(2), which grants bargaining councils the power to extend collective agreements without the exercise of discretion by a state power; and section 32(5) which allows the proclamation of the extension of a collective agreement where parties are only "sufficiently representative". The main attack against the extension mechanism was based on the principle of legality and freedom of contract.[42]

However noble its cause may have been deemed to be, the FMF's challenge against the extension mechanism once again failed. The court held that the Promotion of Administrative Justice Act[43] ("PAJA") applies in relation to bargaining councils. Such councils, the court said, are constituted of private players vested with legal personality in terms of the LRA.[44] The reward was bittersweet, as the judgment provided the first

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38 See, for example, *Kem-Lin Fashions CC v Brunton & Another* (2001) 22 *ILJ* 109 (LAC); *Chamber of Mines of SA Acting in its Own Name & on behalf of Harmony Gold Mining Co Ltd & others v Association of Mineworkers & Construction Union & others* (2014) 35 *ILJ* 1243 (LC); *NEASA v MEIBC & others* (2015) 36 *ILJ* 732 (LC); *Confederation of Associations in the Private Employment Sector & others v MIBC & others* (2015) 36 *ILJ* 137 (GP). See also the discussion in Ch 4 para 6.

39 *Kem-Lin Fashions CC v Brunton & another* (2001) 22 *ILJ* 109 (LAC).

40 (2016) 37 *ILJ* 1638 (GP).

41 Murphy J described the Free Market Foundation's arguments as a "significant constitutional challenge to the system of collective bargaining in South Africa".

42 The applicant argued that the rule of law provision in s 1(c) of the Constitution should introduce an additional requirement that public power should be exercised in the public interest. See fn 21, 43 of the judgment.

43 3 of 2000.

44 *FMF* para 14.

detailed explanation of the extension mechanism and provided guidelines for future review applications against such extensions.

Despite these developments it is the hypothesis of this study that the extension mechanism has a negative impact on minority parties, who are bound by extended collective agreements even though they were not involved in the negotiations which preceded the conclusion of such agreements.[45] In terms of section 65(1)(a) of the LRA no person may participate in a strike or a lock-out if such a person is bound by a collective agreement which prohibits participation in industrial action.[46] Section 65(3) further provides that no person may take part in a strike or lock-out in circumstances where the issue in dispute is regulated by a collective agreement. This entails that minority trade unions and their members could be excluded from engaging in a strike where they are covered by a collective agreement which contains a peace clause.[47]

This study considers whether the negative effects of the extension of collective agreements are so severe as to justify the abolition or amendment of the extension mechanism.

However, before delving into this question in more detail, it is necessary to explore which one of the main approaches to labour law would be the most appropriate model to serve as basis for the study. This research places emphasis on three approaches, or perspectives, on the underlying function of labour law. The traditional collective *laissez faire,* the free market and the social justice models are examined.

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[45] Steenkamp *et al* (2014) *ILJ* 960 state that in circumstances where collective agreements are extended to non-parties, two indispensable elements of bargaining are prohibited, namely, the conclusion of collective agreements and the exercise of economic power.

[46] These sections promote the notion of "orderly" collective bargaining by prohibiting industrial action regarding any issue addressed in a collective agreement.

[47] From a minority trade union's point of view, the existence of a collective agreement may bar entry to certain workplaces or sectors as such agreements are also applicable to it by virtue of the agreement being applicable to its members. See Snyman (2016) *ILJ* 865. The effect of an extended collective agreement, albeit on workplace level, on a minority union's ability to embark on strike action gave rise to the extended legal battle between the Association of Mineworkers and Construction Union and the Chamber of Mines, which dispute eventually came to an end in the Constitutional Court in *Association of Mineworkers & Construction Union v Chamber of Mines & Others* (2017) 38 *ILJ* 831 (CC). See the discussion in Ch 4 para 6.2.

3. The Main Approaches to Labour Law

3.1 The Traditional Collective *Laissez Faire* Approach

To grasp the underlying principles of collective bargaining, the writings of Sir Otto Kahn-Freund are particularly informative. Kahn-Freund viewed labour law as one of the most significant branches of the law due to its direct influence on a vast number of stakeholders.[48] He stated that labour law is mainly concerned with the regulation of social power, which is inherently unevenly distributed in most if not all societies.[49] The main purpose of labour law therefore is to regulate the power of management and to balance it with the power of organised labour to engage in collective bargaining.[50]

Kahn-Freund noted that legislation should play a minor role in industrial relations and that the parties to the employment relationship ought to manage their own affairs. The ideal was viewed as something to strive towards, as employees could collectively protect their interests in circumstances where an individual employee acting alone could not.[51] He observed that the individual worker inherently had no social power, and as such did not possess bargaining power to influence the decisions of management. He stated:[52]

> "Typically, the worker as an individual has to accept the conditions which the employer offers. On the labour side, power is collective power. The individual employer represents an accumulation of material and human resources, socially speaking the enterprise in itself in this sense a "collective power". If a collection of workers (whether it bears the name of a trade union or some other name) negotiate with an employer, this is thus a negotiation between collective entities, both of which are, or at least be, bearers of power."

From the above it is clear that Kahn-Freund appreciated the benefit of the balancing effect that collective labour could have in establishing terms and conditions of employment. Another critical theme of Kahn-Freund's view of labour law is the principle that

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48 Kahn-Freund (1977) 2.
49 Kahn-Freund (1977) 3, where the author explains that the unequal distribution of social power is not limited to labour law but may be found in all spheres of civilisation.
50 Kahn-Freund (1977) 4.
51 Davies (2004) 4.
52 Kahn-Freund (1977) 6.

parties in an employment context should be allowed to determine their own relationship without interference[53] and that labour and management inherently have opposing expectations.[54]

He argued that the only common interest between labour and management is that conflict should be regulated by "reasonably predictable procedures, which do not exclude the ultimate resort to any of those sanctions through which each contending party must – in case of need – assert its power". A further legitimate interest outside the employment relationship is that of the public, the consumer. He stated that the public has an interest in the uninterrupted supply of products and services, and that it is at this junction that a government may play a role in introducing legislation to limit production stoppages.[55]

3.2 The Free Market Approach

The free market approach is also referred to as neo-classical, pro-market, deregulation, neo-liberal, libertarian or the liberal theory.[56] The proponents of the free market approach have made their voices heard in South Africa regarding the extension of collective agreements.[57] In accordance with this perspective, governments started playing a part in industrial systems by enacting legislation with a view to curb inflation and combat unemployment.[58]

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53 Kahn-Freund (1977) 51: "Through being countervailing forces, management and organised labour are able to create by autonomous action a body of rules, and thus to relieve the law of one of its tasks."

54 Coined by him as "the war between the profit-maker and the wage-earner".

55 Kahn-Freund (1977) 8.

56 Langille (1998) *ILJ* 1003; Brassey (2012) *ILJ* 2; Van Niekerk and Smit (2017) 7; and Du Toit *et al* (2014) *ILJ* 1805.

57 The Applicant in *Free Market Foundation v the Minister of Labour* (2016) 37 ILJ 1638 (GP) almost exclusively relied on the free-market argument in its founding papers and expert opinions in challenging the extension mechanism contained in s 32 of the LRA. A quote from the judgment provides further explanation of the free-market argument: "Its attack on the system is predicated upon a free market perspective opposed to the prevailing orthodoxy. From its ideological standpoint, sectoral bargaining and the extension of the products of it to non-participants, far from advancing the protection of vulnerable workers, are an impediment to the growth of small businesses resulting in less job creation and a higher rate of unemployment."

58 Davies (2004) 7 explains as follows (with reference to the experience in the United Kingdom): "Their (the government's) main goal was to ensure that the UK had a favourable balance of trade, in other words, that the value of the products exported by the UK exceeded the value of products imported."

The free market model presupposes that, without legal intervention, business will be able to compete on international level and be more profitable.[59] Once businesses are profitable, employees enjoy the benefit as they will be in a better situation to compete amongst one another for better wages. Without legal intervention, businesses can respond to loss of income with flexibility. Brassey explains that according to this perspective "[in] a perfectly competitive market, price is always determined by the intersection of a supply and demand schedule. There can be no overproduction or unemployment. The price or wage simply falls until the market is cleared".[60]

The free market model assumes that the imposition of a specific requirement by way of legislation will have no impact on the eventual state of the labour market, as the employer will only compensate for the additional requirement in another manner which will ultimately affect employees.[61] Freedom of contract is highly advocated by this group as the law will only interfere with agreements entered into in instances of undue influence or duress.[62]

Supporters of this approach argue that employers and employees should be free to enter into contracts totally unregulated by law and that market forces will achieve equilibrium in the labour market. Brassey believes that the deregulation of the market is the only way in which equilibrium can be achieved.[63] He contends that the free market approach entails that collective agreements should only be applicable to those who voluntarily subscribed to such agreements and that collective action should be free of coercion, compulsion and force.[64] The proponents of the free market perspective not only argue that barring labour legislation will be beneficial for the employee as well as

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59 Brassey (2012) *ILJ* 2.
60 Brassey (2012) *ILJ* 3.
61 Davies (2004) 26 provides the example of the imposition of paid holidays. Such requirement is a burden on an employer, as it needs to pay an employee who is not bringing in profit for the duration of the paid holiday and it needs to arrange for a replacement during that period. The employer will not absorb such loss in profit but would rather pass it on to the employees by lowering their wages.
62 Davies (2004) 27. Van Niekerk and Smit (2017) 8 write: "Proponents of this view regard labour legislation with the disdain normally reserved for an alien plant species, an unwelcome intruder invading the indigenous landscape of the common law and imposing unwarranted regulation on the freedom of contract on equal terms in the marketplace. They argue that laws intended for the protection of employees have the unintended consequence of protecting the employed at the expense of the unemployed."
63 Brassey (2013) *ILJ* 827; Van Niekerk and Smit (2017) 8; and Van Niekerk (2013) *ILJ* 28.
64 Brassey (2013) *ILJ* 828.

the general society, but that deregulation of labour legislation invites foreign investment.[65]

Several labour law scholars have quite correctly made the point that blaming regulation for the challenges in the labour market rather oversimplifies a much more complex issue.[66] In answer to Brassey, Van Niekerk criticises the view that deregulation will lead to equilibrium in the labour market. His critique rests *inter alia* on the premise that there is no empirical evidence that regulation is the sole cause of high levels of unemployment, or that deregulation will indeed invite foreign investment or maximise welfare.[67]

Supporters of the free market perspective lose sight of the labour market reality that employers and employees are not equals, and that information is not shared freely to the extent that employees are empowered to conclude fitting agreements.[68] Applying the free market perspective in South Africa would be ill-advised. A significant portion of the South African population is illiterate and cannot bargain effectively for their best interests. Adopting a free market stance might benefit business and increase global competitiveness but it would do so at the expense of employees and employee rights. In an ideal system where business owners are not unscrupulous, and employees are informed and able to bargain, the free market system might work. However, it is a compelling argument that there is no concrete evidence that labour legislation negatively affects global competition. South Africa, with its chequered past, cannot afford to adopt a purely market-based labour law perspective.

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65 Van Niekerk and Smit (2017) 8.

66 Baskin (1998) *ILJ* 991 further states that: "In short, labour market reform is important and necessary. However, the labour market is not accused number one, as some would have it, on the charge of failing to create jobs. Adjustments to existing practices must be realistic and cognizant of our national circumstances."

67 Van Niekerk and Smit (2017) 8.

68 An example of the unequal footing between employers and employees is the high unemployment rate. There are currently more unemployed persons than there are jobs. According to Stats SA Quarterly Report, 31 July 2018, the unemployed rate was 27.2% (6.1 million). See http://www.statssa.gov.za/publications/P0211/P02112ndQuarter2018.pdf (accessed on 6 August 2018, 09:16).

3.3 The Social Justice Approach

Social justice is not an easily-defined concept and the LRA specifically does not contain a definition of "social justice". Matlou explains as follows:[69]

> "Social justice does not lend itself to a precise and absolute definition. However, it would not be controversial broadly to state that social justice means that every citizen of the Republic of South Africa is entitled to at least some or other form of fair treatment under the law. For purposes of labour law, social justice would include the realisation by every worker of their labour rights created under the LRA. In South Africa, in the context of our history of political and legal exclusion where not all people were entitled to fair treatment under the law, the idea of social justice is eminently important."

One of the founding principles on which the adoption of the Constitution of the Republic of South Africa is based, is to establish a society based on democratic values, social justice and fundamental human rights.[70] The robust consultation which preceded the adoption of the Constitution is no doubt an indication by all social partners that the legislator, and thereby the courts, were tasked to transform the Republic of South Africa into a country with democratic values.[71]

The Constitution, read with the applicable labour legislation, calls upon those applying it to interpret its provisions purposefully with a view to achieve social justice. This is a particularly pressing matter in the South African context because of the lasting effects of apartheid and colonialism.

Matlou[72] states that the achievement of social justice is one of the objects of the LRA.[73] Unlike other legislation, the LRA further provides that the interpretation of its provisions should be informed by the objects of the LRA. Le Roux[74] refers to transformative constitutionalism[75] as a manner of describing the process by which social transformation can take place through the interpretation of law: "It promises that fundamental social

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69 Matlou (2016) *SA Merc LJ* 545.
70 S 1 of the Constitution, 1996.
71 Davies *et al* (2010) *SAJHR* 406.
72 Matlou (2016) *SA Merc LJ* 544.
73 This principle has also been affirmed by the Constitutional Court in *Rural Maintenance (Pty) Ltd & another v Maluti-A-Phofung Local Municipality* (2017) 38 *ILJ* 295 (CC).
74 See W Le Roux in Du Toit (2013) 31.
75 As with the concept of "social justice", the concept of "transformative constitutionalism" cannot be described easily. For further reading on the various strands of transformative constitutionalism, read Klare (2015) *Stell LR* 447; and Brand (2011) *Stell LR* 614.

change (transformation) can come about through legal reforms, backed by popular mobilisation, and enforced through legislation. It promises that people can change their lives and society by arresting their rights."

The advocates of the social justice perspective believe that lawyers, advocates and judicial officials that interpret the law are tasked to advance social justice in order to ensure that the majority enjoy the benefit of the law.[76] Geldenhuys further states that those interpreting labour law have a particular obligation to ensure that it is applied equitably and equally, so that all those it is meant to protect are indeed so protected.[77] This was the approach originally promoted by Karl Klare, in terms of which the judiciary and civil society were constitutionally mandated to act robustly and as activists.[78] However, the judiciary and civil society have not always proved to be immune to the longstanding conservative nature of the courts and legal thought.[79]

An opposing view regarding transformative constitutionalism can be found in the writings of Sunstein. In terms of Sunstein's view of the subject-matter, whilst the judiciary is clothed with the authority to develop common law and make decisions to promote social justice, it is incumbent that the separation of powers doctrine be respected.[80] Klare does not agree with this view and maintains that a conscious decision was made with the adoption of the Constitution that all powers, public and private, must be subject to Constitutional control without fear or prejudice.[81]

To summarise: the social justice perspective entails that legislation must be robustly interpreted to promote social justice. There are opposing views within the social justice perspective regarding the extent to which courts are empowered to play an oversight or an active role, and the extent to which courts defer important issues to the legislature rather than acting decisively.

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76 Matlou (2016) *SA Merc LJ* 547.
77 Geldenhuys (2016) *SA Merc LJ* 401.
78 Le Roux in Du Toit (2013) 49. An early example where the Constitutional Court fulfilled its obligation in this regard is *Carmichelle v Minister of Safety and Security* (2001) 4 SA 938 (CC), where it was held that courts are called upon to develop the common law in any instance where it is apparent that it (the law) does not comply with constitutional values and may do so on own motion.
79 Le Roux in Du Toit (2013) 49; Mceldowney (2013) *TSAR* 269; and Davies *et al* (2010) *SAHRJ* 406.
80 Le Roux in Du Toit (2013) 50; Klare (2015) *Stell LR* 446; and Brand (2011) *Stell LR* 614. Brand argues against the traditional approach taken by the courts, whereby contentious issues are deferred to other branches of government in a bid to protect the separation of powers doctrine.
81 Klare (2015) *Stell LR* 447.

Whilst social justice is a wide concept with no single definition, it is not a vague concept. It is meant to uplift all individuals, a right upon which all can rely. Social justice should not only be an afterthought or something which only accrues to a majority to the detriment of a minority. Whilst acknowledging the separation of powers doctrine, which forms a vital part of the Constitution, courts are empowered to act robustly in achieving social justice.

3.4 Observations about the Approaches

Because of the requirement of purposive interpretation whenever a section of the LRA is interpreted, the extension mechanism cannot be considered in isolation and the objects of the LRA should also be borne in mind.[82] Any challenge to the extension mechanism must be answered with reference to whether there is a connection between the objective of sectoral bargaining and the extension of collective agreements.[83]

In *Kem-Lin Fashions CC v Brunton*[84] the Labour Appeal Court confirmed that the legislative objective of the extension mechanism is to prevent unfair competition between employers who are bound by a bargaining council agreement and those who are not bound. The non-party employer may attach lower prices to its products since it does not need to remunerate its employees at the same rate that the party-employer must remunerate its own employees. The extension of a bargaining council agreement ensures that all employers must pay the same minimum wage, afford the same benefits, and in doing so will not be able to sell their products at an unfair competitive rate. The cumulative effect thereof is that more employers would engage with the bargaining council at sectoral level due to the benefit obtained from a competitive point of view.

The *FMF* case[85] confirms that the following objectives are achieved when collective agreements are extended to non-parties: The promotion of collective bargaining at

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[82] S 3 of the LRA. The objects of the LRA include the advancement of economic development, social justice and labour peace.

[83] Du Toit (2014) 35 *ILJ* 2644.

[84] (2001) 22 *ILJ* 109 (LAC) para 20.

[85] (2016) 37 *ILJ* 1638 (GP). As was stated in para 110: "The section aims to give effect to a legislative policy of industrial pluralism, voluntarism and orderly collective bargaining permitted by the spirit and purport of the constitutional right to engage in collective bargaining in s 23(5) of the Constitution and international law. The perceived advantage of the constrained discretion in s 32(2) of the LRA in a majoritarian situation is certainty and predictability in the outcomes of bargaining that incentivise

sectoral level; the promotion of majoritarianism; the prevention of unfair competition; the benefit of workers who have no collective bargaining strength to negotiate wages and terms and conditions of employment; and a pluralistic system of industrial relations based on voluntarism rather than state interference in the collective bargaining relationship.[86] An additional benefit, from an employer's perspective, is that employees who are bound by an extended collective agreement are precluded from embarking on strike action regarding those issues which are regulated by the agreement in question.[87] The principles at play in this particular matter were the majoritarian principle versus the free market perspective and state control and judicial supervision.

In the wake of globalisation and calls for increased competiveness to increase efficiency and job creation, the extension mechanism itself has often been named a major culprit and impediment to market growth.[88] However, this study supports Du Toit's sound argument that the challenge to the extension mechanism is surprising given the fact that far more employees and employers are affected by sectoral determinations under the BCEA than by extended bargaining council agreements.

The free market and the social justice perspectives have been highlighted in this chapter because each of the two approaches to labour law provides its own agenda regarding the extension of bargaining council agreements. Those advocating the free market approach regard the extension mechanism as negative and as an impediment to market growth. On the other hand, the social justice perspective would see the extension mechanism being used to benefit and uplift both employers and employees. Although the two perspectives are at loggerheads with one another, each provides an interesting counter argument in its effects when interpreting case law and legislation.

It is submitted that the social justice model is the appropriate approach to be promoted and applied in South Africa. This approach also serves as the basis of this study. Alt-

participation at sectoral level, which will result in uniformity brought about by a balance of power at that level. That is a legislative purpose. Though there may be forceful ideological, moral and practical objections to that legislative policy, due judicial deference recognises that Parliament is free to adopt whatever economic policy may reasonably be deemed to promote public welfare".

86 Above fn 85 para 8.

87 Above fn 85 para 28.

88 Du Toit (2014) 35 *ILJ* 2638.

hough the chosen approach is social justice, the free market model is frequently referred to because of its recent ever-increasing influence in case law. It provides a thought-provoking counter argument which is very relevant today due to globalisation.

4. Background to the Problem Statement

4.1 Remedies for Non-Parties

Because the Minister is obliged to extend a collective agreement within 60 days of receiving such a request from a bargaining council once he or she is satisfied that the parties to the bargaining council are sufficiently representative,[89] non-parties often only realise that a collective agreement has been extended after the fact. There is no requirement that potentially affected non-parties should be notified of an impending application to the Minister or to be cited as possible respondents or participants in the process.

In 2015 the legislature introduced further requirements that apply prior to extending a collective agreement, perhaps in an attempt to address the concerns of non-parties who unexpectedly find themselves bound by extended collective agreements.[90] These requirements include that every bargaining council seeking extension should make provision for an exemption procedure, an independent appeal body and expeditious appeal procedures in order to decide on failures to grant exemption.[91] The amendments of 2015 have thus provided non-parties with some form of a remedy through guaranteed exemption and appeal procedures.

4.2 Why wish for Exclusion?

The ultimate effect of the extension of collective agreements is that parties who have not engaged in collective bargaining are be bound by the collective agreement. Thus,

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89 S 32 of the LRA.

90 The Labour Relations Amendment Act 6 of 2014. In terms of the Explanatory Memorandum to the Labour Relations Amendment Bill, 2012, s 32 was amended to improve the speed and effectiveness of the exemption procedures and to ensure the independence of appeal bodies.

91 S 32(3)(e) of the LRA.

the extension mechanism infringes on the right to freedom of collective bargaining and freedom of contract.[92]

Godfrey states that there are three main categories, or reasons, for employers seeking exemption from the extension of collective agreements, namely, affordability; exemption from the bargaining council's social benefit schemes; and technical reasons (such as working on Sundays or having a shortened lunch-break).[93]

The extension of collective agreements also influences minority trade unions. Snyman notes that the extension of collective agreements, together with certain other sections of the LRA,[94] is a statutory advantage that majority trade unions have over minority trade unions. The terms of an extended collective agreement will be applicable to such a minority trade union, which will be deprived of its aspirations relating to organisational rights as well as its right to engage in strike action and collective bargaining.[95]

From all the legal challenges raised against the extension of collective agreements, it is clear that a significant number of non-party stakeholders do not wish to be bound by collective agreements. As previously mentioned, applicants have questioned the constitutionality of sections 32 and 206 of the LRA.[96] Employers have also argued that their employees do not fall under the definition of "employee", but rather under "independent contractor", to circumvent the binding nature of an extended collective agreement.[97]

Despite the challenges raised against the procedure for the extension of collective agreements, Du Toit states that employer parties seldom actually apply for exemption from the ambit of extended collective agreements.[98]

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[92] S 22 of the Constitution, 1996 states that every citizen has the right to choose their trade, occupation or profession freely.
[93] Godfrey *et al* (2010) 72.
[94] Ss 18, 23(1)(d), 25, 26 and 78 of the LRA.
[95] Snyman (2016) *ILJ* 875–876. Also see *AMCU v Chamber of Mines* (2016) 38 *ILJ* 831 (CC).
[96] S 206 of the LRA determines that certain procedural defects and deficiencies do not invalidate the constitution or the registration of any registered trade union, employers' organisation or council, or the validity of a collective agreement or arbitration award.
[97] See *Kem-Lin Fashions CC v Brunton & Another* (2001) 22 *ILJ* 109 (LAC).
[98] Du Toit (2014) *ILJ* 2648.

However, it may be argued that the mechanisms of extending collective agreements are necessary to improve and promote collective bargaining on sectoral level. As it is not mandatory to be party to a bargaining council (despite the benefits of being a party), it may well be asked how collective bargaining will be promoted at sectoral level without collective agreements being extended to non-parties to a bargaining council.

4.3 An issue of Representivity

For collective bargaining to be successful and most advantageous to both employers and representative trade unions, it is necessary that trade union parties to bargaining councils are indeed representative of most employees in the specific sector. Du Toit *et al* allude to the fact that, should trade unions no longer be representative, collective bargaining will fail.[99]

It is submitted that situations may arise where the composition of bargaining councils does not truly reflect all the stakeholders in a particular sector. Small to medium enterprises, as well as members of minority unions, may not enjoy representation at bargaining councils. In such situations the principle of majoritarianism may clash with the principle that "everyone" has the right to fair labour practices, the right to engage in collective bargaining and the right to strike.

Malan notes that a contentious factor which begs to be taken into account in our modern-day society, is whether a majority may make decisions about matters which directly affect specific interests of a minority.[100] Esitang and Van Eck make the poignant statement that:[101]

> "[W]e are not convinced that the amendments do enough to establish the type of multiparty democracy which the Constitution envisages. The model of democracy established by the Constitution allows for minority parties with relatively low numbers of votes to participate in parliamentary processes. Added to this, the limitations which the LRA places on minority trade unions appear to be disproportional in as far as they limit the constitutional rights to associate and to organise."

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[99] Du Toit *et al* (2015) 51.
[100] Malan (2010) *TSAR* 447; and Kruger and Tshoose (2013) 16 *PELJ* 285.
[101] Esitang and Van Eck (2016) 37 *ILJ* 763.

There can be no doubt that the current extension mechanism supports the principle of majoritarianism. It is submitted that an appropriate balance should be struck between the principle of majoritarianism and the rights of minority trade unions during the process of the extension of bargaining council agreements.

5. Research Questions

The pertinent issues to be addressed in this research are the following:

5.1 Does South Africa comply with its international law obligations regarding the extension of collective agreements, in so far as non-parties are not granted an opportunity to make representations prior to the mandatory extension of collective agreements?

5.2 Are the requirements pertaining to the extension of collective agreements contained in section 32(3) of the LRA sufficient to protect the interests of non-parties to collective agreements? In exploring this issue, section 54(3) of the BCEA, which contains factors which should be considered prior to the publication of a sectoral determination by the Minister of Labour, is considered together with the relevant recommendations provided by the ILO's bodies of experts.

5.3 How should the current provisions regarding the extension of collective agreements be adapted to provide appropriate regulation?

6. Research Methodology

In conducting the research, a doctrinal approach was followed.[102] As confirmed by Morris and Murphy, the purpose to be achieved by following a doctrinal analysis is to seek consistency and coherence in relation to a particular set of rules.[103] Once the principles upon which a certain branch of the law is premised have been revealed, the law itself may be analysed to determine whether its application is consistent with its

[102] Watkins and Burton (2013) 8 describe the concept of doctrinal research as the process used to identify, analyse and synthesise the content of law. Van Staden (LLD UP 2017) 27 explains that the doctrinal approach belongs to the branch of "expository jurisprudence", being a branch of research concerned with analysing the law as it currently stands. See also Walpole (2015) *LIJSERW* 210.

[103] Morris and Murphy (2011) 31.

purpose. The application of the doctrinal research method requires a close examination of legislation and case law and that all the relevant elements be combined to establish a coherent view of the law at hand.[104]

This study assesses relevant legislation, case law and principles in the South African context with the view of providing recommendations to address any shortcomings.[105] Although a doctrinal methodology was followed in conducting this research, this study is underpinned by a social justice perspective, and ultimately assesses whether the extension mechanism is compliant with the notion of social justice in the South African context.[106]

The study also comprises of international comparison. International norms are not only considered, but the position in South Africa is also compared to the position in Namibia, Australia and the Netherlands.[107]

It is to be noted that the study covers publications and case law up to 31 August 2018.

7. Structure of the Dissertation

Chapter 1 introduces the research topic and explains the main approaches to Labour Law. The approaches to Labour Law are discussed to provide background to the main perspectives which may play a role in the extension of bargaining council agreements. Chapter 1 further describes the research methodology which was followed in conducting this research and provides the research questions which inform the study.

In Chapter 2 the ILO and its role in South Africa are considered. The applicable conventions and recommendations are assessed to provide the appropriate international background to the research topic.[108] It is argued at the conclusion of this chapter that

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[104] Watkins and Burton (2013) 10. The writers state that the three core features of doctrinal research include that the arguments are derived from authoritative sources, such as existing rules, principles, precedents and scholarly publications. The second feature is that the law must represent a system and thirdly that even exceptions must take place in such a way that the system remains coherent.

[105] Morris and Murphy (2011) 31; and Van Staden (LLD UP 2017) 27.

[106] Morris and Murphy (2011) 31 suggest that doctrinal analysis may be based on the idea that the law is underpinned by a particular moral or political philosophy, and that such a study can be analysed for its closeness to the ideal situation.

[107] See Ch 5.

[108] Ch 2 para 4.

certain core requirements pertaining to the extension of collective agreements have been developed with which South Africa is bound to comply.

Chapter 3 contains a historical overview of South African labour legislation as well as the extension mechanism.[109]

In Chapter 4 the legislative framework of the Constitution, 1996, and the relevant provisions of the LRA and the BCEA are analysed in order to appraise the current position surrounding the extension of collective agreements in South Africa. Thereafter the noteworthy legal challenges are discussed with a view to assess the current stance of both the legislature and the courts towards the extension mechanism and the majoritarian principle.[110]

Chapter 5 focuses on the international community as a possible yardstick against which to measure the South African framework. The extension mechanism in Namibia is considered as an African peer and the Australian and Dutch models as international sources.[111]

In Chapter 6 the outcomes of each of the chapters are summarised to draw conclusions. After the conclusions, proposals and recommendations are made on whether the extension mechanism should be amended if it is found that the model is not compliant with international norms.

[109] Ch 3 para 2.
[110] Ch 4 para 6.
[111] Ch 5.

Chapter Two: South Africa's International Law Obligations

1. Introduction

The purpose of this chapter is briefly to explore the functioning of the International Labour Organisation ("ILO") and to analyse the relevant international norms which relate to the extension of collective agreements to non-parties. The aim of this chapter is to determine whether South Africa is aligned to international norms in so far as the extension of collective agreements is concerned.

The South African Constitution provides that when interpreting the Bill of Rights, international law "must" be considered. Section 1 of the Labour Relations Act[1] ("LRA") also stipulates that it is one of the purposes of the LRA to "give effect to the obligations incurred by the Republic as a member state of the International Labour Organisation".

[1] 66 of 1995.

2. Establishment and Functioning of the ILO

The ILO was established in 1919, after the First World War, as part of the Treaty of Versailles.[2] This treaty established the League of Nations, which was to become the United Nations after the Second World War.[3] Since its establishment the ILO has served as the principal international institution tasked with the oversight of labour and social norms in relation to its member states. The ILO has the express goal of promoting social justice, prosperity and peace.[4] The ILO was the independent labour branch of the League of Nations, and since 1946 the ILO has been a specialised agency of the United Nations.[5]

The ILO is a tripartite alliance consisting of representatives of labour, management and government.[6] The ILO currently has 187 countries as member states[7] and comprises three principal bodies, namely, the International Labour Conference,[8] the Governing Body[9] and the International Labour Office.[10]

The ILO's original objectives included establishing global standards of social justice regarding work matters.[11] This ensures that workers are not placed in a position of

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2 The founding document of the ILO is the Treaty of Peace between the Allied and Associated Powers and Germany, Part XIII Labour (1919). See also Van Staden (2012) *TSAR* 94; Erasmus and Jordaan (1993/94) *SAYIL* 65 and 68; and Van Niekerk and Smit (2017) 23.

3 Van Niekerk and Smit (2017) 23.

4 Van Staden (2012) *TSAR* 96 explains that the initial drive to create international labour standards was to curtail competition between countries. The post-First World War social circumstances led to the formation of the ILO to avoid revolution and another war. Wisskirchen (2005) *ILR* 255; Owens *et al* (2011) 30; and Erasmus and Jordaan (1993/94) *SAYIL* 66.

5 Owens *et al* (2011) 30 and the ILO's website (http://tinyurl.com/j8cu7l6, accessed on 8 December 2016, 08:23). The United Nations consists of 15 specialised agencies, and the ILO was the first specialised agency to join the United Nations in 1946.

6 Owens *et al* (2011) 32.

7 The ILO's website (http://tinyurl.com/6lsxn6o ,accessed on 8 December 2016, 10:18).

8 Owens *et al* (2011) 31. The central deliberative forum of the ILO meets once a year during a conference. Each member state sends four delegates (two from government, one from labour and one from management) who vote individually on the issues discussed during the conference. See Wisskirchen (2005) *ILR* 255. According to Van Niekerk and Smit (2017) 24 the most important function of the Conference is to adopt new labour standards.

9 The Governing Body is elected every three years during the Conference, and it constitutes the executive body of the ILO. The Governing Body is composed of 28 government members, 14 employer and 14 employee members. The Governing Body has a range of committees, including the Committee on Freedom of Association. According to Van Niekerk and Smit (2017) 24 the Governing Body is the executive arm of the ILO.

10 Van Niekerk and Smit (2017) 24.

11 Van Staden (2012) *TSAR* 96; and Seady *et al* (1990) *ILJ* 439.

competitive advantage or disadvantage.[12] The Labour Standards agreed to by the ILO's social partners are so-called "minimum standards". This mechanism ensures that member states do not lower their labour standards to gain a competitive advantage in the international arena.[13] The International Standards as reflected in conventions and recommendations have been described as "the building blocks of the organisation's goal of achieving social justice".[14]

Representatives and experts of the International Labour Office discuss, negotiate and adopt conventions.[15] Conventions are not automatically binding on member states, but rather create a voluntary assumption of responsibility.[16] It is for this reason that once a member state has ratified a convention, it should adopt national laws and policies to give effect thereto.[17]

Recommendations,[18] on the other hand, do not constitute formal binding obligations on member states but are published to complement and provide guidelines for the application of certain conventions.[19] They cannot be ratified.[20] Aletter and Van Eck state that recommendations, whilst not binding on member states,[21] should not be

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12 The Constitution of the ILO identified, amongst others, the following important principles: Labour should not be regarded as a commodity; the right of association for all lawful purposes; the payment of a wage adequate to maintain a reasonable standard of life; the adoption of an eight-hour day or forty-eight hour week; the adoption of a weekly rest of at least twenty-four hours; the abolition of child labour and the imposition of such limitations on the labour of young persons to ensure their proper physical and educational development; and equal remuneration between women and men for work of equal value.

13 The International Labour Office's "Rules of the Game" (2014) 11.

14 Van Staden (2012) *TSAR* 93.

15 Owens *et al* (2011) 33; and the International Labour Office's "Rules of the Game" (2014) 14. A convention is a treaty that may be ratified by member states. See also Wisskirchen (2005) *ILR* 257.

16 Van Niekerk and Smit (2017) 25 state that this is due to a hesitance among member states, at the time of the formation of the ILO, who did not want an international parliament in which a majority could dictate to minorities.

17 Article 19(5) of the Constitution of the ILO requires member states to present the adopted convention to their legislative authorities for ratification.

18 In terms of article 19(6) of the ILO's Constitution member states are obliged to bring any ratified recommendations under the attention of the competent authority for the enactment of legislation on par with the recommendation. No further obligation rests on member states than to report to the Director-General of the ILO on the position of law and practice in relation to the recommendation when requested to do so. Wisskirchen (2005) *ILR* 258 states that the deliberation and arguments prior to the implementation of a convention are robust and extensive, particularly regarding the wording to be applied. The effect is often that, after a convention is published and ratified, a recommendation is published which contains all the remaining finer details of the convention.

19 Owens *et al* (2011) 33; and the International Labour Office's "Rules of the Game" (2014) 15.

20 Van Niekerk and Smit (2017) 25.

21 Weiss (2018) *ILJ* 696 states that recommendations lack the quality of enforcement which applies to conventions.

lightly disregarded because they place moral obligations on member states.[22] They state that "both instruments are tools, which organised business, labour and governments should consult and be guided by when drafting and implementing labour law and social policy".

Because the ILO recognised that freedom of association and collective bargaining were of fundamental importance, the Committee on Freedom of Association was founded in 1951 to examine complaints regarding violations of the right to freedom of association, regardless of whether the infringing country had ratified a convention to such effect.[23]

The ILO's most recent declaration is the Declaration on Social Justice for a Fair Globalization, 2008, in which four major areas of decent work in an era of globalization were highlighted, namely, employment, social protection, social dialogue and rights at work.[24] A further important declaration is the Declaration on Fundamental Principles and Rights at Work, 1998 ("the Declaration on Core Labour Standards"). This declaration is an amalgamation of eight fundamental conventions into one binding document – passed due to the low rate of ratifications of core conventions.[25]

Countries that ratified conventions are monitored and supervised by the ILO in respect of the implementation of the standards imposed. Member states are obliged to report to the ILO on a regular basis regarding the implementation of the conventions.[26] However, the efficacy of the ILO's enforcement mechanisms has been criticised because

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22 Aletter and Van Eck (2016) *SA Merc LJ* 301.

23 According to the ILO website (accessed at http://tinyurl.com/hwd3h32 on 31 January 2017, 05:32) employers and employee representatives may refer complaints to the Committee. If the Committee investigates a complaint, it liaises with the government concerned to establish the facts surrounding the complaint. If it finds that the complaint has merit, the Committee will issue a report and recommendations to the ILO's governing body. The country in question is requested to report regularly on the implementation of the recommendations, and where the country is a member state of the ILO, the various legislative aspects of the complaint are referred to the Committee of Experts.

24 Owens *et al* (2011) 31.

25 Weiss (2018) *ILJ* 694. The conventions cover forced labour; freedom of association; the right to organise and collective bargaining; equal remuneration; abolition of forced labour; discrimination; minimum age; and the worst forms of child labour. This Declaration is binding on member states whether they ratified the individual conventions or not. Van Niekerk and Smit (2017) 26.

26 According to the International Labour Office's "Rules of the Game" (2014) 102, member states must report to the ILO every three years on aspects such as the steps taken to incorporate the fundamental and priority conventions into law and practice.

of its perceived focus on enabling and educating member states rather than a sanction-based approach. Referring to the Declaration on Core Labour Standards, Weiss writes:[27]

> "Its aim is to find out why a member state has not lived up to the core labour rights and then to offer financial and technical assistance in order to enable the member state to do better in the future. While it can be argued that the ILO's supervisory and sanctioning system needs to be improved, nevertheless that does not derogate from the fact that the abrogation of the standards was sanctions-based. The problem at present, by contrast, is not the quality of the system of sanctions but the fact that the hard law approach has been abandoned in the declaration in favour of a soft law one."

As confirmed by Van Niekerk and Smit, the soft-law approach, imposed by way of broad conventions and the use of standards (set by way of recommendations and codes of practice), is a response to several challenges wrought by the effects of globalisation.[28]

3. South Africa as a Member of the ILO

South Africa was one of the founding members of the League of Nations in 1919[29] and was thus automatically a member of the ILO when it was established.[30] The ILO played a continuous role in South Africa during its years of turmoil.[31] By 1939 South Africa had ratified eight ILO conventions and voted on 21 which were yet to be ratified.[32] As is elaborated on in Chapter 3, even though the regime of apartheid was only formally entrenched in South African legislation in 1949, South Africa's labour legislation favoured the white minority long before the advent of apartheid.[33]

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27 Weiss (2018) *ILJ* 700.

28 Van Niekerk and Smit (2017) 30 explain that adopting the soft-law approach was a means to address perceived inflexible conventions, as well as a response to the low rate of ratification of conventions.

29 ILO History Project "The Role of the ILO during and Ending Apartheid" ("the ILO History Project on Apartheid") 2013 2. See in general the ILO's website and http://www.ilo.org/addisababa/events-and-meetings/WCMS_229505/lang--en/index.htm (accessed on 19 October 2016 at 15:07) in particular. See also Erasmus *et al* (1993/94) *SAYIL* 69.

30 Erasmus *et al* (1993/94) *SAYIL* 69.

31 Aletter and Van Eck 2016 *SA Merc LJ* 298; Erasmus *et al* (1993/94) *SAYIL* 70; and Van Niekerk and Smit (2017) 24.

32 ILO Century Project "From Workplace Rights to Constitutional Rights in South Africa" (2013) 3.

33 United Nations Bulletin of the International Commission of Jurists – Aspects of the Rule of Law South West Africa (1967) 28, where the following was confirmed: "Long before the South African government evolved its laws to effect the 'separate development' of the different communities ... South West Africa was already suffering the even yet unrealised effects of a pernicious experiment which

Initially the ILO was cautious to interfere with the sovereignty of its member states and hence did not interfere with South Africa's segregation policies.[34] After the rise of the National Party in South Africa and its formal enactment of the policy of apartheid, the relationship between South Africa and the other member states of the ILO deteriorated.[35] Whilst the South African government passed discriminatory legislation, the ILO itself declared discrimination as a fundamental human rights issue in light of the atrocities committed during the Second World War.[36]

The ILO and the United Nations initially formed a joint initiative to oppose apartheid. In 1953 the Ad hoc Committee on Forced Labour issued a report after investigating certain of the discriminatory practices taking place in South Africa.[37] The ILO's Governing Body's Committee on Freedom of Association and the Committee of Experts on the application of Conventions and Recommendations found that the legislation and labour practices in South Africa were racially discriminatory.[38]

During the political turmoil in South Africa in the 1960s, the ILO took a stronger stance against the South African government. In 1961 the ILO passed a resolution condemning the regime of apartheid and called on South Africa to withdraw as a member state of the ILO until apartheid was no longer in force.[39] During the 1963 ILO conference, member states refused the South African government's representative from taking the floor, an unprecedented occurrence. Due to the opposition of the ILO member states,

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used, among other things, the artificial exploitation of tribalism, in order to achieve the isolation of the African from all progressive and educating influences and from all economic benefits within the Territory and outside."

34 ILO Century Project "From Workplace Rights to Constitutional Rights in South Africa" (2013) 4.

35 The ILO History Project on Apartheid (2013) 2.

36 ILO Century Project "From Workplace Rights to Constitutional Rights in South Africa" (2013) 3.

37 Report of the Ad-hoc Committee on Forced Labour of the ILO and United Nations (Geneva) E/2431 1953 83–79. The Committee *inter alia* found that the pass laws seriously infringed upon the freedom of movement of native Africans and had serious economic consequences, the least of which was to direct cheap, permanent and abundant manual labour to certain areas, such as agricultural sectors. A further finding was that African workers under a labour contract could not terminate such contract without committing a criminal offence, which was found to be a restriction of personal freedom. It is interesting to note that the Committee also investigated the apartheid legislation in the form of the Suppression of Communism Act 44 of 1950 and found that it could be used to "correct the political opinions of those who differ from the ideology of the State".

38 The ILO History Project on Apartheid (2013) 3.

39 ILO Century Project "From Workplace Rights to Constitutional Rights in South Africa" (2013) 5. The resolution was accepted by 163 member states, with 89 member states abstaining from voting in favour of the resolution, which allowed South Africa to remain a member state of the ILO. See also the ILO History Project on Apartheid (2013) 3. See also Erasmus *et al* (1993/94) *SAYIL* 75.

steps were taken to ban the South African government from participating in most ILO meetings thereafter.[40]

In 1964 the Declaration concerning the Policy of Apartheid was unanimously adopted and constituents agreed that South Africa was threatening international peace.[41] The ILO's Governing Body demanded that the South African government abandon its policy of apartheid and honour the ILO's undertakings regarding the freedom and dignity of all human beings. South Africa, to avoid official exclusion, subsequently withdrew from the ILO of its own accord on 11 March 1964.[42] The Special Committee on Apartheid tabled a report to the ILO on the labour-aspects of the apartheid regime, thus keeping the international audience's attention on the South African government.[43]

In 1973 a unanimous resolution was passed that all governments should sever all ties, be they diplomatic, economic, or commercial, with the government of South Africa and cease all investments in South Africa.[44]

Whilst South Africa was no longer a member state of the ILO, and particularly in 1988, the Congress of South African Trade Unions ("COSATU"), directed a complaint to the ILO regarding an array of issues surrounding the Republic of South Africa and its failure to comply with international standards surrounding freedom of association.[45]

Because South Africa was not a member of the ILO and initially refused to grant permission for investigation by the ILO, but was still a member of the United Nations, the complaint was referred to the Economic and Social Council of the United Nations

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40 The ILO History Project on Apartheid (2013) 3.

41 See Van Staden (2012) *TSAR* 95 who explains that the ILO, apart from issuing conventions and recommendations, also uses other instruments to formulate standards, such as declarations. Declarations are seldom issued but are intended to reaffirm the ILO's stance regarding certain principles and values. He explains that declarations are not ratified but are nevertheless meant to have wide application. According to the ILO History Project on Apartheid (2013) 4, the Discrimination Convention of 1964 provided the policy framework for the ILO to act against apartheid. The Convention provided an unprecedented continued monitoring and analysis of countries found not complying with anti-discrimination measures. See also Erasmus *et al* (1993/94) *SAYIL* 75, fn 36.

42 The ILO History Project on Apartheid (2013) 4. The ILO was one the first institutions to impose sanctions on the South African government.

43 Van Niekerk and Smit (2017) 24.

44 Erasmus *et al* (1993/94) *SAYIL* 80. This resolution was passed during a Trade Union Conference on Apartheid. The sanctions included severing all ties whether political, economic, military, cultural, sporting and diplomatic.

45 Report of the Fact Finding and Conciliation Commission on Freedom of Association (1992) 1. Also see Saley *et al* (1992) *ILJ* 731.

("ECOSOC") as per agreement between the United Nations and the ILO.[46] A resolution was passed by the ECOSOC in terms of which the complaint was referred to the ILO's Fact-Finding and Conciliation Commission on Freedom of Association ("FFCC") for further investigation and liaison.[47]

Due to the challenges caused by South Africa not being a member state of the ILO, the FFCC[48] could only visit South Africa in 1992 to investigate COSATU's complaint to the ILO. The FFCC conducted its investigation by way of interviews and hearings, and issued a report titled "Prelude to Change: Industrial Relations Reform in South Africa" in 1992. Amongst the issues investigated and recommended on were the contents of trade union constitutions, the right to strike and executive interference with collective bargaining processes.[49]

During its 1992 session, the ECOSOC adopted a resolution in terms of which its satisfaction with the report was recorded. The Secretary-General of the UN thereafter requested the South African government to report annually on its progress in implementing the recommendations contained in the report.[50]

After the first democratic election in 1994 the South African government once more became a member state of the ILO and the Declaration concerning Action against Apartheid was formally dissolved.[51] The ILO provided technical assistance to South Africa in the drafting of the 1995 Labour Relations Act[52] and the establishment of the National Economic Development and Labour Council.[53] The South African government declared its support for the principles and values endorsed by the ILO and has

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46 Saley *et al* (1992) *ILJ* 734; and Erasmus *et al* (1993/94) *SAYIL* 81.

47 Seady *et al* (1990) *ILJ* 449.

48 According to Saley *et al* (1992) 734 the group consisted of three experts, namely, Sir William Douglas, Justice Michael Kirby and Justice Rajsoomer Lallah.

49 Report of the Fact-Finding and Conciliation Commission on Freedom of Association (1992) iii where it is explained that the Minister had the authority to refuse to promulgate collective agreements, to exempt or exclude certain areas or classes of work from the ambit of collective agreements or to promulgate employment conditions proposed by employers.

50 General Observation (CEACR) adopted in 1993, published 80th session of the International Labour Conference (found at http://tinyurl.com/zxxu4cn on 26 January 2016, accessed 09:43).

51 The ILO History Project on Apartheid (2013) 10 further records that the delegates from South Africa were welcomed to the ILO Conference with a standing ovation by all delegates. See also Erasmus *et al* (1993/94) *SAYIL* 84.

52 According to Aletter and Van Eck (2016) *SA Merc LJ* 298 the report of the ILO's Fact Finding and Conciliation Commission was used as a guide in the drafting of the LRA of 1995. See also Du Toit *et al* (2006) 215.

53 The ILO History Project on Apartheid (2013) 11.

ratified all core conventions since 1994,[54] while the courts have consistently upheld the principles contained in the ILO's conventions and recommendations.[55]

4. Founding Principles of Collective Bargaining and the Extension Mechanism

4.1 Introduction

Because of the nature of collective agreements, the right to freedom of association plays a significant role. It is one of the fundamental rights captured in the ILO Declaration on Core Labour Standards.[56] The conventions from which the right to freedom of association stems are the Right to Organise and Collective Bargaining Convention[57] ("the Collective Bargaining Convention") and the Freedom of Association and Protection of the Right to Organise Convention[58] ("the Freedom of Association Convention").[59]

Conventions are deliberately constructed in as wide a sense as possible to provide member states with the required flexibility to import them into their legal systems.[60] Recommendations often contain more general provisions and guidelines to assist member states in implementing conventions.[61]

Both the Collective Bargaining Convention and the Freedom of Association Convention are discussed in this section, as well as the supporting recommendations issued by the ILO which relate to the subject matter of this study.

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54 Van Niekerk and Smit (2017) 24.
55 See below para 5.
56 Article 2(a) of the ILO Declaration on Core Labour Standards provides that all member states are obliged to respect, promote and realise the freedom of association and the effective recognition of the right to collective bargaining.
57 98 of 1949.
58 87 of 1948.
59 In *National Union of Metalworkers of SA v Bader Bop (Pty) Ltd and another* (2003) 24 *ILJ* 305 (CC) para 29 the Constitutional Court confirmed that the key supervisory bodies who ensure that these two conventions are observed are the Committee of Experts of the Application of Conventions and Recommendations and the Freedom of Association Committee of the Governing Body.
60 Wisskirchen (2005) *ILR* 259.
61 Weiss (2018) *ILJ* 696 states that recommendations lack the quality of enforcement associated with conventions.

4.2 Conventions

The Freedom of Association Convention does not define “freedom of association” but rather provides for the components thereof. These include that employees and employers have the right to join organisations of their own choice; that trade unions and employers’ organisations may draw up their own constitutions and rules; and may elect their own representatives without state interference.[62]

The Freedom of Association Convention and the Collective Bargaining Convention should be read together. When member states give effect to the rights of freedom of association as prescribed by the ILO an environment is created in which collective agreements may be concluded.

The Collective Bargaining Convention provides that member states should implement measures to encourage and promote voluntary negotiation between employees and their representatives and between employers and their representatives. These measures are aimed at regulating terms and conditions by means of collective agreements.[63] ILO norms provide backing for the implementation of national legislation that provides for voluntary collective bargaining and the conclusion of collective agreements.[64]

South Africa has ratified both the above conventions.

4.3 Recommendations

As mentioned before, recommendations give content to conventions. They cannot be enforced like conventions, but in the South African context it has been argued that there is a moral obligation to abide by their provisions.[65]

The Collective Bargaining Recommendation[66] supplements the Collective Bargaining Convention.[67] This recommendation provides that member states should implement measures to ensure that collective bargaining is possible at all levels (regarding the

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62 Articles 2 and 3 of The Freedom of Association Convention.
63 Article 4 of the Collective Bargaining Convention.
64 Irwin (LLM UP 2016) 20.
65 Erasmus and Jordaan (1993/1994) 19 *SAYIL* 91; and Aletter and Van Eck (2016) *SA Merc LJ* 299.
66 163 of 1981.
67 Preamble to the Collective Bargaining Convention.

activity, industry, region, regional or national levels).[68] It further provides that measures should be implemented so that "representative" employers' organisations and trade unions are recognised for the purposes of collective bargaining,[69] and that in those member states where collective bargaining takes place at several levels there is coordination between those levels.[70]

Collective agreements are defined in the Collective Agreements Recommendation[71] as

> "all agreements in writing regarding working conditions and terms of employment concluded between an employer, a group of employers or one or more employer's organisations, on the one hand, and one or more representative workers' organisations, or, in the absence of such organisations, the representatives of the workers duly elected and authorised by them in accordance with national laws and regulations, on the other".

The Collective Agreements Recommendation gives content to the Collective Bargaining Convention.[72] It provides that member states should implement measures to extend the application of collective agreements (or parts thereof) to all employers and employees within the industrial and territorial scope of the agreement.[73] This confirms that the ILO supports the principle of the extension of collective agreements.

The conditions required for extending collective agreements as prescribed by the Collective Agreements Recommendation include:[74]

> "(a) that the collective agreement already covers a number of employers and workers concerned which is, in the opinion of the competent authority, sufficiently representative.
>
> (b) that, as general rule, the request for extension of the agreement shall be made by one or more organisations of workers or employers who are parties to the agreement.

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68 Article 4 of the Collective Bargaining Convention.
69 Article 3 of the Collective Bargaining Convention.
70 Article 4(2) of the Collective Bargaining Convention.
71 91 of 1951.
72 Irwin (LLM UP 2016) 19.
73 Article 5(1) of the Collective Agreements Recommendation.
74 Article 5(2) of the Collective Agreements Recommendation. In *National Union of Metalworkers of SA v Bader Bop (Pty) Ltd* (2003) 24 *ILJ* 305 (CC) para 30 it was confirmed that the Committee of Experts on the Application of Conventions and Recommendations has developed a complex jurisprudence on the application of conventions which is contained in its Digest of Decisions, and that such jurisprudence is an important resource in developing the labour rights contained in the South African constitution.

(c) that, prior to the extension of the agreement, the employers and workers to whom the agreement would be made applicable by its extension should be given an opportunity to submit their observations."

A number of significant aspects can be derived from the Recommendation. Firstly, it is clear that a numerical aspect is concerned. The collective agreement should already cover employers and workers who are "sufficiently representative". Secondly, non-parties should be given the opportunity to submit representations before the collective agreement is extended. Thirdly, although not specifically mentioned, it is submitted that the requirement that potentially affected parties be given the opportunity to make prior observations, implies that prior notice must be given of an impending extension of a collective agreement.

Both the Collective Agreements Recommendation and the Collective Bargaining Convention refer to "representative" trade unions and employers' organisations. However, the instruments do not define what is meant by "representative" nor what constitutes "sufficiently representative".[75]

4.4 Supervisory Bodies and Mechanisms

As confirmed by Weiss, it has always been accepted that "it fell to the supervisory committees of the ILO – the committee of experts and the committee on freedom of association – to interpret the vague notions of the conventions and, thereby, to specify their scope and content".[76]

Du Toit states that the labour standards set out in conventions are amplified by the decisions of the ILO's supervisory and investigatory bodies – the Committee on Freedom of Association and the Fact-Finding and Conciliation Commission on Freedom of Association.[77] The Committee on Freedom of Association examines allegations of breaches of the freedom of association, both by member and non-member states, and reports thereon to the Governing Body.[78] The reports of the Committee on Freedom

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[75] Article 3 of the Collective Bargaining Recommendation states that "representative" trade unions and employers' organisations should be recognised for collective bargaining.

[76] Weiss (2018) *ILJ* 697, where he discusses a recent trend among employer representatives to lobby that the right to strike does not form part of the right to freedom of association, despite the bodies of experts finding to the contrary. The employer representatives indirectly challenged the external effect of the findings of these bodies.

[77] Du Toit (2017) 78; and Van Niekerk and Smit (2017) 30.

[78] Van Niekerk and Smit (2017) 30.

of Association are condensed into the Digest of Decisions and Principles of the Freedom of Association ("Digest of Decisions") which is a rich source of international law.[79]

The Digest of Decisions addresses the extension of collective agreements as a category of its own[80] and states that any extension of a collective agreement should be preceded by a tripartite analysis of the consequences that the extension would have on the particular industry.[81] The Digest of Decisions provides that the extension of a collective agreement to non-member employees does not *per se* infringe on the principles of freedom of association, provided that the most representative organisations bargain on behalf of all employees. In circumstances where the industry or sector is comprised of several enterprises, the decision regarding the extension of the agreement must be determined between the parties.[82]

The Digest of Decisions determines that the right to free collective bargaining of sufficiently representative parties may be infringed where a minority support collective agreement is extended.[83] The ILO's committees of experts have confirmed that "the extension of collective agreements is not contrary to the principle of voluntary collective bargaining and is not in violation of Convention No. 98" and that "[i]t observes that such measures are envisaged in several countries".[84]

In 1996, an ILO Working Document mentioned that the process of collective bargaining had originally focused on employee interests, such as fair wages and fair increases. However, it was noted that increasingly employers were making use of the collective bargaining processes as a means to increase productivity and competitiveness.[85] This same document confirmed that employers had typically viewed central bargaining structures as a means of limiting competition by fixing wages, but increasingly employers found that such structures lacked the necessary flexibility in relation to wages, hours of work and utilisation of employees.[86] Regarding the extension of

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79 5th ed (2006) and Du Toit (2017) 78.
80 P 210–211 of the ILO Digest of Decisions.
81 Para 1051, p 210 ILO Digest of Decisions.
82 Para 1052, p 210 ILO Digest of Decisions.
83 Para 1053, p 211 ILO Digest of Decisions.
84 ILO Committee of Experts' General Survey on the Fundamental Conventions concerning Rights at Work in Light of the ILO Convention on Social Justice for a Fair Globalization (2008) (Report III [Part 1B] 99 para 245.
85 ILO ACT/EMP Publications "Collective Bargaining Negotiations" (1996) 8.
86 10. This paper found that in member states with central bargaining structures, employer parties exert pressure to opt for industry or enterprise level bargaining.

collective agreements, the study found that although collective agreements concluded above industry level ought to be extended, such extensions could be seen as "undesirable from several points of view" (for employers). The Working Document recorded as follows:[87]

> "First, extension of collective agreements deprives an employer of the opportunity he would have had, had he been a party to the negotiations, to take account of workplace conditions and needs. This is particularly important at a time when enterprise level bargaining is the trend. Second, it is inconsistent to speak of voluntary collective bargaining on the one hand and provide for involuntary coverage on the other. An extension of coverage should occur, if at all, only where both parties agree to it. Third, extensions are impractical – and can be harmful – in countries with large regional disparities."

These arguments were also endorsed by the Free Market Foundation in the *FMF* case[88] where the applicant challenged the extension mechanism *inter alia* because of its alleged impediment to the growth of small businesses.[89]

5. The Impact of South Africa's International Obligations

South Africa's international law obligations can be inferred from conventions.[90] As mentioned at the outset of this chapter, the Constitution and the LRA provide that international law must be taken into account when legislation is interpreted. Before the adoption of the LRA, when the draft Labour Relations Bill was published, the Cheadle Commission[91] confirmed its view, namely, that the new dispensation should give effect to the decision of the Minister of Labour to commit the South African government to the ILO's conventions, in particular Conventions 87, 98 and 111, and the findings of the FFCC.

According to Du Toit *et al*, all international conventions are not automatically assimilated into South African legislation. In the normal course a further legislative act would be necessary upon ratification.[92] However, the authors do confirm that because the

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87 See fn 85, 11.
88 (2016) 37 *ILJ* 1638 (GP).
89 Above para 9. Also see Ch 4 para 6.3.
90 According to Seady *et al* (1990) *ILJ* 440 such adopted conventions and recommendations are the principal source of international law. See also Du Toit *et al* (2015) 85.
91 The Explanatory Memorandum prepared by the Ministerial Legal Task Team (1995) *ILJ* 279.
92 This is in terms of s 231 of the Constitution, which provides as follows: 1. The negotiating and signing of all international agreements is the responsibility of the national executive. 2. An international

Constitution provides that rules of customary international law binds the Republic South Africa, international law can be part of South African law without the necessity of ratification.[93]

In *NEHAWU v University of Cape Town*[94] it was confirmed that the LRA, as the empowering legislation in terms of section 23 of the Constitution, must be interpreted by courts and tribunals with guidance from domestic and international experience. Such guidance may be gained from the conventions, recommendations and rulings of the ILO.[95]

Due to their very nature, the Bill of Rights and the LRA's individual clauses cannot be interpreted piecemeal but must be interpreted considering their underlying principles.[96] In *S v Makwanyane*[97] it was held:

> "In the context of s 35(1), public international law would include non-binding as well as binding law. They may both be used under the section as tools of interpretation. International agreements and customary international law accordingly provide a framework within which chapter 3 can be evaluated and understood."

Ratified conventions of the ILO thus automatically apply at national level and South African courts are empowered to consider international standards to decide cases where no provision is made for a particular instance, or where insufficient provision is

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agreement binds the Republic only after it has been approved by resolution in both the National Assembly and the Council of the Provinces, unless it is an agreement in terms of subsection (3). 3. An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time. 4. Any international agreement becomes law in the Republic when it is enacted into law by national legislation; but a self-executing provision of an agreement that has been approved by Parliament is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament. 5. The Republic is bound by international agreements which were binding on the Republic when this Constitution took effect.

93 Du Toit *et al* (2017) 85 state that international law can become customary law where it has become settled practice and where there is an acceptance of the obligation to be bound. It is argued that certain of the ILO's conventions have thus become customary law in South Africa. Aletter and Van Eck (2016) *SA Merc LJ* 299 explain that the Constitution does not define what is understood to be "international" or "foreign law". According to them, academics in the field have confirmed that "international law" comprise laws that are applicable between countries, whilst "foreign law" are those legal rules and laws which are internally applicable inside countries with regard to their own citizens.

94 2003 (3) SA 1 (CC) 34.

95 Van Staden (2012) *TSAR* 91.

96 Le Roux in Du Toit (2013) 45, who describes the South African Constitution as "historically self-conscious and that its fundamental purpose is to transform apartheid society into a democratic society".

97 1995 (3) SA 391 (CC).

made.[98] Matlou explains how the South African courts may be influenced by international law:[99]

> "Some of the most pertinent international instruments that are likely to impact on our courts' understanding of social justice include the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the ILO's Convention Concerning Freedom of Association and Protection of the Right to Organise. These instruments reflect international consensus and the values that South Africa through ratification, has committed itself to uphold. The courts may further refer to the non-binding interpretations of the ILO's Committee on Freedom of Association, Committee of Experts, or Commissions of Inquiry."

Recommendations, not having the same binding effect as conventions, do not constitute customary international law. However, Erasmus states that although recommendations are not customary international law they are not irrelevant to the development of labour law.[100]

South African courts are thus obliged to apply international law in the interpretation and application of national legislation. This obligation becomes even more pertinent because our courts have endorsed a "purposive"[101] approach to the interpretation of labour legislation.[102] Purposive interpretation requires that the objective of the various sections of the LRA must be considered against the background of the goals of the Act.[103] It is submitted that the obligation to consider international law does not only include that ratified conventions should be taken into account, but also that other standards (imported by way of recommendations and the rulings of the bodies of experts) should inform the decision-making process.

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98 The Internal Labour Office's "Rules of the Game" (2014) 21.

99 Matlau (2016) *SA Merc LJ* 549.

100 Erasmus *et al* (1993/94) *SAYIL* 91.

101 This is explained as follows in *NUMSA v Bader Bop* (2003) 24 *ILJ* 305 (CC) 321 para 26: "The first purpose of the Act is to give effect to constitutional rights. Secondly the Act makes it clear that it is intended to give legislative effect to international treaty obligations arising from the ratification of ILO conventions. South Africa's international obligations are thus of great importance to the interpretation of the Act. Thirdly, the Act seeks to provide a framework whereby both employers and employees and their organisations may participate in collective bargaining and the formulation of industrial policy. Finally, the Act seeks to promote orderly collective bargaining with an emphasis on bargaining at sectoral level, employee participation in decisions in the workplace and the effective resolution of labour disputes".

102 *BSA v COSATU & another* (1997) 18 *ILJ* 474 (LAC); *CWIU v Plascon Decorative (Inland) (Pty) Ltd* (1999) 20 *ILJ* 321 (LAC); *Chirwa v Transnet Ltd* [2008] 2 BLLR 97 (CC); and *NEHAWU v University of Cape Town* 2003 (3) SA 1 (CC). See also Du Toit *et al* (2015) 79.

103 *Equity Aviation Services (Pty) Ltd v SA Transport & Allied Workers Union & others* (2009) 30 *ILJ* 1997 (LAC).

Van Staden, in exploring the concept of "social justice" in both local and international contexts, explains that "the body of work of the organisation must therefore inform the South African understanding of social justice, as its strategic objectives are the facilitation of social justice, which is also the organisation's fundamental aim".[104]

6. Conclusion

The ILO strives to establish minimum standards that promote the ideals of social justice, prosperity and peace. Although there is no simplistic definition of the notion of social justice, the LRA seeks to promote it and this study endorses its broad principles.

South Africa has aligned itself with the ILO's core values. In terms of the Constitution there is a positive obligation on those applying the law to take such values into account. The South African government has aligned itself with the core values endorsed by the ILO and has placed a positive obligation on those applying the law to take such values into account.

The ILO supports the institution of collective bargaining and the conclusion of collective agreements. However, the ILO does not provide detailed guidance regarding the extension of collective agreements to non-parties. Nonetheless, this is in line with the ILO's strategy of providing member states with flexible guidelines rather than detailed minimum requirements. As noted in the chapter, member states are under a moral obligation to take account of the ILO's recommendations in the absence of non-specific conventions.

Despite the absence of specific rules in this regard, the Collective Agreements Recommendation and the ILO's Digest of Decisions do establish a number of significant broad principles regarding collective agreements and the extension thereof to non-parties. It is against this background that the following key points regarding collective agreements and their extension to non-parties have been identified that should be adhered to.

Firstly, the ILO supports the conclusion of collective agreements. In instances when such agreements cover employers and workers who are sufficiently representative,

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[104] Van Staden (2012) *TSAR* 93.

measures should be taken to extend the application of these agreements to all parties within the area or sector.[105]

Secondly, national legislation may make the extension of collective agreements subject to certain conditions.[106] So, for example, the request for extension must be made by one of the parties to the agreement. In addition, potentially affected employers and employees should be given the opportunity to submit their observations before the agreement is extended.

Thirdly, any extension of a collective agreement should ideally be preceded by a tripartite analysis of the consequences that such extension will have for the industry or area.[107]

Finally, where collective bargaining takes place at both workplace and industry level, there should be cooperation between these levels.[108]

The mentioned guidelines reveal that the ILO places a high premium on the representivity of parties who may request the extension of a collective agreement. The ILO is against the undue restriction of the right to freedom of association and the right to engage in collective bargaining.

The abovementioned guidelines should be taken into account when evaluating the position in South Africa and when future amendments to the LRA are considered.

[105] S 5(1) of the Collective Agreements Recommendation.
[106] S 5(2) of the Collective Agreements Recommendation.
[107] Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO (2006) 1051.
[108] Article 4(2) of the Collective Agreements Recommendation.

Chapter Three: Historical Development of the Extension Mechanism

1. Introduction

In exploring the development of the extension of collective agreements in South Africa, this chapter provides a cursory background to the country's watershed moments pertaining to industrial relations that prompted major legislative change. This chapter specifically focuses on the extension of collective agreements.

The chapter is structured along each of South Africa's industrial relations periods. The political background, applicable labour legislation and the extension mechanism in place during each period are traversed. The chapter concludes with a commentary regarding the extension mechanism as it developed over the years.

2. Historical Perspective

2.1 The Rise of Industrialism and Exclusion

Industrialisation commenced in South Africa between 1867 and 1886 with the discovery of diamonds and gold.[1] Before the advent of industrialism, society was largely agrarian in nature.[2] After the end of the Anglo-Boer War in 1902 many individuals migrated[3] from farms and smaller towns to the metropoles to seek employment.[4]

Initially the mines and supporting industries preferred to employ British and Chinese immigrants due to a lack of skilled labour in South Africa. These migrants were seen as more literate and sophisticated[5] than their African and Afrikaner peers, and were also paid higher wages.[6] After the Anglo-Boer War the Afrikaner joined the ranks of workers in the industrial sector, and they, together with African workers, became the unskilled and semi-skilled workers.[7] With the rise of mechanisation, tensions arose as unskilled workers could be trained to operate machines and thus replace the skilled and semi-skilled workers. Economic growth was a driving factor behind the implementation of the first industrial relations legislation enacted in 1911, namely, the Mines and Works Act.[8] Further legislation was enacted between 1911 and 1920 in response to

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1 According to Jones *et al* (1980) 1 the necessity for comprehensive regulation of labour affairs arose due the discovery of gold in the Witwatersrand in 1886 and later the extraction of coal in Boksburg.

2 See Bendix (2015) 45 and Grogan (2017) 3. The authors explain that the laws of master and servant placed onerous obligations on employees with little regard for their wellbeing. Steenkamp *et al* (2004) *ILJ* 947 describe the Master and Servant Act of 1841 as an Act which primarily set down the rules for black employees.

3 The "Scorched Earth Policy" that the British employed as a strategy during the Anglo-Boer War ruined at least 30 000 farms. Boer and African families were displaced due to the concentration camp strategy. See in general AngloBoerWar.com.

4 See the Wiehahn Report (1982) para 3.5.

5 Jones *et al* (1980) 1.

6 Steenkamp *et al* (2004) *ILJ* 947.

7 According to Jones *et al* (1980) 18 the Afrikaans-speaking section of the white community had led a rural existence which isolated them from industrial development. This in turn led to the majority not possessing any significant industrial skills. Like their African peers, they were not fluent in English.

8 8 of 1911. Bendix (2015) 46 explains that the Mines and Works Act reserved 32 occupations exclusively for white mineworkers. According to the Nelson Mandela Foundation website (available at http://tinyurl.com/jf964wm) the Mines and Works Act provided the Governor-General with the power to grant, cancel and suspend certificates of competency to mine managers, mine overseers, mine surveyors, mechanical engineers, engine drivers and miners entitled to blast. The Governor-General could also decide what other occupations required certificates of competency.

numerous strikes.[9] These measures included the recognition of white trade unions in 1915 and the so-called "stand-still agreements" which were reached with such unions.[10]

Strikes by white workers escalated significantly after 1920. There was a sharp decrease in the gold price and imminent threats that they would be replaced with more affordable African labour.[11] This resulted in tensions erupting in January 1922 in what was to become known as the "Rand Revolt". Over 25 000 white miners embarked on violent strikes and the government[12] intervened by way of military action.[13] Although the miners who took part in the Rand Revolt were ultimately unsuccessful in their demands,[14] the sheer scale of the strike and the measures that the government had to implement to quell it led to the government entering serious discussions with interest groups regarding the implementation of industrial relations legislation to regulate collective bargaining.[15]

Although the original Industrial Conciliation Bill of 1923 did not contain an extension mechanism, interest groups exerted pressure on the government to establish compulsory centralised bargaining structures and to provide for an extension mechanism.[16]

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9 These included the Black Labour Regulations Act 15 of 1911, the Black Land Act 27 of 1913, Workmen's Wages Protection Act 15 of 1914, Riotous Assemblies and Criminal Law Amendment Act 27 of 1914 and the Factories Act 28 of 1918.

10 According to Jones *et al* (1980) 15 these agreements were referred to as "status quo agreements" and entailed that the ratio of positions held by African and white workers would remain the same as it had been during September 1918. See also Bendix (2015) 46.

11 According to Bendix (2015) 46 the reasons why these workers embarked on strike action included being informed about new technology which could see them replaced with less-skilled workers and the "standstill agreements" being abandoned. The Wiehahn Report (1982) para 3.6.(v) states that the influx of soldiers returning from the First World War after 1919 caused a higher rate of unemployment.

12 According to Bendix (2015) 47 to 48 the Smuts government lost its support due to its response to the Rand Revolt. The Smuts government was perceived to have chosen the side of the corporations to the detriment of white workers. A pact government was subsequently established and consisted of a coalition between the Labour Party and the National Party.

13 Jones *et al* (1980) 17.

14 According to Bendix (2015) 47 a significant number of miners were retrenched in any event, and those who were not retrenched had to return to work for lower wages and positions which required a lesser degree of skill.

15 Godfrey *et al* (2010) 42 explain how vigorous the consultations surrounding the Industrial Conciliation Bill were after its publication in 1923. The submissions of trade unions included suggestions that permanent bodies should be established to negotiate and agree on a wide range of issues, and that collective agreements reached by "sufficiently representative parties" should be able to be extended to a whole industry.

16 Godfrey *et al* (2010) 42.

The Industrial Conciliation Act 11 of 1924[17] ("ICA of 1924") provided for the establishment of voluntary collective bargaining structures and an extension mechanism was included for collective agreements concluded at industrial councils.[18]

The ICA of 1924 was primarily enacted to promote labour peace by establishing frameworks and incentives for participating in collective bargaining.[19] It provided for the establishment of industrial councils where collective agreements could be negotiated and concluded,[20] as well as conciliation boards[21] for those industries with no industrial councils.[22] The establishment of industrial councils and conciliation boards was voluntary.[23] Collective agreements concluded by these bodies were legally enforceable between the parties thereto and their respective members, once the Minister of Labour ("the Minister") published a notice to that effect in the *Government Gazette*.[24]

The definition of "employee" in the ICA of 1924 excluded "pass-bearing natives", thus excluding African males as well as trade unions representing them from participating in industrial councils.[25] The ICA of 1924 provided that strike action was illegal if prior

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17 The ICA of 1924 was actually named the "*Nijverheid Verzoenings Wet*".

18 Godfrey *et al* (2010) 43.

19 Steenkamp *et al* (2004) *ILJ* 947.

20 In terms of s 2 of the ICA of 1924 any employer or employers' organisation could agree with a registered trade union to establish an industrial council for the consideration and regulation of matters of mutual interest and the prevention and settlement of disputes between them.

21 In terms of s 4 of the ICA of 1924 any trade union or employers' organisation, or any number of employees or employers, could apply to the Minister for the establishment of a conciliation board in any area or sector where no industrial council was in place. The parties thus applying for the establishment of a conciliation board had to be sufficiently representative in its area of the industry, trade or occupation. See also Godfrey *et al* (2010) 44.

22 Godfrey *et al* (2010) 44 and Grogan (2014) 4 explain that although participation was voluntary, the failure to comply with the 1924 Act was enforced by criminal sanction.

23 Godfrey *et al* (2010) 45.

24 S 9(1) of the ICA of 1924. See also Bendix (2015) 48.

25 S 24 of the ICA of 1924 defined an employee as "any person engaged by an employer to perform, for hire and reward, manual, clerical or supervision work in any undertaking, industry, trade or occupation … but shall not include a person whose contract of service or labour is regulated by any Native Pass Laws and Regulations".

negotiation had not taken place in the collective bargaining forums,[26] thus barring African workers and trade unions from participating in protected strike action.[27] The rationale behind the exclusion of "pass-bearing natives"[28] was to promote the economic position of impoverished white workers at the expense of African workers.[29]

The membership of white, Indian and coloured trade unions increased significantly, partly because of the defeat suffered by the white miners during the Rand Revolt but mostly due to the pressure that registered trade unions could exert on employers by making use of the centralised collective bargaining structures.[30]

The Great Depression had a significant effect on all trade unions.[31] The unions barely had the opportunity to recover before the Second World War broke out. This war caused African workers to be employed in the industrial sector out of necessity.[32] The increase in the employment rate of African workers resulted in a significant proportion of rural and tribal Africans relocating to industrial areas.[33]

The government could not afford production being interrupted during this period and, in response to pressure from African trade unions, the government pressured employers to pay workers increased wages. During this time the recognition of African trade unions became a distinct possibility.[34] However, after the Second World War, African workers once more became replaceable by the white soldiers returning to the workplace.[35] The period after the Second World War was initially an economically unstable

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26 S 12 of the ICA of 1924. See also Bendix (2015) 48.

27 According to Godfrey *et al* (2010) 43 the prohibition on striking in industries with industrial councils without first referring the dispute to the industrial council for conciliation had a two-fold purpose. Firstly, the government wanted to stabilise the relationship between employers and white employees, and secondly such prohibition served as an incentive for employers to participate in industrial councils.

28 At the time of the implementation of the ICA of 1924 "pass-bearing natives" referred to all African workers in Transvaal and Natal.

29 Jones *et al* (1980) 18. See also Steenkamp *et al* (2004) *ILJ* 947 who explain that the exclusion of black workers from the definition of "employee" had the effect that black trade unions could not register under the ICA of 1924.

30 Godfrey *et al* (2010) 44.

31 According to the Wiehahn Report (1982) para 3.6(vii) the Great Depression caused one of the greatest migrations of white Afrikaans workers from the smaller towns to metropolitan areas. A total of 200 000 to 300 000 individuals made this journey in search of work and better prospects.

32 According to the Wiehahn Report (1982) the majority of African workers had been resident on farms and homesteads, and the advent of the war and the promise of work due to a shortage of manpower led to a migration of African workers to the metropolitan areas.

33 See the Wiehahn Report (1982) 477 para 4.11.3.

34 Godfrey *et al* (2010) 49.

35 Godfrey *et al* (2010) 50.

period, but global industrialisation expanded at an extraordinary rate in the extended period of relative peace thereafter.[36]

2.2 The ICA of 1924 and the Extension Mechanism

The extension of collective agreements to non-parties was first introduced into South African legislation by the ICA of 1924[37] and has since continuously featured in labour legislation. Robust dialogue regarding the inclusion of an extension mechanism took place long before the implementation of the ICA of 1924. It was argued that collective agreements concluded by parties who were "sufficiently representative" within an industry should be extendable to the whole industry or area, subject to the Minister's discretion.[38]

The ICA of 1924 provided for the extension of collective agreements concluded in industrial councils and conciliation boards to non-parties upon application to the Minister, who could extend the collective agreement if he or she deemed it expedient to do so and was satisfied that the parties were sufficiently representative of the industry.[39] Such extended agreements would only be applicable to "employees" as defined[40] and could be made binding on non-parties by publication of a notice to such effect in the *Government Gazette*.[41]

The ICA of 1924 did not provide for an exemption procedure in terms of which employers could apply for exemption from an extended agreement,[42] nor did it require prior notice to potentially affected parties. Before extending the collective agreement, the Minister only had to satisfy him- or herself that the parties to the industrial council who had applied for the extension were sufficiently representative of the sector.[43]

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36 The Wiehahn Report (1982) states that the agriculture and mine industries, factories and production, marketing, services, transport etc. underwent an unprecedented boom after the Second World War.
37 Godfrey *et al* (2010) 16.
38 Godfrey *et al* (2010) 42–44.
39 S 9 of the ICA of 1924.
40 Godfrey *et al* (2010) 43.
41 S 9(1)(b) of the ICA of 1924.
42 Godfrey *at al* (2010) 43; and Du Toit *et al* (2015) 7.
43 Once extended, it was a criminal offence to disregard an extended collective agreement. See s 9(5) of the ICA of 1924.

During 1930 the ICA of 1924 was amended to provide for the extension of certain clauses of collective agreements to include African workers.[44] The government thought it expedient to include such amendments because employers could circumvent the ICA of 1924 by dismissing their employees and replacing them with African workers. Minimum wages and maximum hours of work, as set by the industrial councils, were not applicable to African workers and many employers found employing African workers to be more cost effective.[45]

Industrial councils and conciliation boards could report instances to the Minister where the objects of the ICA of 1924 were being defeated by employers paying African workers rates less than those contained in an extended collective agreement, or having African workers work longer hours than prescribed. As a result, the Minister could publish applicable minimum rates and maximum hours of work for African workers.[46]

Further amendments to the ICA of 1924 during 1930 included that the Minister, when publishing a notice that a collective agreement had been extended, could include in the notice any provision for the granting of exemption from an extended collective agreement.[47] This was the first instance where provision was made for a process of exemption from the ambit of an extended collective agreement. Amendments to the ICA of 1924 during 1937 empowered the Minister to extend to African workers all the provisions of a collective agreement and not only provisions dealing with wages and hours of work.

2.3 Absolute Exclusion and Political Unrest

Although, up to that time, the government purposively took a stance of advancing the interests of white employees, certain efforts were made to address the concerns of

[44] S 7(h) of the Industrial Conciliation (Amendment) Act.
[45] Godfrey *et al* (2010) 46.
[46] S 7(h) of the Industrial Conciliation Amendment Act of 1930.
[47] S 7(e) of the Industrial Conciliation Amendment Act of 1930.

African workers.[48] However, the advent of the National Party ("the NP") in 1948 and its policy of apartheid silenced the voices of African workers.[49]

One of the first actions taken by the NP was the appointment of the Botha Commission to probe the labour legislation of the day. The commission *inter alia* advised against the representation of African workers in industries,[50] and suggested that whilst separate trade unions may be created to represent African workers, these should be outlawed.[51] The government, prior to implementing its ideologies in labour legislation, first implemented other segregation strategies by means of amending its pass laws to include African women, which had the effect that they no longer qualified as employees.[52]

The Black Labour Relations Act[53] (the "BLRA of 1953") was implemented in 1953[54] with the purpose of influencing African workers to refrain from being members of African trade unions. The BLRA of 1953 provided for a system in terms of which an association of employers in a trade and area without an industrial council could submit proposals to the Minister concerning wages or conditions of service, with a request that such proposal be made applicable to all employers and African workers engaged in or employed in such area.[55]

The NP repealed and replaced the ICA of 1924 with the enactment of the Industrial Conciliation Act of 1956[56] (the "ICA of 1956"). The most drastic consequences of the

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48 According to Bendix (2015) 51 the period from the implementation of the ICA of 1924 up until the early 1940s had seen continued efforts to provide for some form of representation for African workers on industrial councils, but after the rise of the National Party government all efforts of representation had come to nought.

49 According to Jones *et al* (1980) 79 the enactment of legislation, including most significantly the Group Areas Act 41 of 1950, led to the establishment and proclamation of certain areas to be declared as exclusively white, black or coloured areas, to isolate different racial groups into segregated areas.

50 According to Godfrey *et al* (2010) 50 "in any industry where African workers predominated and formed a powerful trade union, they would be in such a position 'to exercise such influence on the fixation of wages as to have a detrimental effect on the wage levels of European, Indian and Coloured workers in the same industry'".

51 According to the Wiehahn Report (1982) 33 para 3.28 the arguments put forward for why African workers had been excluded from the definition of "employee" included that these workers were deemed too unsophisticated fully to grasp the trade-union system and were too numerous in comparison with other worker-groups and would dominate the industrial system.

52 Godfrey *et al* (2010) 51.

53 Originally the Native Labour (Settlement of Disputes) Act 48 of 1953.

54 Bendix (2015) 51.

55 Jones *et al* (1980) 94, s 11A of the BLRA of 1953.

56 Act 28 of 1956.

ICA of 1956 included the following: All African workers were excluded from its ambit;[57] "mixed" trade unions could no longer be registered as trade unions;[58] any form of strike action was illegal,[59] and the Minister was empowered to appoint an industrial tribunal with the power to investigate and arbitrate disputes referred by industrial councils and conciliation boards.[60]

The ICA of 1956s prohibition of "mixed" trade unions[61] had the effect that many established and registered trade unions were divided along racial lines and had to be reconstituted to retain their registered status. Godfrey *et al* note that it was only with the final separation of unions along racial lines in the 1950s that the incorporation of white workers and the exclusion of African workers were completed.[62]

The apartheid government encouraged businesses to locate their manufacturing plants in close proximity to the homeland areas by providing incentives, the so-called decentralised areas, in order to control the migration of African workers to urban areas.[63] Since the 1970s and in particular between 1972 and 1973, African workers engaged in nationwide strike action to protest against the apartheid regime and put pressure on the government for equal rights,[64] both within and outside the workplace. The 1973 strike saw more than 61 000 participants in KwaZulu-Natal alone.

The government responded to the KwaZulu-Natal strike by implementing the Black Labour Relations Regulation Act[65] in 1973 (the "BLRRA of 1973") to provide for liaison

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57 The 1956 Labour Relations Act defined "employee" as "any person (other than a native) employed by, or working for any employer and receiving, or being entitled to receive any remuneration, and any other person whatsoever (other than a native) who in any manner assists in the carrying on or conducting of the business of an employer". A "native" was defined as "a person who in fact is or is generally accepted as a member of any aboriginal race or tribe of Africa".

58 S 5(6) of the ICA of 1956. S 6 divided once registered trade unions into "original" and "new" trade unions. The "original" trade unions were those trade unions whose constitutions allowed for both white and coloured employees, and the "new" trade unions were those whose constitutions provided for whites only membership. The assets which once belonged to an "original" trade union could be acquired by application by the "new" trade union if the two unions could not agree as to the division of assets within 12 months of the registration of the "new" trade union.

59 See Grogan (2014) 4.

60 S 17 of the ICA of 1956.

61 S 4 of the ICA of 1956.

62 Godfrey *et al* (2010) 45

63 Godfrey *et al* (2016) 12.

64 Steenkamp *et al* (2004) *ILJ* 948.

65 70 of 1973.

committees at workplace level as a replacement for the workers' committees to provide for a communication platform between employers and African workers.[66]

It soon became evident that the BLRRA of 1973 did not have the desired effect of addressing the occurrence of strikes amongst African workers.[67] Under mounting pressure, the government appointed the Commission of Inquiry into Labour Legislation, the Wiehahn Commission, during 1977, to investigate and report on the existing labour relations legislation and to provide recommendations.[68]

The Wiehahn Report recommended *inter alia* that full freedom of association should be granted to all employees irrespective of race or gender; that all trade unions be allowed to register as such irrespective of the race or gender of their members; that job reservation be eased out; and that safeguards be adopted to protect minorities who would no longer enjoy the benefits of job reservation.[69]

Partly due to the recommendations of the Wiehahn Commission, the ICA of 1956 was amended repeatedly between 1980 and 1983. The 1983 amendment saw African workers being included in the definition of "employee" and trade unions being able to register as such despite the constitution of their members.[70] The amendments thus allowed African trade unions to participate in the central bargaining structures as provided for in the ICA of 1953.[71] These changes in the legislative policies spelled the beginning of the end of the dual system of labour relations.[72]

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66 Bendix (2015) 58. The BLRRA of 1973 provided African workers with a limited right to strike, but in practice it was almost impossible for African workers to embark on protected strike action.

67 Steenkamp *et al* (2004) *ILJ* 949.

68 According to Bendix (2015) 58 it is probable that the Wiehahn Commission's instruction was to consider how African trade unions could be controlled and incorporated into the labour relations system without undue disruption.

69 The Wiehahn Report (1982) Part I 24–28 recorded evidence that the dual system of labour relations had a negative effect on employees and employers.

70 See Jones *et al* (1980) 112.

71 Steenkamp *et al* (2004) *ILJ* 950 mention that African trade unions were initially hesitant to make use of industrial councils due to a perception of government interference therein.

72 Grogan (2014) 5.

2.4 The Extension Mechanism in terms of the ICA of 1956 and the BLRA of 1953

2.4.1 The ICA of 1956

Section 48 of the ICA of 1956 provided for an extension mechanism in terms of which some or all the parties to an industrial council[73] could request the Minister to extend a collective agreement[74] to a whole industry.[75] Where an industrial council sought to extend a collective agreement to an area beyond its scope, it would make an application to the Minister. After satisfying him- or herself that the parties to the collective agreement were sufficiently representative of the sector,[76] the Minister would publish a provisional notice in the *Government Gazette*, calling upon affected parties to lodge objections.[77] The only circumstance where the Minister could not extend a collective agreement was where the sector, industry or area concerned fell under a different industrial council, or was subject to another collective agreement or arbitration award.[78]

Where an industrial council requested the extension of a collective agreement to an industry or sector in or near its proximity, and the Minister believed that unfair competition had to be prevented due to such proximity, the Minister could forego the publication of a provisional notice and forthwith publish a notice of extension.[79]

In a significant development, the Minister could consider the good standing of the members of the respective trade unions as at the date of the application for extension, the nature of the industry and the situation of the area.[80] The Minister was empowered

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[73] See Du Toit *et al* (1998) 182 where it is explained that s 27(7) read with s 48 of the ICA of 1956 allowed the Minister to extend a collective agreement concluded by an industrial council where the council voted in favour of the extension by a two-thirds majority.

[74] In terms of s 24 of the ICA of 1956 collective agreements could include provisions regarding minimum rates payable to employees or any class of employees, the average rates to be paid to employees or any class of employees, prohibition of deductions from salaries, the prohibition of set-off for debt against salaries and the method of calculating minimum wages and rates.

[75] S 48 of the ICA of 1956. Jones *et al* (1980) 116 mention that the parties to the industrial council had to apply to the Minister in any event to have their agreement declared binding on all the parties involved.

[76] According to Du Toit *et al* (1998) 183 the Minister was obliged to consider the membership in good standing of the parties to the industrial council, and he or she was permitted to consider the nature of the sector and geographical factors.

[77] S 48(1)(c)(i) of the ICA of 1956.

[78] S 48(1)(c)(ii) of the ICA of 1956.

[79] S 48(2)(c) of the ICA of 1956.

[80] S 48(11) of the ICA of 1956. See also Du Toit *et al* (1998) 183.

to regard parties as sufficiently representative even though they had no members in a particular area or industry, provided that the employer parties employed employees in such area and industry.

In determining whether the parties to an industrial council itself were sufficiently representative of the industry or area, the Minister did not rely only on numerical factors but considered the reality of the sector/area.[81] The additional factors that the Minister considered included the restrictive nature of collective agreements on businesses; the degree of consultation which had preceded the extension request; the extent to which the industrial council had considered any dissenting views; the allowance made for wage differentiation per area; and the opportunities for small businesses to obtain exemption from the terms of the extended collective agreement.[82] After assessing all relevant factors, the Minister had the discretion to extend a collective agreement.[83] It is important to note that no mechanical "checklist" approach was followed to approve the extension of a collective agreement. In *S v Prefabricated Housing Corporation (Pty) Ltd and Another*[84] the Appellate Division held that the promulgation of a collective agreement under section 48 of the ICA of 1956 caused the agreement to be a piece of subordinate domestic legislation.

In a controversial development, section 48(12) of the ICA of 1956 allowed for any method of differentiation.[85] The differentiation could be based on age, sex, experience, length of employment, type of work and class of premises to subdivide the classes of employers and employees to which a collective agreement could be extended – provided that no discrimination was allowed based on race or colour. Despite the bar on discrimination based on race, the Minister could, if he or she believed the "natives" in an area or industry would defeat an extended collective agreement, extend the application of such agreement.[86]

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81 See Du Toit *et al* (1998) 183.
82 See Du Toit *et al* (1998) 183.
83 Calitz (2015) *SA Merc LJ* 3.
84 1974 (1) SA 535 (A).
85 Although the Industrial Conciliation Amendment Act 57 of 1981 removed any reference to "discrimination" and only allowed for "differentiation which is deemed advisable: Provided no differentiation on the basis of sex, race of colour shall be made".
86 S 48(3) of the ICA of 1956.

A number of amendments were made to the ICA of 1956 between 1979 and 1984, one of which had the effect that the ICA of 1956 was renamed the Labour Relations Act ("LRA of 1956").[87] An amendment to the LRA of 1956 during 1984 made it possible for affected parties to appeal directly to the Minister. Such an appeal was permissible where the industrial council refused an exemption from the ambit of a collective agreement.[88]

2.4.2 The BLRA of 1953[89]

The BLRA of 1953 made provision for a separate industrial dispensation for African workers[90] in terms of which a committee system was created, with no connection to the central bargaining structures and a strong shop floor presence.[91] In terms of the dualistic systems created by the ICA of 1956 and the BLRA of 1953, employees working for the same employer could fall under two separate dispensations, with the employer often forced to bargain and reach agreements with its African workers on the shop floor, whilst being subject to a collective agreement reached by an industrial council regarding its other "employees".[92] According to Steenkamp *et al* the cumulative effect of the ICA of 1956 and the BLRA of 1953 was the development of a dualistic and racially segregated labour relations system that polarised white and non-white workers for many years to come.[93]

The BLRA of 1953 established a central native labour board whose members were all of European descent and regional native labour boards whose members were African workers in the employ of the Minister.[94] The regional native labour boards were tasked

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87 Du Toit *et al* (2015) 11 explain that these amendments were made according to the Industrial Conciliation Amendment Acts 94 of 1979 and 95 of 1980, and the Labour Relations Amendment Acts 57 of 1981, 51 of 1982 and 2 of 1983.

88 Additional factors that the Minister could take into consideration were the interests of employers, employees and the public and whether small to medium businesses and new entries into the market would be able to afford the imposed higher wages. Also see the ILO's Report of the Fact-Finding and Conciliation Commission on Freedom of Association (1992) 37.

89 Act 48 of 1953.

90 Du Toit *et al* (2015) 9.

91 The Wiehahn Report (1982) 26 para 3.10.

92 According to the Wiehahn Report (1982) Part 1 Ch 3 para 3.10 one of the many consequences of the dual dispensation was the fact that African workers could only enforce the provisions of their collective agreement via a civil court, at their own expense, whilst the failure to abide by a collective agreement concluded in an industrial council was automatically a criminal offence.

93 Steenkamp *et al* (2004) *ILJ* 948.

94 Ss 3 and 4 of the BLRA.

with furthering the interests of African workers in their respective areas; keeping a close eye on operations where African workers were employed; and to provide reports as to the general conditions of employment and potential disputes to the native labour inspector[95] and central native labour board. The works committees,[96] regional labour committees and central native boards were confined to reporting issues and addressing and resolving disputes under strict government control.[97]

Section 9 of the BLRA provided for industrial councils and/or conciliation boards to deliberate on conditions of employment for an area or industry and to extend a notice to the central or regional native labour board for representatives to attend the meetings where conditions of employment would be considered.[98]

Once a decision had been made by the industrial council or conciliation board regarding the applicability of its deliberations to the African workers concerned, the native labour board had to submit a report to the Minister in which it would indicate whether it agreed with the decision or whether a further opinion from the Wage Board was necessary. Once the Minister was satisfied with the recommendation of the Wage Board, he or she was entitled to proclaim an order in accordance with the recommendation made. The Minister's order would be published in the *Government Gazette* and would thereupon be applicable to all the specified African workers (and their employers) within the area and/or industry.[99]

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95 According to s 8 of the BLRA an European, who would maintain close contact with African workers and remain well-acquainted with their needs, desires and circumstances, could be appointed as a native labour inspector for a specified area.

96 S 7 of the BLRA. Workplaces with a workforce of 20 or more African workers could request their employer to constitute a works committee, where elected members could gain access to the regional native labour boards or native labour inspector. An employer faced with such a request had to constitute a works committee. See *Ngcobo and others v Associated Engineering Ltd t/a Glazier Bearings* (1980) 1 *ILJ* 126 (D).

97 Du Toit *et al* (2015) 9.

98 Any person attending such meeting was entitled to partake in its deliberations as far as African workers in their area would be affected but were not entitled to vote.

99 S 11 of the BLRA. In terms of s 14 of the BLRA, the Minister was entitled to extend the applicability of any order published, to persons who fell under the definition of "employee" under the ICA of 1956 where an object of such order could be defeated by different rates of pay.

2.5 South Africa as a Democracy

With the fall of apartheid and the rise of tripartite negotiations between government, labour and management, new labour legislation became necessary.[100] This was partly because the existing legislation had become archaic because of its numerous amendments since 1924 and its underlying air of exclusion. As stated by Kriek J in *Natal Die Casting Company (Pty) Ltd v President, Industrial Court and others*:[101]

> "I have on previous occasions ... expressed dismay at the fact that the legislature, in 1979, saw fit to cut, trim, stretch, adapt and generally doctor the old Act in order to accommodate the recommendations of the Wiehahn Commission instead of scrapping the old Act and producing an intelligible piece of legislation which clearly and unequivocally expressed its intentions."

The ILO's Fact-Finding and Conciliation Commission on the Freedom of Expression ("FFCC") noted as follows regarding the ICA of 1956:

> "One of the fundamental issues with the LRA in its current form, on which there was agreement between parties, is the lack of coherence in its structure and complexity. These problems have followed the large number of often radical amendments which have been made to it in the 25 years following its original adoption. The result is extremely difficult to understand. The Government recognised that the LRA is inadequate for South Africa's needs and must be amended."[102]

The Cheadle Task Team was appointed in 1995 to overhaul South Africa's labour legislation and to provide a negotiating document to be discussed by all social partners. Narrowing some of the problems which had previously been identified regarding the extension of collective agreements, it was found that administrators and adjudicators had been granted too wide a discretion in their decision-making powers.[103] This echoed the sentiments of the FFCC regarding the Minister's erstwhile discretion to

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[100] According to Grogan (2014) 7–8 the defects of the ICA of 1956 included its scope, in that it did not include domestic workers or public servants; the vagueness of the unfair labour practice definition; its structure for dispute resolution perceived as lacking; and the uncertainty about the rules and practices of collective bargaining.

[101] (1987) *ILJ* 245 253J–254A.

[102] The ILO's Report of the Fact-Finding and Conciliation Commission on Freedom of Association (1992) para 578.

[103] See the Explanatory Memorandum to the Draft Labour Relations Bill 1995: Ministerial Legal Task Team (1995) *ILJ* 16 278–279. One of the reasons for the establishment of the Cheadle Task Team was to prepare a Labour Relations Bill which would give effect to the public statements of the President that were made during the ILO's Fact Finding and Conciliation Commission's various visits to South Africa.

deny the extension of collective agreements despite all procedural requirements having been met or exceeded.[104]

The Cheadle Task Team recommended that bargaining councils should provide for the protection of the interests of small to medium business enterprises by including in their constitutions mandatory representation of such businesses. As a measure of protection against the unchecked discretion to extend such agreements it was recommended that all collective agreements should contain an expedited and independent exemption procedure.[105]

The Cheadle Task Team finally suggested that a bar should be placed on the Minister's extensive discretion to extend collective agreements. It was recommended that the Minister would be obliged to extend collective agreements where they would not discriminate against non-parties and where the failure to extend would undermine collective bargaining at industry level.[106]

The recommendations of the Cheadle Task Team led to the publication of the draft Labour Relations Bill. The Labour Relations Act 66 of 1995 (the "LRA of 1995") was adopted and it repealed the LRA of 1956 and the BLRA of 1953. The LRA of 1995 provided for a system of voluntary participation in central bargaining processes and unashamedly promoted centralised bargaining and a majoritarian model.[107]

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[104] The ILO's Report of the Fact-Finding and Conciliation Commission on Freedom of Association (1992) paras 709–710 confirmed the importance of voluntary bargaining between parties with minimal government interference and that such interference can only be justified due to major economic and social interests in the general interest.

[105] Explanatory Memorandum (1995) *ILJ* 16 296. The recommendation was that parties affected by an extended collective agreement should be able to apply for exemption on the grounds of "undue hardship".

[106] Explanatory Memorandum (1995) *ILJ* 16 299.

[107] The LRA of 1995 does not define "majority" or "majoritarianism" but does ensure that trade unions with majority status obtain certain rights above smaller trade unions. The LRA of 1995 defines "representative trade unions" as "a registered trade union, or two or more registered trade unions acting jointly, that are sufficiently representative of the employees employed ... in a workplace". As regards the extension of collective agreements within bargaining councils, s 32 of the LRA of 1995 refers to "the majority of the members of trade unions (or employer's organisations) that are party to the bargaining council". See also Bendix (2015) 65.

With the enactment of the LRA of 1995 the dual system of labour relations came to an end.[108] Industrial councils and conciliation boards were replaced with bargaining councils[109] and the Commission for Conciliation, Mediation and Arbitration. The Industrial Court was replaced by the Labour Court and Labour Appeal Court.

3. Conclusion

Having considered the historical development of the extension of collective agreements, several key findings can be made. Firstly, since the enactment of South Africa's first national labour legislation, the ICA of 1924, provision has always been made for an extension mechanism.

Secondly, the extension mechanism was first introduced with the intention to promote business-critical aspects. In this regard the extension of collective agreements was meant to curtail competition, by levelling the playing field in industries which render the same products or services.

Thirdly, and although not initially the primary reason for implementing the extension mechanism, the introduction of an extension procedure was intended to ensure that the maximum number of employees enjoy the protection and benefit of collective bargaining, including those employees who did not belong to a trade union.

Fourthly, by extending collective agreements an additional goal would be achieved whereby it would induce non-parties to participate in central bargaining structures, and in doing so, promote labour peace. The original rationale for the extension mechanism remains valid today and is perhaps even more pressing due to the advent of globalisation.

Lastly, it can be noted that the extension mechanism itself has changed dramatically over the years and has become much more refined. Initially the mechanism was quite rudimentary and allowed the Minister the greatest degree of circumspection in deciding whether a collective agreement was to be extended or not. Later, provision was

[108] Except for employees of the Defence Force and State Security Agency, who are excluded from the ambit of the LRA of 1995 in terms of s 2 of the LRA of 1995.

[109] According to a report of the Department of Labour, in March 2018 there were a total of 38 registered bargaining councils for the private sector and 6 registered bargaining councils for the public sector.

made for an exemption procedure, until the stage where the Minister had to consider the circumstances of the industry in question before extending a collective agreement.

Chapter Four: Extension of Collective Agreements in South Africa

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1. Introduction

South African courts have increasingly been faced with challenges to the extension of collective agreements. These challenges are often directed at the constitutionality of the extension mechanism. Any evaluation of the current model invariably leads to a discourse on the majoritarian principle. In *Kem Lin Fashions CC v Brunton & another*[1] the Labour Appeal Court ("LAC") had the following to say about the legislature's endorsement of the majoritarian model in the context of the extension of collective agreements:[2]

> "One policy choice is that the will of the majority should prevail over that of the minority. This is good for orderly collective bargaining as well as for the democratization of the workplace and sectors. A situation where the minority dictates to

1 (2001) 22 *ILJ* 109 (LAC).
2 Para 19.

> the majority is, quite obviously, untenable. But also a proliferation of trade unions in one workplace or sector should be discouraged."

This chapter commences with an analysis of the increasing tension regarding the extension of collective agreements and the application of the majoritarian principle. The second part of the chapter deals with a number of constitutional principles and the LRA's general collective bargaining framework. The third part analyses the LRA's extension mechanisms for collective agreements. The fourth and fifth parts examine the reasons why collective agreements are extended and the objections thereto. The chapter concludes with a general commentary on the stance endorsed by the courts, and a synopsis of the current position regarding the extension of collective agreements.

2. **Tension Between Majoritarianism and Minority Trade Unions**

In the South African context, civil, political, economic, social and cultural rights all form part of the Bill of Rights contained in the Constitution, 1996.[3] Everyone is guaranteed certain fundamental rights. However, these fundamental rights may be limited by way of national legislation. The most significant fundamental rights applicable to labour law are the freedom of association and the right not to be discriminated against.[4] The right to freedom of association is dependent on government protection and as such is usually defined in legislation.[5]

The principle of majoritarianism has featured in South African labour law since the inception of the Labour Relations Act of 1995 ("the LRA") and it forms a central theme

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3 For example, civil rights include the right to equality (s 9); the right to human dignity (s 10); the right to life (s 11); and the freedom from slavery and forced labour (s 13). Political rights include the right to assembly, demonstration, picket and petition (s 17); and freedom of trade, occupation and profession (s 22). Economic rights include freedom of trade, occupation and profession (s 22). Social rights include the right to language and culture (s 30) and the right to cultural, religious and linguistic communities (s 31).

4 Davies (2004) 40.

5 Davies (2004) 42.

of collective bargaining.[6] It entails that majority interests prevail over individual or minority interests.[7] The stronger the membership base of a trade union the more influence such a union has in the sphere of collective labour law.[8] The court made the following statement about majoritarianism in *Ramolesene v Andrew Mentes*:[9]

> *"*By definition, a majority is, albeit in a benevolent sense, oppressive of a minority. In those circumstances, therefore, there will inevitably be groups of people, perhaps even fairly large groups of people, who will contend, with justification, that a settlement was against their interests. Nonetheless, because of the principle of majoritarianism, such decision must be enforceable against them also."

The South African legislature has shown its support for the majoritarian principle *inter alia* by section 49(1) of the Basic Conditions of Employment Act[10] ("BCEA") in terms of which collective agreements enjoy preference over certain basic conditions of employment, and section 65(1) of the LRA which provides that the right to strike may be limited by way of collective agreement. Brassey has levelled the following criticism at the principle of majoritarianism:[11]

> "The current system, in which central bargaining enjoys primacy over plant bargaining, is too unresponsive to the demands of a complex economy. Majoritarianism, the leitmotif of both industry bargaining and plant-level organizational rights, is too crude to give proper expression to the interests of minority unions, which frequently represent skilled or semi-skilled workers but, as the Marikana experience demonstrates, may simply be acting on behalf of workers who feel alienated from the majority union."

The criticism against the majoritarian principle also applies to the extension mechanism. The nub of the argument is that, although the objects of the LRA include the promotion of sectoral level bargaining and labour peace,[12] the system could be detrimental to significant groups of employees.

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6 Du Toit (2000) *ILJ* 545.
7 *Ramolesene v Andrew Mentes* (1991) 12 *ILJ* 329.
8 *Police and Civil Rights Union v Ledwaba* (2014) 35 *ILJ* 1037 (LC) 1050.
9 (1991) 12 *ILJ* 329.
10 75 of 1997.
11 Brassey (2013) 34 *ILJ* 834.
12 Through the discouragement of multi-party trade unions within a single workplace or industry, as can be seen in s 21(8) of the LRA where the commissioners of the Commission for Conciliation, Mediation and Arbitration ("CCMA"), when deciding upon whether a trade union is representative, should seek *inter alia* to minimise the proliferation of trade unions and should encourage a system of a representative trade union in a workplace.

Once a collective agreement has been extended in the workplace or sector, all minority trade unions are effectively bound unless they can subsequently secure majority membership. This has been confirmed by a number of significant court decisions. The fact that the 2014 amendments to the LRA included mechanisms for minority trade unions to obtain certain organisational rights confirms that the legislature acknowledged, to a certain extent, that tensions and power struggles are at play between majority and minority trade unions.[13] Policy makers sought to ameliorate the situation.

Brassey alludes to the fact that the tragic events at Marikana are an example of the worst that can happen during inter-union rivalry in the presence of established collective bargaining structures.[14] The employees at Lonmin, Marikana, were members of the National Union of Mineworkers ("NUM") but felt disenfranchised due to the perception that NUM and their employer had too cosy a relationship. When the Association of Mineworkers and Construction Union ("AMCU") entered the arena as an alternative trade union, a large portion of employees elected to join AMCU. The employees demanded a wage increase outside the existing bargaining structures and the employer refused. In the face of the employer's refusal to bargain, the employees embarked on an unprotected strike. Violence and intimidation escalated during the strike and 44 people were tragically killed and 78 were wounded.[15]

The events that took place at Marikana cannot be blamed on the failure of the LRA's collective bargaining structures alone. However, some argue that this compounded the problem.[16]

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[13] S 21(8A) of the LRA provides that a commissioner of the CCMA may grant organisational rights to a registered trade union that does not have the majority of employees within a workplace as members specified.

[14] Brassey (2013) *ILJ* 823.

[15] For more information about the Marikana massacre, read the Farlam Report (2013). Amongst the deceased and injured were security personnel, South African Police Service officers and employees. According to the report, a number of factors contributed to the massacre. Amongst the contributing factors were a perceived inability to traverse the existing bargaining structures; wage inequality of the Rock Drill Operators ("RDOs") when compared to other mines; the failure of NUM to try and assist the RDOs despite their not being NUM members; the violent manner in which the strikers engaged from the beginning of the strike, which compounded the employer's unwillingness to consult with the RDOs; the employer's failure to ensure the safety of its employees by not issuing instructions not to return to work; AMCU's opportunistic use of the unprotected strike as a platform from which to gain membership; and the failure by the SAPS to implement an effective crowd control plan.

[16] See Ngcukaitobi (2013) 34 *ILJ* 840 who elaborates on the extreme levels of poverty and the lack of sanitation and housing in the immediate informal area near Lonmin. He argues that the wage demand and the legality of the strike took second place, and that the striking miners actually embarked

Ngcukaitobi cautions that any proposed amendments to the LRA should only be made after careful consideration of South Africa's social realities. He emphasises the imbalance in the power relationship between employers and employees, the current functioning of the collective bargaining structures and the prevalence of entrenched structural inequality.[17] He writes:[18]

> "This alienation can be seen as an inevitable outcome of the current labour relations system which does not include a legally enforceable duty to bargain but instead promotes collective bargaining between employers and 'representative trade unions' who capture the majority of employees employed by an employer in a workplace. Many smaller factions of the labour force who do not reach the stipulated threshold of representation, potentially rival minority unions as was the case in Marikana, are denied an effective voice through this structure."

The question remains whether the central bargaining structures do enough to protect the rights of minority groups. Snyman describes the tensions that arise in the majoritarian system as an unavoidable conflict between the right to freedom of association[19] and the right to bargain collectively,[20] which cannot always be compatible.[21]

The erstwhile Industrial Court developed a complicated body of case law which included a general duty to bargain in good faith.[22] The current LRA established a voluntary majoritarian system in terms of which all organisational rights are afforded to majority trade unions,[23] and some to sufficiently representative trade unions. The duty to bargain in good faith has been discarded.[24] It follows that no organisational rights accrue to small minority trade unions. The number of members within a workplace is the most significant factor in securing organisational rights.

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upon the strike to address socio-economic issues which came to pass due to structural violence and inequality.

17 Ngcukaitobi (2013) 34 *ILJ* 847 explains that structural violence exists where essential services such as education and care are significantly better in more privileged societies. The resulting inequality in the rendering of services equates to structural violence being perpetrated against the most vulnerable in society.

18 Ngcukaitobi (2013) 34 *ILJ* 853.

19 S 18 of the Constitution, 1996.

20 S 23(5) of the Constitution, 1996.

21 Snyman (2016) *ILJ* 867.

22 Explanatory Memorandum (1995) *ILJ* 291.

23 The organisational rights contained in ss 14 and 16 of the LRA, namely, the right to elect trade union representatives and the right to the disclosure of information accrues to a representative trade union, or two or more registered trade unions acting jointly, that have as members the majority of the employees employed by an employer in a workplace.

24 The organisational rights contained in ss 12, 13 and 15, namely, access to the workplace, deduction of trade union levies and leave for trade union activities accrue to representative trade unions.

In *Association of Mineworkers & Construction Union & Others v Chamber of Mines of SA acting in its own name & on behalf of Harmony Gold Mining (Pty) Ltd & Others* the Constitutional Court ("CC") made the following comment regarding majoritarianism:[25]

> "Nearly 23 years into democracy, and over two decades since the adoption of the LRA, it has been suggested that the statute's embrace of majoritarianism is no longer appropriate. This is because it enforces a 'winner-takes-all approach'."

However, despite this remark, the CC accepted that the policy makers endorsed the principle of majoritarianism when they introduced the LRA. Consequently, the extension mechanism of collective agreements was found not to be unconstitutional. This study poses the question whether the current system should be adapted.

3. **Collective Bargaining Framework**

Section 2 of the Constitution provides that it "is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled".[26] The legislative framework in which the extension mechanism functions stems from section 23(5) of the Constitution which provides that:

> "Every trade union, employers' organisation and employer has the right to engage in collective bargaining. National legislation may be enacted to regulate collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1)."

The LRA was enacted to give effect to section 23(5) of the Constitution and to regulate collective bargaining. The LRA provides for the conclusion of collective agreements and for the extension of such collective agreements. Section 23 provides for extension within a workplace whilst section 32 provides for the extension of collective agreements concluded in bargaining councils.

Apart from the LRA, the BCEA establishes a floor of basic conditions of employment[27] and empowers the Minister of Labour ("the Minister") to issue ministerial and sectoral

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[25] (2017) 38 *ILJ* 831 (CC) para 47.
[26] S 2 of the Constitution, 1996.
[27] Godfrey (2016) 5.

determinations which supersede the basic conditions of employment.[28] The LRA provides for the conclusion of collective agreements which in turn trump the provisions of the BCEA. It therefore is clear that terms and conditions collectively agreed upon enjoy preference over the BCEA's basic conditions of employment.

Section 23 of the Constitution also guarantees certain collective bargaining rights: employees have the right to join a trade union and participate in its activities, and to embark on strike action; employers have the right to join an employers' organisation and participate in its activities; and trade unions have the right to organise.

Other relevant sections of the Constitution include section 33 which provides for the right to fair administrative action;[29] section 36(1) which contains the limitation clause that determines how and when a constitutional right may be limited;[30] and section 39 which provides that anyone interpreting the Bill of Rights must promote the values that underlie an open and democratic society based on human dignity, equality and freedom. It also states that courts must consider international law and may consider foreign law.

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[28] Sectoral determinations enable the Minister to establish basic conditions of employment in sectors or areas where no bargaining council agreement is in place. Prior to publishing a sectoral determination, an investigation must be done by the Director-General of Labour. A notice is published in the *Government Gazette*, notifying the public of the investigation and inviting comment. Once the investigation is completed, a report is issued to the Employment Conditions Commission ("ECC") for further recommendations. The ECC considers the report and the following: the ability of the employers concerned to continue their businesses effectively; the operation of small, medium or micro-enterprises and new enterprises; the cost of living; the alleviation of poverty; conditions of employment; wage differentials and inequality; the likely impact of any proposed condition of employment on current employment, or the creation of new employment; the possible impact of the proposed conditions of employment on the health, safety or welfare of employees; and any other relevant information. Once the Minister has received a report from the ECC, she or he may make a sectoral determination regarding a particular area or sector. Ministerial determinations are arranged in terms of s 50 of the BCEA. Ministerial determinations are in effect the same as sectoral determinations, save for the fact that minimum wages are not arranged and certain basic conditions of employment may not be varied or excluded by way of ministerial determination.

[29] S 33 of the Constitution provides as follows: "1. Everyone has the right to administrative action that is lawful, reasonable and procedurally fair. 2. Everyone whose rights have been adversely affected by administrative action has the right to be given written reasons. 3. National legislation must be enacted to give effect to these rights, and must - (a) provide for the review of administrative action by a court, where appropriate, an independent and impartial tribunal." The national legislation enacted in terms of s 33 is the Promotion of Administrative Justice Act 3 of 2000.

[30] S 36(1) provides as follows: "The Rights in the Bill of Rights may be limited only in terms of law of general application to the extent that the limitation is reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom, taking into account all relevant factors, including - the nature of the right, the importance of the purpose of the limitation, the nature and the extent of the limitation, the relation between the limitation and its purpose, and less restrictive means to achieve the purpose."

The Constitution also provides that fundamental rights may be limited in certain circumstances, thus confirming that not all fundamental rights are absolute. A permeating feature which flows from the Constitution into the LRA is the advancement of social justice.

The LRA's objectives[31] include the following:

> "[T]o advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary object of the Act, which are:
> (c) To provide a framework within which employees and their trade unions, employers and employers' organisations can -
> (i) Collectively bargain to determine wages, terms and conditions of employment and other matters of mutual interest."

Apart from the above, the LRA also has the following goals:

> "(d) To promote -
> (i) Orderly collective bargaining;
> (ii) Collective bargaining at sectoral level;
> (iii) Employee participation in decision-making in the workplace; and
> (iv) The effective resolution of labour disputes."

The LRA gives content to the fundamental labour rights contained in the Constitution. It promotes orderly collective bargaining and the conclusion of collective agreements. Added to the purpose of the LRA, section 3 of the LRA specifies how the LRA is to be interpreted. This section states that any person who interprets the Act must interpret it in such a manner as to give effect to its primary objectives, in compliance with the Constitution and in compliance with the public international law obligations of the Republic.[32]

From the above it is clear that the Constitution places a high premium on the protection of collective labour rights. Not only the right to freedom of association is protected but also the right to strike and to engage in collective bargaining.

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31 S 1 of the LRA.
32 South Africa's international law obligations are discussed in Ch 2 para 5.

4. **The Extension Mechanisms: Sections 23 and 32 of the LRA**

The current LRA retained some of the structures and procedures of the Labour Relations Act of 1956.[33] One of these is the extension mechanism. Sections 23 and 32 of the LRA provide for two types of extension mechanisms. Section 23 applies to the extension of collective agreements at workplace level whilst section 32 applies to agreements concluded at industry level and particularly those concluded under the auspices of bargaining councils.[34]

Although this study mainly investigates the extension of bargaining council agreements it would not provide the full picture if the extension of collective agreements beyond the scope of bargaining councils is not briefly mentioned.

4.1 Section 23: Workplace Extensions

Section 23(1)(a) of the LRA provides that a collective agreement is binding on all the parties thereto as well as their respective members. Section 23(1)(d) states that the collective agreement binds all employees who are not members of the trade union party to the agreement if has as its members the majority of employees in the "workplace".[35]

In *Association of Mineworkers and Construction Union v Chamber of Mines* the LAC highlighted the following differences between sections 23 and 32:[36]

> "[I]t is apparent from a reading of ss 23 and 32 ... that the two sections contemplate two different kinds of collective agreements. In s 23 collective agreements outside bargaining councils are contemplated and provided for, whereas s 32 contemplates collective agreements concluded on a broader basis, and more particularly, within bargaining councils. Moreover ... one significant difference is that collective agreements concluded within bargaining councils are capable of extension to employers who are not parties to the agreement, while the same is not permissible for agreements concluded outside bargaining councils."

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[33] See Ch 3 for the historical development of the extension mechanism.

[34] *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others* (2016) 37 *ILJ* 1333 (LAC).

[35] S 23(1) of the LRA of 1995. In *Association of Mineworkers and Construction Union and Others v Chamber of Mines* (2017) 38 *ILJ* 831 (CC) it was confirmed that the term "workplace" refers to whether the place(s) of work are independent operations, and to where employees as a collective work.

[36] *AMCU* LAC para 43.

4.2 Section 32: Extension of Bargaining Council Agreements

Section 32 of the LRA provides for the extension of a collective agreement concluded in a bargaining council to non-parties.[37] Collective agreements concluded in bargaining councils are regarded as subordinate legislation.[38] The process to extend a collective agreement concluded in a bargaining council commences with the parties to the council passing a resolution that an existing collective agreement be extended. This resolution is followed by a written request to the Minister, who is obliged to extend the collective agreement within 60 days if the requisite numerical and jurisdictional requirements have been met.[39]

The numerical requirements include that the Minister must be satisfied that the resolution passed by the bargaining council was supported by the majority members of the bargaining council;[40] that the non-parties identified in the request do fall within the registered scope of the bargaining council;[41] and that the members of the employers' organisations that are parties to the bargaining council will be found to employ the majority of all the employees in the scope of the collective agreement.[42]

Once the Minister is satisfied about the numerical majority requirements, he or she must consider what is referred to as the "jurisdictional" requirements for the extension of collective agreements. These requirements include that the bargaining council has an effective procedure to process exemption applications within 30 days;[43] that the collective agreement provides for an independent body to hear any appeals against the refusal or withdrawal of an exemption application within 30 days of such refusal or withdrawal;[44] that the collective agreement must contain fair criteria to be applied by

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37 These "non-parties" include parties who are in the bargaining council and who did not consent to the collective agreement, and employers and employees who are not party to the bargaining council at all but whose services fall within the registered scope and area of the bargaining council in question. See Du Toit *et al* (2017) 320; and Grogan (2014) 170.

38 Du Toit *et al* (2017) 319.

39 Du Toit *et al* (2017) 320.

40 Du Toit *et al* (2017) 320 state that this resolution must be supported by both the majority of the trade union parties and the employers' organisation parties whose members employ the majority of the employees.

41 S 32(b) and (c) of the LRA of 1995.

42 S 32(3)(a) of the LRA of 1995.

43 S 32(3)(dA) of the LRA of 1995. This section was included in the LRA during December 2014.

44 S 32(3)(e) of the LRA of 1995; and Du Toit *et al* (2017) 321.

the independent body when considering an appeal;[45] and that the terms of the collective agreement may not discriminate against non-parties.[46]

These numerical and jurisdictional requirements are built into the extension mechanism due to the impact that such agreements may have on non-parties.[47] Once the Minister is satisfied with the numerical and jurisdictional requirements, the collective agreement must be extended within 60 days of the Minister receiving the written request.[48] All extensions are formalised through publication of a notice in the *Government Gazette*, declaring that as from a certain date the identified collective agreement is extended to and binding upon non-parties.[49] Once the numerical and jurisdictional requirements are satisfied the Minister exercises a non-discretionary function by extending an agreement.[50]

If, however, the numerical requirements are not met but the jurisdictional requirements are present, the Minister has a discretion to extend the collective agreement if the parties to the bargaining council are sufficiently representative[51] and where the failure to extend would undermine collective bargaining at sectoral level.[52]

Before extending the collective agreement in terms of the discretionary extension mechanism, the Minister must inform interested and potentially affected parties that an application to extend a collective agreement has been received and that such agreement is available for inspection.[53] Interested parties are also invited to comment within a period of not less than 21 days from the date of publication.[54] The Minister

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45 S 32(3)(f) of the LRA of 1995.
46 S 32(3)(g) of the LRA of 1995.
47 Du Toit *et al* (2017) 319 state that the provisions are built in to seek a balance between the statutory purpose of promoting sectoral bargaining and fairness to non-parties.
48 Du Toit *et al* (2017) 321.
49 S 32(2) of the LRA of 1995.
50 *Free Market Foundation v The Minister of Labour & others* (2016) 37 *ILJ* 1638 (GP) para 21. Cheadle (2006) *ILJ* 697 describes this as an "automatic" extension where the parties to the agreement are representative.
51 Regarding representativeness, s 49(4) of the LRA of 1995 provides that "a determination of the representativeness of a bargaining council in terms of this section is sufficient proof of the representativeness of the council for the year following the determination for any purpose in terms of this Act, including a decision by the Minister in terms of ss 32(3)(b), 32(3)(c) and 32(5)".
52 S 35(5) of the LRA of 1995; and Du Toit *et al* (2017) 322.
53 The Minister notifies interested and potentially affected parties via publication in the *Government Gazette*.
54 S 35(5)(c) of the LRA. This requirement was introduced into the LRA during December 2014.

may only proceed to extend the collective agreement once he or she has received and considered all comments and representations.[55]

The Minister must perform his or her duties in respect of section 32 personally and may not delegate his or her powers, functions and duties to any other functionary.[56] Once an agreement has been extended by the Minister, section 49(2) of the LRA requires the bargaining council to inform the Registrar of Labour Relations ("the Registrar") annually, in writing, as to the number of employees who are covered by the collective agreement, who are members of trade unions which are party to the bargaining council, and who are employed by members of party employers' organisations.[57]

As confirmed by Du Toit *et al*, exemptions from extended collective agreements have long been a contentious issue despite official statistics revealing that less than 5% of affected employers apply for exemption and that exemptions have a high rate of approval.[58] The only requirement set by the LRA is that there must be fair criteria, captured in the collective agreement, that promote the objects of the LRA.[59] Exemptions primarily serve as a measure by which affected employers, who for various reasons cannot comply with the terms of the extended collective agreement, may have a safety valve for a limited period – after which the terms of the collective agreement will be applicable.[60]

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55 S 32(5)(d) of the LRA of 1995.

56 S 208A(1) of the LRA of 1995.

57 Du Toit *et al* (2017) 321 state that the Minister relies on a determination of the representativeness of a bargaining council by the Registrar in terms of s 49(4) of the LRA. However, it is further stated that, due to a lack of accurate statistics on the number of employees within the scope of bargaining councils, there is no way to determine the actual degree of representivity of a bargaining council. Grogan (2014) 174 states that s 49(2) of the LRA was amended in 2014 most likely to address the previous legal challenge of *Valuline CC v Minister of Labour* (2013) 34 *ILJ* 1404 (KZP). In this matter an extension was set aside because the Minister placed undue reliance on a certificate of representativeness to determine whether a bargaining council was representative of the sector. The 2014 amendments to the LRA saw s 49(4) amended to reflect that "a determination of the representativeness of a bargaining council in terms of this section is sufficient proof of the representativeness of the council for the year following the determination for any purpose in terms of this Act, *including a decision by the Minister in terms of sections 32(3)(b), 32(3)(c) and 32(5)*" (own emphasis).

58 Du Toit *et al* (2017) 323.

59 S 32(3)(f) of the LRA.

60 Du Toit *et al* (2017) 323 state that exemptions therefore should be narrowly construed. The authors list a number of examples that have been considered in deciding whether an exemption should be granted, including: whether the exemption would grant an employer a competitive edge; whether an exemption would undermine collective bargaining in the sector; the effect of the exemption on the employees' rights to fair labour practices; and the consent of affected employers.

If exemption is refused the collective agreement must also contain an appeal procedure and an independent appeal body to hear the appeal.[61] A measure of objectivity is mandatory regarding the appeal body, as no representative, office-bearer or official of a trade union or employer's organisation and a party to the bargaining council may be a member of the appeal body. Any such individual may also not partake in the deliberations of the appeal body.[62]

4.3 The Labour Relations Amendment Bill 2017

On 17 November 2017 the Minister published an explanatory summary of the Labour Relations Amendment Bill 2017[63] ("the LRAB of 2017") to amend certain provisions of the LRA.[64] One of the motivations for the LRAB of 2017 is "to provide criteria for the Minister before the Minister is compelled to extend the collective agreement as contemplated in the Act" and "to provide for the process and criteria for the extension of bargaining council agreements to non-parties by the Minister".

The proposed amendments to section 32 of the LRA include that the Registrar must determine whether a bargaining council is sufficiently representative prior to the Minister effecting an extension by way of discretionary extension.[65] Furthermore, the Registrar must decide whether the majority of employees who will fall under the extended collective agreement are members of party trade unions, or whether the majority of employers' organisation members will be found to employ the majority employees who will fall under the extended agreement, before the Minister may extend the collective

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61 The requirement of an independent appeal body was introduced by the Labour Relations Amendment Act 6 of 2014 ("the LRAA 2014"). According to Du Toit *et al* (2017) 324 an appeal against a refusal or withdrawal of an exemption application is not a narrow appeal, but a fresh determination on the merits of the exemption application.

62 S 32(3A) of the LRA. This section was also implemented in terms of the LRAA 2014.

63 The LRAB of 2017 was published in the *GG* 629/41257 of 17 November 2017.

64 The LRAB of 2017 was passed by the National Assembly on 29 May 2018. See https://www.parliament.gov.za/press-releases/labour-laws-communal-property-associations-amendment-bill-and-pic-act-legislative-proposal-get-approval-national-assembly (accessed on 3 June 2018, 04:45).

65 S 32(2A) of the LRAB of 2017 provides that where the Registrar determines that the parties to the bargaining council are sufficiently representative, the Minister will be obliged to extend the collective agreement within 90 days of receiving the request to extend. S 32(5A) of the LRAB of 2017 empowers the Registrar to take into account the composition of the workforce in the sector, including the extent to which employees are employed by temporary employment services, fixed-term employees and part time or non-standard types of employment. According to the Memorandum of the Objects of the LRAB of 2017 the purpose of the extension of the period in which the Minister must extend the collective agreement is to provide the Minister with more time to consider comments received from affected parties.

agreement at all.[66] A last noteworthy proposed amendment is that the exemption and appeal procedure has been extended to include a provision that the Minister may make regulations regarding the procedures and criteria to be applied by a bargaining council when considering applications for exemption.[67]

In terms of the explanatory memorandum accompanying the LRAB of 2017, section 32(2) of the LRA, as it is currently formulated, only allows for the extension of a collective agreement where both the trade unions represent the majority of members, and the employers' organisations represent the members who employ the majority of employees. The effect of the proposed amendment to section 32(2) will be that only one of these requirements has to be met – that is, either the trade unions represent the majority of members, or the employers' organisations represent the members who employ the majority of employees. The following is stated in this regard:[68]

> "In order to promote collective bargaining at sectoral level and in accordance with the jurisprudence of the International Labour Organisation ("ILO"), the operating principle underlying the extension of agreements is whether the agreement applies to the majority of employees in the sector or scope of the agreement. In other words, the principle is now one of coverage rather than strict representativeness."

It is clear that the proposed amendments will transfer the burden of assessing the representivity of the bargaining council from the Minister to the Registrar. This is a positive development as far as greater emphasis is placed on determining whether the numerical requirements have been met, and it is also to be welcomed that the Minister will be empowered to provide guidelines regarding exemption applications.

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66 According to the Memorandum of the Objects of the LRAB of 2017 the changes to s 33(b) and (c) are meant to provide for improved representativeness requirements regarding the extension of collective agreements. The amendments will provide that either the trade union party or the employers' organisations be in the majority (either have the most members or employ the most employees within the scope of the agreement). The focus therefore will be on coverage as opposed to representativeness.

67 According to the Memorandum of the Objects of the LRAB of 2017 the purpose of this proposed amendment is to provide the Minister with greater powers in providing guidelines and setting criteria that bargaining councils must consider.

68 Para 2.1.1(b) of the Memorandum of the Objects of the LRAB of 2017.

5. Authors' Arguments For and Against the Extension Mechanism

Generally speaking, bargaining council agreements only apply to the assenting parties to the bargaining council, their members and the members' employees.[69] However, when collective agreements are extended the agreements' provisions become applicable to non-parties. The non-parties affected by an extended bargaining council agreement are bargaining council parties who did not assent to the agreement, as well as parties who are not part of the bargaining council.[70] Workplace agreements, once validly extended, will apply to employees who are not members of the trade union parties to the collective agreement.[71] The ultimate effect of the extension of collective agreements is to bind parties who are not necessarily engaging in collective bargaining to the collective agreement. The extension mechanism therefore can be seen as a departure from the right to engage freely in one's own chosen profession or business and from the principle of contractual freedom.[72]

As far back as 1939, Hamburger noted that the object of securing the extension of a collective agreement is to ensure uniform employment conditions. By extending a collective agreement, the living conditions of unionised employees will not be undermined by non-unionised members being able to accept lower conditions of employment, whilst employers are protected against unfair competitive practices by rivals in relation to labour conditions.[73] The author confirmed that there could be only two ways in which uniform conditions of service could be extended industry wide: firstly, by compulsory industry-wide trade union or employers' organisation membership; secondly, by way

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69 S 31 of the LRA.

70 As observed by Irwin (LLM UP 2016) 51 in the context of bargaining councils, the non-parties to the bargaining council are treated as if they assented to the application to extend the collective agreement.

71 S 23(1)(d) of the LRA determines that a collective agreement will bind employees who are not members of the registered trade union or trade unions party to the agreement if (i) the employees are identified in the agreement; (ii) the agreement expressly binds the employees; and (iii) that trade union or those trade unions have as their members the majority of employees employed by the employer in the workplace.

72 S 22 of the Constitution, 1996, provides that every citizen has the right to choose their trade, occupation or profession freely.

73 Hamburger (1939) *ILR* 154–155.

of extending collective agreements to cover whole industries. He noted that the second option would be the less offensive one.[74]

From a minority trade union perspective, Snyman notes that the extension of collective agreements[75] is a statutory advantage that majority trade unions have over minority trade unions. The terms of an extended collective agreement will be applicable to such a minority trade union who will be deprived of its aspirations relating to organisational rights.[76] The "deprivation relating to organisational rights" relates to section 65 of the LRA which prohibits any party bound by a collective agreement which contains a peace clause to take part in strike action in respect of that issue.[77] This limits minority trade unions' right to strike.

From an employer's point of view, Godfrey states that there are three main reasons why employers seek exemption from the extension of collective agreements. These are based on affordability, exemption from the bargaining council's social benefit schemes and technical reasons (such as working on Sundays or working shorter lunch breaks).[78] Maritz notes that "employers with different needs who are parties to bargaining councils have difficulty in reaching agreement on a wage offer" and that this is but one reason for protracted strike action in South Africa.[79]

Brassey is one of the most prominent opponents of the extension mechanism. He suggests that deeper structural changes are necessary to address the increasing unemployment rate, including the repeal of the extension mechanism.[80] He ascribes this to the oversupply of labour in comparison with the demand for labour, and to the over-

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74 Hamburger (1939) *ILR* 156 and 157. The author states that the extension of the first option would encroach upon the fundamental right to freedom of association.

75 Ss 18, 23(1)(d), 25, 26 and 78 of the LRA are other provisions noted to be in favour of majority trade unions.

76 Snyman (2016) *ILJ* 875–876.

77 S 65 of the LRA provides as follows: "(1) No person may take part in a strike or a lock-out or in any conduct in contemplation or furtherance of a strike or a lock-out if - (a) that person is bound by a collective agreement that prohibits a strike or lock-out in respect of the issue in dispute; (b) that person is bound by an agreement that requires the issue in dispute to be referred to arbitration; (c) the issue in dispute is one that a party has the right to refer to arbitration or to the Labour Court in terms of this Act or any other employment law; (d) that person is engaged in (i) an essential service; or (ii) a maintenance service."

78 Godfrey *et al* (2010) 72.

79 Calitz (2015) *SA Merc LJ* 1.

80 Brassey (2012) 33 *ILJ* 1.

regulation of the labour market. He believes that the central bargaining system is run by "the big players", namely, large companies and established trade unions who have only their own best interests at heart.[81]

Brassey concedes that the extension of bargaining council agreements, based on the majority principle, is not objectionable only in so far as those parties to whom the agreement will apply should share a common identity and interests. Where there are issues in which there are no common interests, majoritarianism should give way to subsidiarity.[82] He agrees that the total abolishment of multiparty collective agreements would not be practical as South Africa has a long history of collective bargaining, but suggests that collective agreements should only be made applicable to those who are party to the agreements. In conceding that the extension of bargaining council agreements may be executed in a conscientious manner, he suggests that, if a particular group is to be tasked with establishing the minimum standards and conditions of another interest group, it should be led by the advice of a body of experts tasked with the furtherance of the interests of all the affected groups.[83] In the absence of abolishing the whole central bargaining system, he calls for a system whereby bargaining councils should serve the purpose for which they were established, namely, to formulate industry minimum standards as opposed to the fixing of actual wage levels as a bar to new entrants.

Although Brassey's free-market view may seem alluring, his point of view is not aligned to the purposes of the LRA which seek to promote collective bargaining at sectoral level and the achievement of social justice.

Brassey's caution surrounding the "big players" in bargaining councils should not be lightly dismissed, as these parties could easily sway a vote because of their majority

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81 Brassey (2012) 33 *ILJ* 4. He states that these gains include big capital derived from the current system of industrial relations. The current system ensures that unions may fix wages and be confident that non-members cannot undercut those wages. On the other hand, employers are safe in the knowledge that wages are fixed and may serve as a barrier to entry by new and small firms. Du Toit (1993) *ILJ* 578 mentions that small business organisations in industrial councils "is as thin on the ground as union organisation, and suspicion of industrial councils ranges from strong to intense".

82 Brassey (2012) 33 *ILJ* 9.

83 (2013) 34 *ILJ* 832. He surmises that the true reason for the extension mechanism lies elsewhere than in the promotion and furtherance of uniform terms and conditions of employment – the reason for the existence of the extension mechanism is to avoid undercutting "to prevent workers and firms who want to enter a market from competing with incumbents by offering jobs at lower wages and lesser terms of employment".

status. In acknowledging that the possibility exists that bargaining councils may act in a manner that does not promote all parties' interests, it is a suggestion worth considering that an objective institution should play a supervisory role to ensure that any limitation or challenges regarding non-parties are truly necessary and beneficial to the majority of employees.

Du Toit is not opposed to the extension mechanism, but states that the current central bargaining system may not be as effective as one might think. In coming to this conclusion, he refers to the Marikana massacre and the role that the current collective bargaining structures played in increasing tension between rival trade unions.[84] Despite voicing concerns about the current industrial relations system, he states that the extension mechanism forms a necessary component of collective bargaining and central bargaining as it is the only way in which to promote sectoral bargaining.[85]

Calitz ascribes the ever-increasing strike rate in South Africa to the perceived inflexibility of the existing central bargaining system. The author also proposes a more accommodating system as alternative.[86] She voices the same concern as Brassey regarding the "big players" in bargaining councils ruling the arena. The author suggests that bargaining council agreements should be brought within the ambit of the Competition Act.[87] She lauds the current extension mechanism for its emphasis on a speedy exemption procedure but suggests that the extension mechanism should be amplified by specific guidelines for the exemption procedure. She agrees with Brassey's suggestion that bargaining councils should be guided by the advice of a body of experts. She refers to requirements to publish a sectoral determination in terms of the BCEA[88] as a possible example of such guidance.[89]

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84 Du Toit (2014) 35 *ILJ* 2640. The author criticises Parliament for failing to deal with systemic problems and its actions in "cementing the position of majority trade unions by opening small windows of opportunity for unions that have not quite achieved majority status".

85 Above 2643.

86 (2015) *SA Merc LJ* 1.

87 89 of 1998. This Act currently excludes collective bargaining and collective agreements in s 3(a)–(b).

88 Ss 44 and 51–54 of the BCEA. The publishing of a sectoral and ministerial determination is preceded by a thorough investigation of the sector concerned, which includes referring the issue to the Commission for Employment Conditions (which is composed of experts in the labour market and employment conditions).

89 (2015) *SA Merc LJ* 27. See fn 28 above regarding ministerial and sectoral determinations.

In her evaluation of the discretionary extension mechanism Irwin criticises the fact that the Minister has not been provided with any guidelines to ascertain the relevant interests of potentially affected non-parties. Although she ultimately finds that the extension mechanism (in so far as the mandatory extension mechanism is concerned) passes constitutional and international muster, she suggests that the discretionary extension mechanism be deleted from the LRA.[90]

Having considered South Africa's industrial relations history in Chapter 3 and the arguments of authors, it is submitted that the extension mechanism should remain. The extension mechanism has always featured in the South African labour law system and the current primary objects of the LRA include the promotion of sectoral bargaining and the advancement of social justice. However, criticisms launched against the extension mechanism should not be ignored. These include that violent strike action has escalated in the face of seemingly insurmountable odds when faced with a majoritarian system, that bargaining councils act as cartels and that they have forsaken the primary role of setting industry minima.

Therefore, if there are avenues for ensuring greater participation and more transparency they may address many of the concerns surrounding the extension mechanism. So, for example, the proposals regarding an objective authority adopting an oversight role to establish whether the collective agreement should be extended seem like a laudable suggestion. A body tasked with a similar role already exists in the form of the Employment Conditions Commission ("ECC"), whose role could be extended quite easily.

The suggestion regarding the introduction of clear and objective criteria for exemption from extended bargaining council agreements also has merit. This is in the process of being addressed by the legislature in terms of the LRAB of 2017[91] and should be viewed as a positive development.

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[90] Irwin (LLM UP 2016) 67 explains that "although there is a rationale behind the principle of extensions, there is not a rationale where the will of a minority is imposed on a majority and section 32(5) is therefore not consistent with an open and democratic society based on human dignity, equality and freedom. The many divergent interests across an industry are not being taken into account, nor is the need to promote democratisation of the workplace and sectors. Whilst the will of the majority, on its own, is not reason to justify a limitation of the infringed rights, when considering that principle of democracy and what this entails in an open and democratic society, section 32(2) of the LRA is far more likely to pass constitutional muster than section 32(5)".

[91] Discussed in para 4.3.

6. **The Key Legal Imperatives before the Courts**

The part is a conspectus of recent case law which deals with purposive interpretation, the separation of powers doctrine, the majoritarian principle and the extension mechanism. The purpose of this part is to assess the direction taken by the courts with the view of considering whether the extension mechanism remains valid whilst applying a doctrinal analysis, while also advancing social justice.

6.1 Purposive Interpretation and the LRA

In *Equity Aviation Services (Pty) Ltd v SA Transport & Allied Workers Union & Others*[92] the majority union adhered to the requirements for a protected strike. Non-member employees participated in the strike. The employer dismissed the non-member employees and they referred an automatic unfair dismissal dispute to court. The LAC had to decide whether the LRA required non-members of a union, supporting the same dispute, to follow a separate procedure to participate in protected strike action.

In deciding the question the LAC confirmed that the interpretation of the provisions of the LRA should be done with the intention to give effect to its primary purposes and in accordance with the Constitution and public international law obligations. This interpretive process was described as follows:[93]

> "Accordingly, before you settle on a particular interpretation of any provision of the LRA, s 3 requires you to stand back and ask yourself the questions: Does this interpretation give effect to any or one or more of the primary objects of the LRA? Is this interpretation in compliance with the Constitution? Is this interpretation in compliance with the public international law obligations of the Republic? If the interpretation that is proposed does not give effect to the primary objects of the LRA or any one of the primary objects of the LRA or if it is not in compliance with the Constitution or with the public international law obligations of the Republic, that interpretation should be rejected and an interpretation should be sought which will comply with the injunction in s 3 of the LRA."

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92 (2009) 30 *ILJ* 1997 (LAC).

93 *Equity Aviation* para 40. Zondo AJA held that: "This does not mean that one disregards the language chosen by the legislature to formulate the statutory provision. However, it does mean, in my view, that where adherence to the literal meaning of the statutory provision would not give effect to or promote the purpose or object of the provision and there is another meaning or interpretation that can be given to the provision which would promote, or give effect to, the purpose of the statutory provision, effect must be given to the interpretation that gives effect to the purpose of the provision even if this means departing from the ordinary or literal or grammatical meaning of the words or provision."

Equity Aviation provided more guidance regarding "purposive interpretation". The court observed that the following questions should be posed when assessing provisions of the LRA, namely: What was the position prior to the enactment of the provision; what was the defect for which the common law did not provide; what mischief was the legislator trying to remedy; and what is the true reason for the remedy chosen?[94]

When applying the interpretative formula as set out in *Equity Aviation* in assessing the extension mechanism, reference may be made to the explanatory memorandum which preceded the publication of the LRA in 1995. The "mischief" to be remedied was that the Minister's erstwhile discretion to extend collective agreements often undermined collective bargaining.[95] The amendment also sought to refine the procedures for the granting of exemptions from industrial council agreements.[96] The response to the mischief was to introduce an extension mechanism in terms of which the Minister is obliged to extend a collective agreement as long as it does not discriminate against non-parties. Any failure to extend should also not undermine collective bargaining at industry level. The collective agreement should also provide for a speedy exemption procedure.[97]

6.2 The Ebb and Flow of Majoritarianism

In *National Union of Metalworkers of South Africa and Others v Bader Bop (Pty) Ltd and Another*[98] the CC affirmed that the LRA should be interpreted in such a manner that constitutional rights are not limited. The National Union of Mineworkers of South Africa ("NUMSA") approached the CC as a court of appeal after the LAC issued an interdict barring it from engaging in strike action in furtherance of demands for organisational rights.[99] What made the dispute contentious was that NUMSA was a minority

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94 *Equity Aviation* para 45.
95 Explanatory Memorandum (1995) *ILJ* 283 and 292.
96 Above 292.
97 Above 299.
98 (2003) 24 *ILJ* 305 (CC).
99 *Bader Bop* para 11. The judges of the LAC were divided on the matter, but the general view was that the LRA conferred on trade unions the right to elect trade union representatives only when such union is representative of a majority of the workers in the workplace. Where the trade union in question is a minority union, it cannot demand to appoint trade union representatives, nor can it embark

trade union in the workplace, while only majority and sufficiently representative trade unions are entitled to organisational rights.

The court held that the rights of majoritarian trade unions were clear. These unions may enforce their claim for organisational rights by way of a legislative enforcement mechanism.[100] However, the court had to consider whether the general scheme of the LRA should be interpreted in such a manner that minority trade unions are precluded from obtaining organisational rights.[101] In adopting a purposive approach the court confirmed that the LRA has four purposes: Giving effect to constitutional rights; to honour South Africa's international obligations;[102] to provide a framework whereby employers and employees may participate in collective bargaining; and the promotion of orderly collective bargaining with an emphasis on sectoral bargaining.

The court held that where it is possible to elect a broad interpretation that does not infringe a constitutional right, such broad interpretation should be preferred to a narrow interpretation. The court concluded that although various provisions of the LRA may create the impression that the LRA does promote majoritarianism to the exclusion of minority trade unions, such impression loses sight of the views of the ILO's supervisory bodies[103] and that such an interpretation would not avoid the limitation of constitutional rights.[104] Van Eck opines that *Bader Bop* endorsed the rights of minority trade unions and pluralism in the workplace.[105]

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on lawful strike action in furtherance of such demand. The minority judgment concluded that such a limiting interpretation of the LRA should be avoided.

[100] By way of s 21 read with s 65 of the LRA.

[101] *Bader Bop* para 25.

[102] *Bader Bop* para 31. With reference to the ILO it was confirmed that the Committee of Experts on the Application of Conventions and Recommendations and the Freedom of Association Committee of the Governing Body of the ILO "have accepted that this does not mean that trade union pluralism is mandatory, they have held that a majoritarian system will not be incompatible with freedom of association, as long as minority unions are allowed to exist, to organize members, to represent members in relation to individual grievances and to seek to challenge majority unions from time to time".

[103] *Bader Bop* para 50 states that "it can be said that the jurisprudence of the enforcement committees of the ILO would suggest that a reading of the Act which permitted minority trade unions the right to strike over the issue of shop steward recognition, particularly for the purposes of representation of union members in grievance and disciplinary procedures, would be more in accordance with the principles of freedom of association entrenched in the ILO conventions".

[104] *Bader Bop* para 39.

[105] Van Eck (2017) 38 *ILJ* 1501.

In *Association of Mineworkers and Construction Union and Others v Chamber of Mines of South Africa and Others*[106] three trade unions which formed a majority concluded a collective wage agreement in terms of section 23 of the LRA with the employers represented in the Chamber of Mines. AMCU was a newcomer trade union and did not enjoy majority membership at most of the mines of those employers represented by the Chamber of Mines. It represented a majority of members at some of the mines and did not consider itself bound by the collective agreement. It embarked on the process to commence with strike action at those individual workplaces where it had majority membership. The Chamber of Mines launched an application for an interdict.

On appeal, the LAC confirmed that there was nothing unconstitutional about the majoritarian principle and that it had been recognised as an essential and reasonable policy choice for the achievement of orderly collective bargaining.

AMCU lodged an appeal against the LAC decision to the CC.[107] The court considered whether section 23(1)(d) of the LRA infringes the rights of minority unions to freedom of association, the right to collective bargaining and the right to strike. AMCU essentially challenged the majoritarian principle which does not "achieve social justice for minority unions whose social circumstances may not be the same as those workers who have mandated the majority".[108] The CC observed:[109]

> "It may be posited that if there is to be orderly and productive collective bargaining, some form of majority rule in the workplace has to apply. What section 23(1)(d) does is to give enhanced power within a workplace, as defined, to a majority union: and it does so for powerful reasons that are functional to enhancing employees' bargaining through a single representative bargaining agent."

Whilst acknowledging that the extension mechanism does limit the right to strike, the CC found that the limitation is both reasonable and justifiable as it promotes orderly

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[106] (2016) 37 *ILJ* 1333 (LAC).
[107] (2017) 38 *ILJ* 831 (CC).
[108] *AMCU CC* para 46.
[109] *AMCU CC* para 44.

collective bargaining. Although it was affirmed that there might be an alternative interpretation whereby constitutional rights would be less restricted, it was confirmed that the principal task of the CC was to determine whether the model preferred by the legislature passes scrutiny under the Bill of Rights and not to pass law.[110]

The court referred to *Bader Bop* and its observation that minority unions should be granted the opportunity to function and exist.[111] The court found that minority unions nevertheless retained certain rights, which meant that the LRA does not use the majoritarian model as an instrument of repression. The court ultimately held that the limitation of the right to strike is both reasonable and justifiable. The court also confirmed that the extension of a collective agreement is narrowly tailored to a specified goal, namely, orderly collective bargaining. This decision clearly supported majoritarianism.

In *Association of Mineworkers and Construction Union and Others v Bafokeng Rasimone Management Services (Pty) Ltd and Others*[112] AMCU members found themselves unable to enter the employer's premises and were subsequently issued with notices of dismissal due to operational requirements. Neither AMCU nor their members had received prior notice of possible dismissal and had not been invited to participate in the consultations preceding the dismissals. A retrenchment agreement had been reached between the employer and two majority trade unions and was extended to AMCU in terms of section 23(1)(d) of the LRA.[113]

AMCU's challenge against section 23(1)(d) of the LRA was based on the fact that private parties could effectively negate an employee's individual rights in relation to the procedural and substantive fairness of a dismissal, which infringes the rule of law, the principle of legality and the right of access to courts.

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[110] *AMCU CC* para 51 in relation to the interpretation of "workplace".

[111] In *AMCU CC* para 54 it was held that: "And the statutory structures that enforce the majoritarian system nevertheless allow minority unions freedom of association. Minority unions have recruiting rights (which AMCU had), organisational rights (which AMCU had), deduction rights (which AMCU had), recognition of shop stewards (which AMCU had), time off for union office-bearers to do union work (which AMCU had) and bargaining rights (which AMCU had). Though they did lose the right to strike while the agreement was in force, none of the non-signatory unions or employees lost any of their organisational and collective bargaining entitlements."

[112] (2017) 38 *ILJ* 931 (LC).

[113] The agreement recorded *inter alia* that the substantive provisions of s 189 of the LRA had been complied with.

In assessing the matter, the Labour Court ("LC") cautioned that the separation of powers doctrine should be respected[114] and affirmed the objectives of the LRA.[115] The court held that even though the extended agreement did not relate to wages but to retrenchment, this was no reason to read an exclusion into the operation of section 23(1)(d) of the LRA. It confirmed that the section permits the extension of all types of collective agreements.

AMCU appealed the outcome reached by the LC. The LAC upheld the decision of the LC and stated:[116]

> "The extension of a collective agreement without affording a minority union or non-union members a hearing is rationally related to the achievement of the purpose of section 23(1)(d) process. It facilitates orderly collective bargaining; it avoids the multiplicity of consulting parties and it fosters peace and order in the workplace."

This decision provided further support for the principle of majoritarianism.

In *South African Correctional Services Workers Union v Police and Prisons Civil Rights Union*[117] the Department of Correctional Services ("DCS") concluded a collective agreement with the Police and Prisons Civil Rights Union ("POPCRU") regarding the organisational rights in terms of sections 12, 13 and 15 of the LRA.[118] During 2010 the DCS concluded a separate collective agreement with a minority union, the South African Correctional Services Workers Union ("SACOSWU"). This agreement addressed issues pertaining to access to members in grievance and disciplinary proceedings, as well as stop-order facilities. Dismayed that the DCS had entered into a separate collective agreement with a minority trade union that did not meet the agreed threshold,

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[114] *Bafokeng* para 86.
[115] *Bafokeng* para 90.
[116] *Association of Mineworkers and Construction Union v Royal Bafokeng Platinum Limited* JA23/2017 [2018] ZALCJHB 208 (26 June 2018) para 69.
[117] (2017) 38 *ILJ* 2009 (LAC).
[118] S 18 of the LRA provides as follows: "(1) An employer and a registered trade union whose members are a majority of the employees employed by that employer in a workplace, or the parties to a bargaining council, may conclude a collective agreement establishing a threshold of representativeness required in respect of one or more of the organisational rights referred to in sections 12, 13 and 15." In *SACOSWU* the DCS and POPCRU had a threshold agreement, termed Resolution 3 of 2006, which determined that a single trade union had to have a membership base of 9 000, or if two unions were acting in concert, 4 500 members each, in order to be admitted to the bargaining council.

POPCRU lodged an interpretation dispute. The arbitrator relied on *Bader Bop* and concluded that nothing in the LRA precluded the employer from concluding a collective agreement with a minority union.

The arbitrator's decision was set aside on review by the LC[119] and SACOSWU appealed to the LAC. The issue in dispute was whether the employer was entitled to grant organisational rights to a minority party where the employer was bound by a threshold agreement. The LAC relied on ILO norms and confirmed its support for the majoritarian principle subject thereto that minority trade unions are not prevented from functioning. It was noted that the ILO's supervisory bodies confirmed that minority trade unions should still be able to assist their members with internal grievances[120] and cautioned that "a monopoly imposed by law" is at variance with the principle of freedom of association. The LAC concluded that the wording of section 20 of the LRA has the effect that nothing, not even the existence of a threshold agreement, could preclude an employer from entering into a collective agreement with a minority union. The LAC relied on *Bader Bop* in finding support for minority unions.

POPCRU appealed to the CC, where it was confirmed that an interpretation of the LRA which would deny minority unions the right to engage in collective bargaining should be avoided. Reading such a limitation into the LRA would be inconsistent with the Constitution as well as the norms of the ILO.[121] The following was stated after considering *Bader Bop*:[122]

> "[T]he principle of majoritarianism which is embraced by our labour law is not incompatible with the principle of freedom of association which finds expression in the right to form and join a trade union of one's choice. Workers form and join trade unions for protecting their rights and advancing their interests at the work-

[119] *POPCRU v Ledwaba NO & Others* (2014) 35 *ILJ* 1037 (LC).

[120] *SACOSWU* para 23: "The ILO relies on two supervisory bodies to implement the two Conventions: the Committee of Experts on the Application of Conventions and Recommendations and the Committee on Freedom of Association (CFA). These bodies take the view that the majoritarian system is compatible with freedom of association, provided that minority unions are not prevented from functioning, from making representations on behalf of their members, and representing members in individual grievance disputes."

[121] *Police and Prisons Civil Rights Union v South African Correctional Services Workers' Union and Others* (CCT152/17) [2018] ZACC 24 (23 August 2018).

[122] Above para 90.

> place. Any statutory provision that prevents a trade union from bargaining of behalf of its members or for forbidding it from representing them in disciplinary and grievance proceedings would limit rights in the Bill of Rights."

Bader Bop has served as a saving grace for minority unions. The two *AMCU* matters have stacked the odds against minority trade unions. Added to this *Bafokeng* added impetus to the view that the majoritarian system is the *leitmotif* of modern South African labour law. The court confirmed that majoritarianism may lawfully impact on the rights of individual employees during retrenchment.

It is submitted that the courts' reliance on purposive interpretation invariably led them to support the majoritarian principle to the exclusion of any other alternative. It is argued that in applying purposive interpretation, an integral part of the doctrine was not applied to its full potential, namely, that of South Africa's international law obligations. It is submitted that *Bader Bop* followed a more balanced approach. It held that an overly restrictive interpretation should be avoided where a broader, less restrictive approach was possible. Although this principle was referred to in argument by AMCU in the CC, and although the court referred to the principles of the ILO, it found that the majority principle was not overly restrictive.

However, in *SACOSWU* the LAC returned to the principle established in *Bader Bop* and the CC finally put the matter to bed. It places emphasis on the majoritarian principle as a permeating feature of the LRA, but also confirms that minority unions should be allowed to exist and that the landscape should rather be of a pluralistic nature as opposed to a strictly majoritarian one. This decision is welcomed against the backdrop of Marikana which highlighted the dangers of inter-union rivalry.

6.3 Self-regulation and Administrative Action

In *Kem-Lin Fashions CC v Brunton and another*[123] two bargaining council agreements were extended to non-parties. After the bargaining council had invoked enforcement proceedings against Kem Lin Fashions, the employer contended that it was not an employer but rather an independent contractor. The dispute was eventually resolved

[123] (2001) 22 *ILJ* 109 (LAC).

by the LAC which held that a non-party to a collective agreement becomes a party once the Minister extends the collective agreement and will remain bound thereby unless it applies for exemption. In assessing the implications of section 32 of the LRA the court stated:[124]

> "The Act seeks to promote the principle of self-regulation on the part of employers and employees and their respective organisations. This is based on the notion that, whether it is in a workplace or in a sector, employers and their organisations, on the one hand, and employees and their trade unions, on the other, know what is best for them, and, if they agree on certain matters, their agreement should, as far as possible, prevail."

The court further confirmed that the legislature had made certain policy choices, chief amongst which was that the will of the majority should prevail over that of a minority. Ensuring that the will of the majority prevails is conducive to orderly collective bargaining. Focusing on the effects of failing to extend a majority agreement, it was confirmed that employers could gain an unfair competitive edge by electing not to take part in collective bargaining at sectoral level.

There are two significant cases relating to the judicial nature of decisions to extend collective agreements.[125] In *The Free Market Foundation v Minister of Labour and Others*[126] the Free Market Foundation ("FMF") sought to declare section 32(2) of the LRA unconstitutional in as far as it allowed a "private actor", i.e. a bargaining council, to impose binding obligations on individuals who are not party to the bargaining council. The application further challenged the model of majoritarianism upon which the extension mechanism is premised.

The court identified three juridical acts in relation to section 32 of the LRA. The first relates to the initial contractual negotiations between the parties to the bargaining council that lead to the conclusion of a collective agreement. The second takes place within the bargaining council. The collective agreement must be concluded in the council, a resolution must be passed by the majority trade union parties and employers' organisation members and a written request must be sent to the Minister. The

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[124] *Kem Lin Fashions* para 18.
[125] Most of the cases relate to challenges against particular extensions as opposed to the extension mechanism itself.
[126] (2016) 37 *ILJ* 1638 (GP).

final act is the Minister's decision to extend the collective agreement. The final juridical step is based on numerical and jurisdictional requirements.

The numerical requirements include that the Minister must be satisfied that the majority members of the bargaining council voted in favour of the resolution to have the collective agreement extended; that the agreement will fall within the scope of the bargaining council; that it will be applicable to a majority of employees who are members of party trade unions;[127] and that the members of the party employers' organisations will employ the majority of the employees. The jurisdictional requirements include that an effective, fair and expeditious exemption and appeal procedure must be in place.[128]

If the request to extend a collective agreement complies with both the numerical and jurisdictional requirements, the Minister has no discretion whether to extend the collective agreement.[129] If the numerical requirements are not met, section 32(5) confers a discretion on the Minister to extend the collective agreement when further requirements are satisfied.[130]

The FMF mainly challenged the legality of the extension mechanism based on the proposition that section 32 of the LRA allows collective agreements to be extended to non-parties against public interest concerns by parties who are not state organs.[131] The court considered PAJA as the relevant legislation and considered whether each of the three juridical acts constituted administrative action.

It held that the first juridical step in relation to the negotiations at the bargaining council was purely contractual in nature. It found that the second juridical step, the internal processes leading up to and including the request to the Minister, could possibly constitute administrative action where the Minister exercises a mechanical duty in the

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[127] Which will invariably mean that in case of party minority trade unions, whether they agreed to the collective agreement or not, or voted against the request to extend same, member numbers will be taken into account.

[128] *Free Market Foundation* para 20.

[129] *Free Market Foundation* paras 18, 19 and 20.

[130] *Free Market Foundation* paras 23, 88 and 90. The further requirements are that the parties to the bargaining council are sufficiently representative within the scope of the bargaining council, the Minister must be satisfied that the failure to extend may undermine collective bargaining at sectoral level and must have invited and considered public comment on the proposed extension.

[131] *Free Market Foundation* para 9.

event that the numerical and jurisdictional requirements for extension have been satisfied.[132] In such a case, the resolution and request seizes the Minister with the immediate duty to extend the collective agreement and the request can thus have a direct external legal effect. It concluded that if the resolution and request are administrative action, it would be reviewable under PAJA on grounds of rationality, legality and due process. Where it is not administrative action, the grounds of review in terms of the rule of law provisions of the Constitution would remain available.[133]

The final juridical step, namely, the Minister's decision to extend, was answered with reference to automatic extension and discretionary extension. The court noted that the Minister exercises a public function in terms of enabling legislation. Having established that a public function is exercised, it was necessary to determine whether the function was of administrative, executive or legislative nature.[134] It confirmed that section 32(5) of the LRA uses permissive language in that the Minister *may* elect a number of actions where the majority thresholds were not met, while section 32(2) confers a mechanical power upon the Minister in the nature of a duty.

It was found that the legislature elected conditions which must be present for the Minister mechanically to extend a bargaining council agreement, and thus it limited the Minister's discretion where majority requirements are met. The rationality in mechanical extension thus lies in the existence of the preordained requirements.

Discretionary extension attracts judicial scrutiny, as broad discretionary powers require constraint so that affected parties are aware of the consequences and their remedies.[135] The court confirmed that in discretionary extension the Minister must be able to show the existence of the subjective preconditions upon which she or he based the decision to exercise the discretion. The standard of review of rationality was found to be the most likely standard of scrutiny which would be applicable to the discretionary

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[132] *Free Market Foundation* paras 76 and 77.
[133] *Free Market Foundation* para 81. The rule of law provisions of the Constitution allow for a legality review based on rationality, legality and the duty not to act arbitrarily, capriciously or with ulterior motive.
[134] In terms of PAJA, executive and legislative actions are excluded from the definition of administrative action.
[135] *Free Market Foundation* para 86.

extension mechanism. The court finally found that the judicial power of review in relation to the discretionary extension mechanism is not at variance with the constitutional right to fair administrative action.[136]

Regarding mechanical extension, the court confirmed that the extent of judicial supervision of the Minister's powers is undeniably less than in the case of discretionary extension, as the majoritarian principle obviates such need. The court found that the constitutional right to fair administrative action is abridged where the action comprises the exercise of a mechanical power. The rationality requirement in the case of a mechanical power lies in the connection between the jurisdictional requirements and the exercise of the power.[137]

The court, in its own deliberations on the limitation clause, found that the restricted power of review in relation to mechanical extension is a reasonable and justifiable limitation on the right to fair administrative action.[138] The advantage of the lack of discretion on the Minister's part ensures certainty and predictability of collective bargaining outcomes, which is a legitimate legislative purpose to which the courts are obliged to give effect.

Although the court considered the ILO's Recommendation 91 of 1951,[139] which may set a higher standard of procedural fairness than section 32(2), this was not addressed as the parties had not sought relief to correct the extension mechanism to such effect.[140]

In the second matter, the CC in *Association of Mineworkers and Construction Union and others v Chamber of Mines of South Africa and others*[141] had to consider whether a workplace extension in terms of section 23 of the LRA constituted administrative action.

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[136] *Free Market Foundation* para 103.
[137] *Free Market Foundation* para 105.
[138] Its reasons for this finding included that s 32(2) and (3) gives effect to a legislative policy of industrial pluralism, voluntarism and orderly collective bargaining permitted by the constitutional right to engage in collective bargaining and international law.
[139] The Collective Agreements Recommendation.
[140] See Ch 2 para 4.3.
[141] (2017) 38 *ILJ* 831 (CC).

The CC ultimately found that the extension of a workplace agreement constitutes the exercise of a public power, as the effect of the extension is the exercise of a legislatively conferred public power. The features which ultimately convinced the court of the public nature were that (a) the decision is rooted in legislation and its effects are circumscribed by statute; (b) the effect of the decision is mandatory on non-parties and coercive on their constitutional entitlements; (c) the decision results in binding consequences without prior acquiescence; and (d) the rationale is plainly public, namely, the improvement of workers' conditions through collectively agreed bargains.[142] Although the court found that the parties to the collective agreement exercised a public power, it did not follow that their conduct constituted "administrative action" as defined in PAJA.

The ultimate effect of the court finding that the extension of a workplace-wide agreement constitutes the exercise of public power is that such an extended agreement must comply with the legality principle. It was held that extended agreements could perhaps be challenged by way of a rationality review, in that the application of the public power is irrationally exercised and has undue effects on minority unions.[143]

FMF and *AMCU* thus delineated various actions by role players and provide guidance regarding which review route affected non-parties should take. Regarding the extension mechanism in section 32 of the LRA, the court confirmed that the bargaining council acts as an organ of state when it requests the Minister to extend a collective agreement, and that such a request itself may constitute administrative action in circumstances where it seizes the Minister with the duty mechanically to extend a collective agreement. It confirmed that the Minister's decision discretionarily to extend a collective agreement in terms of section 32(5) constitutes administrative action. *AMCU* confirmed that workplace-wide agreements in terms of section 23 themselves do not constitute administrative action but may nevertheless be the subject of a legality review.

[142] *AMCU* para 81.
[143] *AMCU* para 86.

The development of the case law has delineated possible grounds for review of extended collective agreements, both within workplaces and bargaining councils. It is submitted that these two cases will provide impetus for many future legal challenges. However, the two cases highlight permeating principles applied by our courts, namely, that the will of the legislature must prevail to protect the sanctity of the separation of powers doctrine. The majoritarian principle therefore must prevail.

7. **Conclusion**

This chapter illustrates the reality within which the extension mechanism operates in South Africa. The majoritarian principle was discussed and it was confirmed that the unwavering tone of the LRA is to promote majoritarianism. The question was posed whether the LRA's central bargaining structures allow for sufficient protection of minority groups.

Several key findings may be made. Firstly, the above question must be answered by applying purposive interpretation. This means that an interpretation must be preferred that gives effect to the primary objectives of the LRA. These imperatives should comply with the Constitution and with South Africa's international law obligations. Orderly collective bargaining at sectoral level must be promoted. The cumulative effect hereof is that our courts apply the law as enacted by the legislator. Any court applying the LRA must do so in a way that promotes the primary objectives as chosen by the legislator. Courts are empowered to test whether legislation passes constitutional muster but may not replace the policy choice of the legislature.

Secondly, the study has found that the extension of collective agreements by majority parties is beneficial to collective bargaining and to the promotion of labour peace. By giving primacy to majority-support collective agreements, the outcome of collective bargaining remains clear. Employers know with whom to consult and may rest assured that the bargaining agent consulted with is the party who acts on behalf of the majority of employees. The parties, and non-parties, have clarity regarding those issues where economic pressure can be exerted and, in doing so, labour peace is promoted.

Having considered the views of academics it was found that some authors are of the view that bargaining councils do not act in the best interests of employees. Collective

agreements may be used as a tool to bar new entrants. These scholars suggest that an independent body should assess whether collective agreements should be extended. Although allegations regarding the neutrality of bargaining councils have not been proven, such a possibility should not be ruled out. This study supports the proposals that the ECC should be granted an oversight role to confirm the feasibility of the extension of collective agreements.

Thirdly, the study supports the proposals contained in the Labour Relations Amendment Bill of 2017. The amendments place a high premium on determining whether the majority numerical requirements have been met. They will also empower the Minister to provide guidelines to bargaining councils regarding when exemptions should be granted.

Fourthly, the study concludes that the courts in *The Free Market Foundation*, *AMCU* and *Bafokeng* cannot be faulted for finding that the extension of collective agreements passes constitutional muster. The extension mechanism supports the legislator's majoritarian policy choice. It promotes collective bargaining at sectoral level and fosters labour peace.

Fifthly, the courts have delineated the available remedies to a significant extent. Affected non-parties may review the Minister's discretionary decision to extend a bargaining council agreement. Non-parties may also review the resolution of a bargaining council to extend a collective agreement.

Sixthly, *SACOSWU* has confirmed the ILO principle that the majoritarian principle is not objectionable if minority unions are still allowed to represent their members in grievance and disciplinary processes. The majoritarian system should not be permitted to establish a monopoly for majority trade unions.

The chapter concludes that the extension mechanism should not be abolished but should be amended. It is necessary to acknowledge that the extension mechanism has been found to promote sectoral bargaining, constitutes a fair limitation of constitutional rights and serves valid and reasonable policy choices. It is further necessary to acknowledge that the courts cannot replace one policy choice with another, and that the clear policy choice in South Africa is one that promotes majoritarianism within a voluntary system of collective bargaining.

Chapter Five: International Comparison

1. Introduction

According to Morris and Murphy[1]

> "[c]omparative legal research can open your mind to new ways of finding solutions to legal problems and requires you to confront any assumptions (often unconscious) you may be holding about how legal systems should operate".

[1] Morris and Murphy (2011) 37. However, comparative law scholars themselves disagree as to whether comparative law has its own distinct methodology apart from the basic approach of comparing and contrasting.

The conclusion and extension of collective agreements are common throughout the world. Although the extension of collective agreements has become common in recent times it has been a historical feature since the rise of the industrial era.[2] This longstanding practice has been endorsed by the International Labour Organisation ("ILO") in its Collective Agreements Recommendation No 91 of 1951.[3]

A global trend towards decentralisation of collective bargaining has emerged as a response to globalisation, and employers and employees are more likely to conclude collective agreements at workplace level.[4] South Africa, where sectoral bargaining is encouraged by the Labour Relations Act[5] ("the LRA"), is one of the exceptions to this practice.

This chapter considers three legal systems and their versions of the extension mechanism, namely, Namibia, Australia and the Netherlands. The extension processes of these countries are compared with that of South Africa for similarities as well as differences. The chapter concludes with a discussion of the different methods of extension and whether South Africa can learn anything from alternative models of extending terms and conditions of employment.

2. Namibia

2.1 Introduction

There are a number of reasons why Namibia was selected for purposes of comparison with South Africa. Firstly, both South Africa and Namibia are member states of the

2 Hamburger (1939) *ILR* 153 lists countries which at that stage had adopted some form of extension of collective agreements, including South Africa, New Zealand, Australia, Sweden, Austria, Mexico, Britain in relation to its cotton industry, Czecho-Slovakia, France and Switzerland.

3 See Ch 2 for more information about the ILO and Recommendation 91 of 1951.

4 Du Toit *et al* (1995) 71; and Bogg *et al* (2013) *ALR* 18.

5 66 of 1995.

Southern African Development Community[6] and the African Union.[7] Secondly, both are developing countries that share a geographical border and a common history under the apartheid regime. Thirdly, like South Africa, Namibia has a sovereign constitution, is a member of the ILO[8] and both countries share certain characteristics in their labour legislation which is influenced by Western tenets.[9] Lastly, Namibia has adopted legislation that includes a mechanism for extending majority collective agreements. However, the Namibian system differs from that of South Africa as there are no central bargaining structures in place. Thus there are no forums similar to South Africa's bargaining councils.

2.2 Background and Historical Development

Mancuso states:[10]

> "Currently the discipline of African comparative legal studies is quite weak. Most, if any of the experiences of comparative law works involving African law(s) tend to consider the local situation vis-à-vis the patterns imported during, and rooted after, the colonial period, as well as such local situations compared to those present in former colonising power. Therefore, the direction has always been to compare Africa and the developed Western world. It can be safely said that almost nothing has been done in terms of comparison among African countries and their legal systems, even though using comparative law instead is essential for a variety of reasons."

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6 The SADC website (accessed at goo.gl/H6z7kv on 23 April 2018, 10:16) explains that the SADC was established in 1980 to focus on the integration of economic development between the SADC members. The SADC member states are Angola, Botswana, DR Congo, Lesotho, Madagascar, Mozambique, Namibia, Seychelles, South Africa, Swaziland, Tanzania, Zambia and Zimbabwe. The SADC treaty states that the main objectives of the SADC are to achieve development and economic growth, alleviate poverty, enhance the standard and quality of life and support the social disadvantaged.

7 See the AU website (accessed at https://au.int/en/au-nutshell on 23 April 2018, 10:31). The AU was established in 1999 with the aim of accelerating the processes of integration in the African continent to play a role in the global economy whilst addressing social, economic and political problems, and promoting international cooperation within the framework of the United Nations.

8 The Republic of Namibia has ratified the Freedom of Association and Protection of the Right to Organise Convention 87 of 1948 and the Right to Organise and Collective Bargaining Convention 98 of 1949, both of which are considered the core conventions concerning labour issues. See Ch 2 for more on the ILO and its conventions. See Van Eck (2010) *PELJ* 120.

9 Fenwick *et al* (2007) 6 confirm that the retained Western characteristics which most SADC member states share are that their labour laws provide for a floor of rights, systems for dispute resolution and that they recognise the principle of tripartism.

10 Mancuso and Fombad (2015) 25.

Although the essence of the above quotation is a commentary on the failure of researchers to look to African countries in conducting their research, it eloquently captures an inherent frustration with the execution thereof. Because of colonisation the development of the legal systems of many African countries, including Namibia and South Africa, was stifled by external influences. It is for this reason that Western legal systems have traditionally been referred to as comparison models in research and why there is limited scholarly literature that is truly Africa-centric.

Namibia is another example of an African country with limited scholarly literature.[11] Because Namibia and South Africa were administered (albeit "unlawfully", as will be discussed) as one government until early in the 1990s, Namibia has not had the same opportunity to amass its own body of case law. For example, this study could not find case law regarding the extension of collective agreements in Namibia. As a result, this study compares national legislation and draws inferences from those institutions and principles that the Namibian government has introduced.

Namibia shares many legislative features with South Africa due to the historical connection between the countries.[12] After being occupied by Britain and being declared as a Territory of the German Protectorate, control of Namibia was "entrusted" to the government of South Africa in 1919.[13] The South African government refused to relinquish its control over Namibia (or South West Africa as it was called) to the Trusteeship Council of the United Nations and subjected Namibia to the apartheid regime.[14] Namibia was accepted as *de jure* fifth province of South Africa, which allowed the South

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11 Fenwick *et al* (2007) 1 who states that scholarly writings on labour law are scarce in most African countries except South Africa. Also see Fenwick (2006) *SALJ* 666.

12 Namibia gained independence from South Africa on 21 March 1990. See goo.gl/KwbCbB (accessed on 23 February 2018 at 07:32).

13 Musukubili (LLD NMMU 2013) 83 states that Namibia became a German Protectorate in 1885, and was "entrusted to the Union of South Africa as a C mandate after South African forces defeated the German forces".

14 Musukubili (LLD NMMU 2013) 86. Also see the website for the International Court (accessed at http://www.icj-cij.org/en/case/53 on 23 April 2018, 11:47), where it is confirmed that the General Assembly in October 1966 decided to terminate the mandate over South West Africa and that the South African government had no right over the territory. In January 1970 it declared South Africa's control over Namibia illegal and all its actions in respect thereof invalid. The International Court of Justice in 1971 issued an advisory opinion in terms of which member states of the United Nations were requested to recognise that the government of South Africa had illegal control over Namibia and to refrain from providing support to the South African government in respect thereof.

African state to govern the area. Thus, whatever legislation applied in South Africa, applied in Namibia.[15]

In March 1990 Namibia gained independence after experiencing a similar struggle to the one that took place in South Africa.[16] The connection between Namibia and South Africa in so far as colonisation is concerned, is an important aspect when comparing the two countries.[17] In both countries black workers were discriminated against based on their race. In *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia*[18] the Namibian Supreme Court explained as follows:

> "The manner of its implementation during that era mirrors and, in a sense, encapsulates a collection of some of the very worst elements the policy of apartheid brought to bear on them: Statutory *classification* of people on the basis of race; proclaimed *segregation* by reference to race and ethnic origins in locations and reserves – the latter at times more euphemistically labelled as 'group areas', 'homelands' or 'self-governing areas' in an attempt to smarten up the ugly face of apartheid; substantive *isolation* of indigenous groups in reserves and locations by enforced measures of 'influx control', passes, curfew (in urban areas) and the forced removal, repatriation and resettlement of some members of those groups resident in urban areas; relative *repression* of the personal, social, educational and economic development of those Namibians; *exploitation* of their disadvantaged position and of their personal and natural resources and, in general, the application of a system of institutionalised racial discrimination that permeated virtually every aspect of their existence as human beings."

The contract labour system described in *Africa Personnel Services* was an integral part of how the apartheid government controlled and exploited the indigenous people of Namibia for its own benefit.[19]

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15 Musukubili (LLD NMMU 2013) 87.

16 Musukubili (LLD NMMU 2013) 87; and Botes (2013) *PELJ* 513.

17 Mancuso and Fombad (2015) 42.

18 See *Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia* (2011) 32 *ILJ* 205, where the erstwhile contract labour system under the South West Africa Native Labour Association ("SWANLA") was extensively discussed due to labour brokerage becoming an increasing feature in recent times. In terms of the contract labour system, black workers were categorised according to *inter alia* their health and physical fitness and provided with tags to be worn around their wrists or necks. They were registered to obtain a work permit for specified areas and provided with a metal tag accordingly. These workers worked for minimum wage, long hours, no annual or sick leave and were required to spend excessive periods of time away from their own families. Also see Botes (LLD NWU 2013) 135.

19 Fenwick (2006) *SALJ* 668. The author states that the Masters and Servants Proclamation 1920, was the only piece of regulation for a period of 55 years, and that in terms of this proclamation it was a criminal offence if a worker failed to comply with the terms and conditions of his or her employment. It was accompanied by the Vagrancy Proclamation which saw Africans restricted to "native reserves", with limited access to "police zones". In 1951 the Natives (Urban Areas) Proclamation im-

The first legislation which regulated collective labour law in Namibia was the Wages and Industrial Conciliation Ordinance,[20] aimed at white employees.[21] It established machinery for setting wages and the resolution of labour disputes. It also made provision for protected strikes by registered trade unions. The Wages and Industrial Conciliation Ordinance did not apply to the agricultural and domestic sectors, and thus African workers were effectively excluded.[22] The Wages and Industrial Conciliation Ordinance, much like South Africa's Industrial Conciliation Act 28 of 1956, did not allow for the registration of black trade unions and therefore they could not conclude enforceable collective agreements nor embark on protected strike action.[23]

Unlike South Africa, workers in Namibia did not have the benefit of a strong trade union presence. Fenwick ascribes this to the fact that the liberation movements focused their efforts on the larger goal of gaining independence from South Africa.[24] The absence of a strong trade union infrastructure, coupled with the absence of government machinery to promote collective bargaining, caused the existing collective bargaining measures to be of little use.[25]

With the adoption of its sovereign Constitution in February 1990 the Namibian government entrenched individual and collective labour law rights.[26] The Namibian Constitution guarantees the right to freedom of association as a fundamental freedom[27] and places a positive obligation on the Namibian government to adopt policies which must

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plemented further restrictions, which culminated in African workers only being able to leave the native reserves to go and work on a farm, a mine or transport infrastructure. Musukubili (LLD NMMU 2013) 92 explains that an African could be repatriated *inter alia* because he or she could not find suitable employment; he or she was refused employment by the employment officer; his or her employment contract had been cancelled; he or she was in the area unlawfully; or because he or she had unlawfully breached an employment contract.

20 35 of 1952.

21 Musukubili (LLD NMMU 2013) 94. The Wages and Industrial Conciliation Ordinance provided for the registration of trade unions limited to white employees. The Ordinance also established conciliation boards and provided for mediation, arbitration and the enforcement of awards.

22 Fenwick (2006) *SALJ* 669. The largest part of the public sector was likewise excluded.

23 Fenwick (2006) *SALJ* 669. The author states that it was only in 1978 that black trade unions could register – but that they could not organise in the agricultural or domestic sectors. It was only in 1986 when the Conditions of Employment Act 12 of 1986 was enacted that a floor of minimum rights was established to be applicable to all employees.

24 Fenwick (2006) *SALJ* 671. It was only from 1985 that the South West African People's Organisation focused on mobilising workers to join trade unions.

25 Fenwick (2006) *SALJ* 671.

26 Fenwick *et al* (2007) 5.

27 Article 21(1)(e)–(f) which determines that: "All persons shall have the right to (e) freedom of association, which shall include freedom to form and join associations of unions, including trade unions and political parties; and (f) withhold their labour without being exposed to criminal penalties."

inter alia adhere to the Conventions and Recommendations of the ILO.[28] It further contains a restriction clause in terms of which certain fundamental freedoms may be restricted by way of legislation of general application.[29]

The first comprehensive labour legislation was adopted by way of the Namibian Labour Act 6 of 1992. This Act sought to deliver upon the principles and rights established in the Constitution.[30] The 1992 Labour Act afforded basic and collective bargaining rights to all workers and established new structures such as a Labour Commissioner. The Labour Act further established a mechanism to extend collective agreements. Fenwick states that the Minister of Labour ("the Minister") frequently made use of this mechanism.[31]

The Labour Act 15 of 2004 was enacted as a replacement of the 1992 Labour Act. However, the 2004 Labour Act was never implemented.[32] The 1992 Labour Act thus remained the only comprehensive labour legislation until the Labour Act 11 of 2007 came into operation.[33]

After independence the government of Namibia had quite a task at hand. It had to improve economic growth whilst promoting social justice in the face of globalisation.[34] As with most African countries with a colonial history, the labour market in Namibia is

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[28] Article 95(d) of the Constitution of the Republic of Namibia. Article 96 in turn confirms the government's stance on international relations and determines *inter alia* that international law and treaty obligations should be respected. Article 101 states that the principles of state policy are not by themselves enforceable by a court but serve as guiding principles for the government in the enactment and application of legislation.

[29] Articles 21(2) and 22. Article 21(2) provides that the fundamental freedoms should be exercised subject to the laws of Namibia, and where such laws introduce any restrictions such restrictions should be necessary in an open and democratic state; in the interest of sovereignty, national security, public order, decency and morality; or in relation to contempt of court, defamation or incitement to an offence. Article 22 in turn determines that where a law of general application restricts any fundamental freedom, it must specify the extent of the limitation and identify the article upon which it vests the authority to impose such restriction.

[30] Fenwick (2006) *SALJ* 673.

[31] S 70 of the Labour Act 1992 and Fenwick (2006) *SALJ* 678.

[32] According to Fenwick (2006) *SALJ* 680 the shortcomings included that only interests disputes could be referred to arbitration and that parties were wont to use the dispute resolution dispute in an adversarial manner. Also see Aletter (2016 LLD) UP 196; and Botes (2013) *PELJ* 516.

[33] It became operational on 31 December 2007 and repealed both the 1992 and 2004 Labour Acts.

[34] Klerck (2003) *SAJLR* 63 states that the advancement of economic welfare effectively protected standard employment whilst non-standard forms of work proliferated. The latter allowed employers greater latitude to arrange their employment matters, which advanced the flexibility requirements mooted by free market proponents.

segmented and consists of a small sector with specialised skills and a large sector of unskilled, uneducated and impoverished workers.[35]

2.2 Extension in Namibia

The 1992 Labour Act provided that collective agreements could be registered with the Labour Commissioner. After registration, such agreements applied to all employer and trade union parties.[36] Section 70 of the 1992 Labour Act provided for a mechanism whereby any party to a registered collective agreement could apply to the Minister to request that the collective agreement be extended to all employers and employees in the industry. The Minister could add conditions, exceptions and exemptions to such an extension. However, the Minister had to give prior notice to potentially affected individuals.[37] The Minister could extend the registered collective agreement only after considering objections; if no other registered collective agreement was in place; and where the extended collective agreement would be more beneficial to employees than their existing conditions of employment.[38] The 1992 Labour Act contained an exemption procedure[39] and the parties directing the request could appeal directly to the Labour Court in the event of a refusal.[40]

As stated previously, the 2004 Labour Act was never implemented. However, it is worth considering because it contained additional requirements that the Minister had to bear in mind before extending a collective agreement.[41] These requirements included that potentially affected parties could object; that such objections had to be

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35 Klerck (2003) *SAJLR* 65 mentions that there is a stark contrast between the relative wealth of the country and the high degrees of inequality and poverty. Namibia has the highest per capita income of the middle-income countries, but also has a high degree of poverty. According to the UN Human Development Index (accessed at http://hdr.undp.org/en/countries/profiles/NAM on 25 April 2018, 06:32) Namibia had a population of 2.5 million in 2016, with an employment to population ratio of 44.2.

36 S 69 of the 1992 Labour Act. Where the collective agreement was concluded by an exclusive bargaining agent in respect of a bargaining unit, the registered collective agreement would be applicable to all the employees within that bargaining unit including those who were not members of the trade union.

37 S 70(2) of the 1992 Labour Act provided that a notice had to be published in the *Government Gazette* and that affected parties would have at least 30 days in which to raise objections.

38 S 70(3) of the 1992 Labour Act determines that the Minister may not extend a collective agreement if these requirements were not complied with.

39 S 70(5) of the 1992 Labour Act. Any employer or employee who was not a member of a party employers' organisation or trade union could be exempted from the ambit of the extended collective agreement due to special circumstances.

40 S 70(6) of the 1992 Labour Act.

41 Fenwick (2006) *SALJ* 686. S 69 of the 2004 Labour Act.

served on the parties to the collective agreement; and that these objections and responses had to be considered by the Minister. The collective agreement had to contain an arbitration clause, and had to be compliant with the Constitution and legislation. Prior to extension the Minister had to ascertain whether the extended collective agreement overall would be to the benefit of employees. It is submitted that these additional requirements were included with the view of giving effect to ILO norms and curtailing the Minister's discretion whether to extend a collective agreement without giving all parties the opportunity to respond.

The 2007 Labour Act[42] envisages a majoritarian system, in terms of which a majority trade union may be recognised as the exclusive bargaining agent under certain circumstances.[43] Registered trade unions that are exclusive bargaining agents automatically acquire certain organisational rights, such as the right to reasonable access to the employers' property during business hours[44] and the deduction of trade union dues.[45]

Similar to the situation in South Africa, a collective agreement supersedes individual contracts except where the contract of employment is more beneficial than the collective agreement.[46] Collective bargaining commonly takes place at company level, and although sectoral bargaining is envisaged in terms of the Labour Act, such bargaining mostly takes place in limited sectors such as the agricultural, security and construction sectors.[47] The 2007 Labour Act abolished the arrangement in terms of the 1992 Labour Act that provided for the registration of collective agreements.

In terms of the 2007 Labour Act, the Minister may be requested to extend a collective agreement to non-parties who are in the same industry.[48] Such a request may only be made in relation to a collective agreement where the trade union has been recognised

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42 11 of 2007.
43 S 64 of the 2007 Labour Act.
44 S 65 of the 2007 Labour Act.
45 S 66 of the 2007 Labour Act.
46 S 70(4) of the 2007 Labour Act. This is subject to the proviso that the contract was concluded in good faith and with no intent to undermine collective bargaining or the status of an involved trade union.
47 Namibia Country Review of Collective Bargaining (2010) 10 (accessed at http://www.lrs.org.za/docs/Namibia%20Collective%20Bargaining%20Review%202010.pdf on 23 February 2018, at 08:07).
48 S 71(2) of the 2007 Labour Act.

as an exclusive bargaining agent.[49] After receiving such a request the Minister publishes the application and invites objections for a period not exceeding 30 days from publication.[50]

Any objections received must be delivered to the parties to the agreement, who are granted a period of up to 14 days to respond. The Minister may only extend a collective agreement upon proper consideration of the objections and responses received. If satisfied that the agreement complies with the Constitution and legislation, and if the terms of the agreement are in the whole not less beneficial than those which applied immediately before the conclusion of the agreement, the Minister must extend the collective agreement.

The agreement itself must contain a dispute resolution procedure regarding the interpretation, application and enforcement thereof.[51] Once all the requirements are met the Minister must extend the collective agreement by way of publication.[52] An interesting requirement is that the Minister must, except for the publication of notices in the *Government Gazette*, publish the notices by other available means in order to ensure that the intended recipients actually receive proper notice of the relevant information.[53]

The 2007 Labour Act specifies that any application for exemption should be directed to the Minister, who may exempt such party where he or she is satisfied that special circumstances exist to justify the exemption.[54] The exemption must be granted in writing; may be subject to certain conditions; and the Minister must notify the parties to the collective agreement thereof.[55] Parties who are refused exemption may have the

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[49] S 64 read with s 71(1) of the 2007 Labour Act. S 64 allows a registered trade union, representing the most employees within a bargaining unit, to be recognised as the exclusive bargaining agent for that bargaining unit for purposes of negotiating a collective agreement on any matter of mutual interest.

[50] The *Government Gazette* of Namibia 6519 of 31 January 2018 contains a recent application for extension in the construction industry, whereby the Minister published both the request for extension and the invitation for objections.

[51] S 71(4) of the 2007 Labour Act.

[52] S 71(5) of the Labour Act.

[53] S 71(8) of the Labour Act.

[54] S 72(1) of the Labour Act.

[55] Both the request for the extension of a collective agreement and the request for exemption must be submitted in writing on the prescribed forms in terms of the Regulations to the Labour Act (GN 261 of 2008).

Minister's decision reviewed by the Labour Court.[56] It appears that the Minister regularly extends the ambit of collective agreements, particularly in the construction industry.[57]

2.3 Comparison with International Labour Standards

What similarities and differences are there between the Namibian model and ILO norms? Furthermore, are there any lessons for Africa?

It has already been noted that Namibia is a member state of the ILO and that the Namibian Constitution places a positive obligation on the government to consider and apply the ILO's international conventions and recommendations when applying and passing legislation.[58] The Namibian government has confirmed its commitment to the ILO by incorporating into the preamble of the 2007 Labour Act the goal to give "effect, if possible, to the conventions and recommendations of the International Labour Organisation".

As was discussed in Chapter 2, the ILO provides useful guidance regarding the conclusion and extension of collective agreements. Namibia has ratified the Collective Bargaining Convention.[59]

The Collective Bargaining Convention provides that member states should establish and promote machinery in terms of which voluntary negotiations between employers and employees may take place in order to promote the conclusion of collective agreements. Furthermore, the Collective Agreements Recommendation[60] provides guidelines that are specific to the extension of collective agreements. It provides that measures may be taken to extend collective agreements to a whole industry or area. The conditions for extension are, firstly, that the collective agreement should prior to

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56 S 171(1)(b) of the Labour Act.

57 Examples include the following: *GG* 4970 of 19 June 2012 where a collective agreement was extended to the whole construction industry; *GG* 319 of 2015, 6567 of 11 April 2018 for the same industry; and *GG* 4390 of 14 December 2009 for the Agricultural Sector.

58 Article 95(d) of the Namibian Constitution provides that: "The State shall actively promote and maintain the welfare of the people by adopting inter alia policies aimed at the following: membership of the International Labour Organisation (ILO) and, where possible, adherence to and action in accordance with the international Conventions and Recommendations of the ILO."

59 98 of 1949, ratified on 3 January 1995.

60 91 of 1951.

its extension already cover a sufficiently representative number of employers and employees; secondly, that the request to extend be made by a party to the agreement; and thirdly that potentially affected employers and employees should be granted the opportunity to submit representations before the extension of the agreement.

The ILO's supervisory and investigating committees ("the ILO's committees of experts"), whose decisions are captured in the Digest of Decisions,[61] have had the opportunity to address the extension of collective agreements. The ILO's committees of experts have recommended that a tripartite analysis be undertaken prior to the extension of a collective agreement to consider the effect that the extension might have on a sector or industry. It has also confirmed that the imposition of a collective agreement on non-parties does not infringe upon the principle of freedom of association as long as the most representative organisation negotiated on behalf of the majority of employees.[62]

It is clear that the Namibian government has established a voluntary framework in terms of which employers and employees may engage in collective bargaining to conclude collective agreements. Its previous labour legislation, the 1992 Labour Act, required the parties to register their collective agreements in order to be effective. The ILO's committees of experts have determined that such requirement was contrary to the Collective Bargaining Convention[63] as it had the potential to discourage parties from freely participating in collective bargaining. By abolishing this requirement the Namibian government has strengthened its commitment to voluntary and free collective bargaining.

As far as representivity is concerned, the 2007 Labour Act stipulates that a collective agreement binds the parties to the agreement and their respective members. Where a trade union has obtained recognition as an exclusive bargaining agent, such recognition entails that the trade union acts on behalf of all of the employees in the bargaining unit.[64] Only collective agreements concluded between an employer or employers'

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61 5th Edition, 2006.
62 ILO Digest of Decisions 1051 and 1052.
63 ILO Digest of Decisions 1012–1018.
64 S 64 of the 2007 Labour Act. Where a trade union is recognised as an exclusive bargaining agent, it has a duty to represent the interests of every employee falling within the bargaining unit, regardless of their membership status.

organisation and a trade union recognised as an exclusive bargaining agent are capable of extension. This requirement meets the requirement of prior representivity as required by the Collective Agreements Recommendation.

It is submitted that the requirement that only a collective agreement concluded with an exclusive bargaining agent is capable of extension negates any concerns that may be raised regarding the hurdle that the collective agreement must already cover a sufficiently representative number of employees.

It is further submitted that the second requirement, that the request to extend must be made by a party to the collective agreement, is complied with. The 2007 Labour Act allows only the parties to the collective agreement to direct a request to extend a collective agreement to the Minister.

The third requirement regarding the making of representations by potentially affected non-parties is also complied with. The 2007 Labour Act obliges the Minister to publish any application for the extension of a collective agreement not only in the *Government Gazette* but also in other available means to ensure that the intended recipients are notified. The Minister must invite objections as well as responses and may only extend the collective agreement once he or she has considered both.

This research concludes that, in the final instance, Namibia complies with the recommendation pertaining to a prior analysis regarding the effect that the extension of a collective agreement may have on an industry or sector. The Namibian model requires the Minister to be satisfied that the collective agreement is compliant with the constitution and the law and that the agreement is overall not less beneficial to employees than their existing conditions of employment. This requirement obliges the Minister to do more than just follow a “tick box” approach in extending collective agreements. Should it be found that the extended collective agreement will not be beneficial to the employees sought to be covered he or she may refuse to extend the collective agreement.

It is therefore concluded that the Namibian model pertaining to the extension of collective agreements complies substantially with the requirements of the ILO.

2.4 Comparing Namibia and South Africa

The South African model pertaining to the extension of collective agreements was discussed in Chapter 4. Whilst recognising that Namibia does not have a central bargaining system it does provide for an interesting alternative model. The Namibian extension mechanism provides for the possibility that a collective agreement may be extended to a whole industry. The part that follows draws a comparison between the two models and also uses the ILO's Collective Agreements Recommendation as point of departure.

The first aspect relates to representivity prior to the extension of collective agreements. Article 5(2)(a) of the ILO Collective Agreements Recommendation suggests that the collective agreement should already cover "a number of the employers and workers concerned which is, in the opinion of the competent authority, sufficiently representative".

The South African model does not require that the collective agreement must *prior to* its extension cover a sufficiently representative number of employers or employees. However, it does require that the majority of workers must be members of the trade unions that are party to the bargaining council who requests the extension and the majority of workers will be employed by those employers who are members of the bargaining council. On the other hand, the discretionary extension mechanism only focuses on whether the bargaining council itself is sufficiently representative within its registered scope.

The Labour Relations Amendment Bill of 2017 ("the LRAB of 2017") proposes certain amendments to section 32 of the LRA.[65] The amendments include that the operating principle for the extension of a collective agreement will be whether it applies to the majority of employees in the industry or sector. The emphasis therefore will be on the coverage of the extended collective agreement.

In Namibia a collective agreement may only be extended where it was concluded with an exclusive bargaining agent. Therefore, by implication, the Namibian model does substantially comply with the requirement that the agreement to be extended must

[65] The LRAB of 2017 is discussed in Ch 4 para 4.3.

prior to its extension already apply to a sufficiently representative number of employees. It is, however, not advisable for South Africa to adopt the exclusive bargaining agent framework in order to overcome hurdles about representivity. South Africa has adopted the majoritarian principle rather than the exclusive bargaining agent approach. The exclusive bargaining agent instrument automatically excludes minority trade unions. However, the bargaining council structure in South Africa at least provides a seat for minority trade unions where their voice can be heard.

Secondly, article 5(2)(b) of the Collective Agreements Recommendation recommends that "as a general rule, the request for extension shall be made by one or more organisations of workers or employers who are parties to the agreement". In Namibia, a party to the collective agreement may request its extension. In South Africa the majority parties to the bargaining council (measured according to their respective membership numbers, or the number of employees employed by the members of the employers' organisations) must vote in favour of such an extension, and the bargaining council will then apply to the Minister. Therefore, the effect of the South African model is that not any one party to the collective agreement may request its extension, but that the request for extension must be supported by a majority of the members of the bargaining council. Despite this difference, it is submitted that this requirement does not fall foul of the requirements of the Collective Agreements Recommendation.

Thirdly, the Collective Agreements Recommendation in article 5(2)(c) recommends that "prior to the extension of the collective agreement, the employers and workers to whom the agreement would be made applicable by its extension should be given an opportunity to submit their representations". The South African model differentiates between mandatory and discretionary extension. Potentially affected parties are afforded the right to prior notice and the opportunity to submit representations only in terms of the discretionary extension mechanism.

An admirable feature of the Namibian extension model is that non-parties must always be notified of a request for extension. These parties are invited to submit their own representations and this invitation is not limited to the *Government Gazette*, but a concerted effort must be made to ensure that the invitation is also published in a widely-circulated newspaper. As a result, not only are non-parties notified of an extension but the authorities may be assured that everything reasonably practicable has been done

to ensure that non-parties are notified. Once representations and objections have been received, the Minister must ensure that those objections are provided to the parties to the agreement and that they have the opportunity to respond. The Minister must then consider both the objections and the responses before making the decision whether to extend the collective agreement.

In South Africa the extension mechanism provides for prior notification in relation to discretionary extensions. Such prior notice is published only in the *Government Gazette*. It is submitted that this notification is not sufficient when compared to Namibia. Added to this, the potentially affected non-parties are invited for comment, but their commentary is not relayed to the bargaining council for further response as would be the case in Namibia. Adopting a process where both objections and responses are considered by the bargaining council and the Minister would ensure that effect is given to natural justice.

It is submitted that the requirement in the Namibian Labour Act that all non-parties must be notified of an application to extend a collective agreement and be given the opportunity to make their own representations, is more compliant with article 5(2)(c) of the Collective Agreements Recommendation than South Africa's mandatory extension mechanism which requires no prior notice to potentially affected non-parties and thus offers no opportunity to make representations.

The final aspect worth consideration is the findings of the ILO's committees of experts that a prior tripartite analysis of the possible effects of the extended collective agreement should be done. Although the Namibian Minister is granted the discretion whether to extend a collective agreement or not, he or she is provided with clear guidelines. The Minister may only extend a collective agreement if the extension complies with the law and as long as the extended agreement on the whole will be more beneficial to employees. It should also contain a dispute resolution clause. The Labour Act ensures that the Minister exercises his or her discretion fairly by the inclusion of a general review process to the Labour Court.

In South Africa the Minister is not required to consider whether the extended collective agreement will be more beneficial to employees. He or she is not required to ensure that the agreement complies with the constitution or any other law. However, this requirement is implied (and protected) by means of the requirement of fair administrative

action contained in the South African Constitution. Majority support dictates whether a collective agreement will be extended or not. Although an additional requirement regarding the beneficial effect of a proposed extended collective agreement will provide the Minister with a wide discretion, such addition will provide vulnerable employees with improved protection. The introduction of such a requirement will not grant the Minister an unfettered power to extend. It is suggested that the Minister's decision should be subject to review and that the test should entail that the extension should be more beneficial to all employees.

3. Extension in Australia

3.1 Introduction

Australia was selected for comparison because it is also a member state of the ILO and offers a truly unique industrial relations system. Australia and its neighbour New Zealand were the first two countries to introduce an extension mechanism to protect employees.[66] Australia has no form of central bargaining and its industrial relations system may rather be described as a compulsory system as opposed to South Africa's voluntarist system.

Although Australia has a constitution, it deals mainly with territorial and governmental provisions. It does not contain an express right to freedom of association.[67] However, Australia's labour legislation does provide some form of protection for freedom of association by providing for representational rights and recourse to industrial action in certain circumstances. The Australian labour legislation places a high premium on minimum employment standards.

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66 Hamburger (1939) *ILR* 157.

67 Information obtained from the Australian Government Human Rights Commission's web page (goo.gl/Rnz3LS, accessed on 22 February 2018 at 09:31).

3.2 Background

The current labour dispensation in Australia[68] is governed by one encompassing piece of legislation, namely, the Fair Work Act ("FWA").[69] The objects of the FWA include that Australia's international labour obligations must be taken account of;[70] that a guaranteed safety net of employment standards be established by way of modern awards and national minimum wage orders; ensuring the right to freedom of association; and the achievement of productivity and fairness through an emphasis on enterprise level collective bargaining underpinned by good faith bargaining obligations.[71]

Australia's collective bargaining model is truly unique as no other country follows a similar model. The Australian model is somewhat of a combination of collective bargaining and compulsory arbitration.[72]

The FWA provides for a tier of labour rights, which includes the National Employment Standards ("NES"), modern awards and enterprise agreements. Where an employer[73] has a registered enterprise agreement in place and such agreement covers the type of work that its employees perform, the terms of that agreement will apply.[74] Only one enterprise agreement may be applicable at a time and the general rule is that the older enterprise agreement will succeed in relation to more recent agreements.[75] Where no

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68 Australia in this context refers to the Commonwealth of Australia, and geographically includes the Norfolk Island and Christmas Island. See s 12 of the Fair Work Act 28 of 2009.

69 28 of 2009.

70 Australia is a member state of the ILO (see goo.gl/JmEgZT, accessed on 23 February 2018 at 08:19).

71 S 3 of the FWA. The good faith requirements can be found in s 228 of the FWA and include that a bargaining representative for a proposed enterprise agreement must attend and participate in meetings at reasonable times; disclose relevant information in a timely manner; respond to proposals made by other representatives in a timely manner; give genuine consideration to the proposals of other representatives and give reasons for its responses to those proposals; refrain from capricious or unfair behaviour that undermines freedom of association; and recognise and bargain with the other representatives for the conclusion of an enterprise agreement.

72 Walpole (2015) *LIJSERW* 205 states that the Australian model of "collective bargaining" should rather be referred to as "collective agreement making", as it lacks certain characteristics typically found during collective bargaining. These include that the focus is rather on the individual choice of employees and that the pressure and counter-pressure usually associated with collective bargaining is often absent from the process as employees are merely required to vote to consent to a proposed agreement.

73 In s 14 reference is made to a National System Employer, widely defined as "a person who carries on an activity (whether of commercial, governmental or other nature) in a Territory in Australia, so far as the person employs, or usually employs, an individual in connection with the activity carried on in the territory".

74 S 57 of the FWA.

75 S 58 of the FWA.

registered enterprise agreement is in place, an industry or occupation modern award may be applicable to employees, and such award will determine the minimum terms and conditions of employment of the employees. Where no such award is in place the minimum terms and conditions of employment contained in the NES will apply.[76]

The FWA established the Fair Work Commission ("FWC"), an independent body tasked with facilitating good faith bargaining and making enterprise agreements; regulating industrial action; providing a safety net of minimum conditions by way of modern awards; and dealing with applications relating to unfair dismissal.[77]

3.3 Collective Bargaining and Uniform Conditions of Employment

The extension process was introduced into New Zealand late in the 1800s and was soon thereafter applied in Australia.[78] The first legislation in Australia that introduced a system of industry-wide standard conditions of employment provided for a system which established a "common rule" to be applicable to all employers by extending compulsory arbitration awards to whole industries.[79]

Bogg *et al* describe the Australian industrial relations system as follows:[80]

> "Australasian labour law has been constructed around a model of decentralised enterprise-based bargaining, rather than European-style sectoral collective bargaining. This has enormous political ramifications … it conceives of collective bargaining as a public regulatory activity conducted on either a sectoral or a national level. It is therefore a form of public governance, more akin to legislation than bargaining."

The trend in Australia for the past two decades has been to promote enterprise bargaining.[81] Enterprise agreements are made at enterprise level, known in South Africa as workplace level. Enterprise agreements may relate to single or multiple enterprises. The objects of enterprise agreements include the establishment of a simple, flexible

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[76] Information obtained from the Fair Work Ombudsman's website (https://bit.ly/2N9m3oK accessed on 14 February 2018 at 07:26).
[77] Information obtained from the Fair Work Commission's website at (goo.gl/6cKLe6 accessed on 20 February 2018 at 07:20).
[78] Hamburger (1939) *ILR* 157.
[79] Hamburger (1939) *ILR* 159.
[80] (2013) *ALR* 18.
[81] Routledge (2015) *LIJSERW* 205.

and fair framework to enable collective bargaining in good faith, as well as enabling the FWC to facilitate good faith bargaining through bargaining orders.[82]

The process of establishing an enterprise agreement is one of collective bargaining, where employer(s) and the majority of employees agree on certain terms and conditions before the FWC approves the agreement. At the commencement of the process employees must be notified of their representational rights.[83] The employer(s) must provide the employees and any employee organisation entitled to represent employees[84] with a copy of the proposed enterprise agreement.[85] The single enterprise agreement is concluded when most employees at a single enterprise vote in favour of the enterprise agreement.[86]

A multiple enterprise agreement is concluded when the majority of employees of at least one of the employers vote in favour of the agreement.[87] Where not all the employees at all the workplaces agree to the enterprise agreement, the agreement must be amended to refer only to those employers of which the majority employees agreed to the enterprise agreement.[88] Where an enterprise agreement has been entered into, one of the representatives who participated in the consultation process must apply to the FWC for approval of the agreement.[89]

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82 S 171 of the FWA.

83 S 173 and 176 of the FWA. S 176 determines that an employee who will be covered by an enterprise agreement may represent him- or herself or be represented by an "employee organisation" if the employee is a member of such organisation, and where the agreement will be a multi-enterprise agreement in relation to a low-paid authorisation, where the employee organisation applied for permission to represent employees. A potentially affected employee may furthermore appoint someone as representative where such appointment is done in writing.

84 In *Appeal by the National Union of Workers against Decision of Gregory C of 30 May 2017* [2017] FWCA 2940: *Re: Signa Company Limited t/a Signa Healthcare* [2017] FWCFB 3892 an approved enterprise agreement was taken on appeal and "quashed" in so far as the employer had failed to provide the proposed enterprise agreement to an employee organisation for consideration prior to the conclusion and subsequent approval thereof.

85 S 180 of the FWA.

86 S 182 of the FWA.

87 S 182 of the FWA.

88 S 184 of the FWA.

89 S 185 of the FWA, which determines that such application must be made within 14 days of the conclusion of the enterprise agreement.

The FWC will approve an enterprise agreement when certain requirements are met.[90] The requirements include that the agreement was genuinely agreed to by the employees;[91] if the agreement is a multi-enterprise agreement, that it was genuinely agreed to by each of the concerned employers and no person was coerced or threatened to agree to the agreement; the terms of the agreement is not less beneficial than the NES; the agreement must pass the "better off overall" test;[92] that the group of employees upon whom the agreement will apply was fairly chosen; and that the agreement does not contain any unlawful terms.[93]

The FWC is entitled to approve an enterprise agreement that does not pass the "better off overall" test where the agreement passes the public interest test. Such approval may take place where the FWC is satisfied that, because of exceptional circumstances, the approval of the agreement would not be contrary to the public interest.[94] Once an enterprise agreement has been approved, persons to whom it applies must abide by its terms or risk a civil remedy.[95]

The FWA envisages that low-paid employees[96] enjoy the benefits of collective bargaining and has *inter alia* the following objects:

> "[T]o assist low-paid employees and their employers to identify improvements to productivity and service delivery through bargaining for an enterprise agreement that covers 2 or more employers, while taking into account the specific needs of

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[90] S 190 of the FWA. However, the FWC will ask the bargaining representatives for their views before accepting an undertaking. In terms of s 191 the undertaking becomes a term of the enterprise agreement once approved.

[91] S 188 of the FWA determines the requirements of "genuine agreement" and provides that genuine agreements will be accepted to be present where an employer has adhered to all pre-approval steps and there are no other reasonable grounds for believing that the agreement has not been genuinely approved.

[92] S 193 of the FWA explains what the "better off overall test" is and states that an enterprise agreement will pass such test where the FWC is satisfied that each award covered employee and each prospective award covered employee for the agreement would be better off overall if the agreement applies than if the modern award applied.

[93] S 186 of the FWA. The other requirements are that the agreement does not contain any designated outworker terms; that it specifies a nominal expiry date; that such date is not more than four years after the day on which the FWS approves the agreement; and that the agreement includes a term that provides for dispute resolution and representation of employees in any such process.

[94] S 189 of the FWA.

[95] S 539 of the FWA item 4 determines that the Federal Court, Federal Circuit Court or an eligible State or Territory Court can be approached for relief.

[96] The FWA does not define "low-paid", but the Explanatory Memorandum to the Fair Work Bill 2008 describes a "high-income threshold" as $100 000.00 per year for full-time employees at that time. In *Application by United Voice* [2014] FWC 6441 the FWC concluded that low-paid employees are those employees "who are paid at or around the award rate of pay and who are paid at the lower award classification levels".

> individual enterprises[97] [and] to enable the FWC to provide assistance to low-paid employees and their employers to facilitate bargaining for enterprise agreements."[98]

The "assistance" referred to above relates to the FWC's authority to make low-paid authorisations and determinations. A low-paid authorisation may be applied for in respect of a proposed multi-enterprise agreement. The application must specify the employers and employees to be covered by the authorisation.[99] The FWC must make the low-paid authorisation where it deems it in the public interest, taking into account whether it would assist low-paid employees (who did not historically have access to collective bargaining or who had difficulty in collective bargaining);[100] the bargaining history in the industry; the bargaining strength of the respective employers and employees; the current terms and conditions of the employees in comparison with the industry norm; and the degree of commonality in the nature of the enterprises to which the authorisation relates.[101] Once a low-paid authorisation has been made, an employer who wishes to be removed from its ambit must apply to the FWC to be removed.[102] An employer, bargaining representative of an employee who will be covered or an employee organisation may apply to have an employer added to a low-paid authorisation, which the FWC must do if it deems doing so to be in the public interest.[103]

The effect of a low-paid authorisation is that the FWC may, in relation to a proposed multi-enterprise agreement, assist in facilitating bargaining and resolve disputes.[104] When granted, the FWC will be able to call compulsory conferences between the parties. It may also make good faith bargaining orders, in which case protected industrial action will not be available.[105] Good faith bargaining orders cannot usually be made in

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97 S 241(b) of the FWA.
98 S 241(d) of the FWA.
99 S 242 of the FWA. See Naughton (2011) *AJLL* 214.
100 Naughton (2011) *AJLL* 216.
101 S 243(2) of the FWA. S 432(3) contains further aspects which must be considered, including whether the granting of the authorisation would assist in identifying improvements to productivity and service delivery; the extent to which the likely number of bargaining representatives for the agreement would be consistent with a manageable bargaining process; and the views of the employers and employees who will be covered by the agreement. Naughton (2011) *AJLL* 215.
102 S 244 of the FWA determines that the FWC may vary a low-paid authorisation to remove an employer's name if it is satisfied that, because of a change in the employers' circumstances, it is no longer appropriate for the employer to be specified in the authorisation.
103 S 244(3) of the FWA, although the additional considerations in s 432(3) must also be considered.
104 S 246 of the FWA.
105 Lucev (2009) 27.

relation to enterprise agreements and a low-paid authorisation therefore is an exception where an employer may be directed to bargain in good faith.[106] As confirmed by the FWC, the effect of a low-paid authorisation is that it may *mero motu* intervene to facilitate bargaining.[107]

Where a low-paid authorisation has been made, the FWA allows any of the parties to a proposed multi-enterprise agreement to apply for a low-paid determination.[108] Such an application may be made when the parties to the proposed agreement are genuinely unable to agree on the terms thereof.[109] Two types of low-paid determinations are in place, namely, consent low-paid determinations and special low-paid determinations. A consent low-paid determination is applied for by the bargaining representatives of employers and employees jointly, whilst a special low-paid determination is applied for by a single bargaining representative (of either an employer or employees).[110]

Before approving the application, the FWC must be satisfied that the low-paid determination will promote future bargaining for an enterprise agreement; will promote productivity and efficiency in the enterprise(s) concerned; and will be in the public interest.[111] Further requirements are that the interests of employers and employees must be taken into account, including that the employers must be able to remain competitive. Once the FWC has considered the application, the low-paid determination may be approved and will be applicable to the employers, employees and trade unions specified in the application.[112] This is the nearest procedure to the South African model

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[106] Naughton (2011) *AJLL* 216.

[107] Application by *United Voice* [2014] FWC 6441. The FWC also confirmed in this matter that the issues to be decided (the issues in dispute) by the FWC are decided following an arbitration process. The parties who sought the low-paid authorisation, several security companies, were ultimately unsuccessful as the FWC found that granting such authorisation would not advance the public interest. Although it was found the employees are low-paid employees, no case had been made that the employees did not have access to collective bargaining or faced substantial difficulty when undertaking bargaining at their workplaces. Naughton (2011) *AJLL* 216.

[108] Ss 260–265 of the FWA.

[109] S 260(3) of the FWA determines what should be reflected in the application, including the bargaining representatives making the application; the terms which have already been agreed to; the issues in dispute; the employers who have agreed to be covered by the determination; the employees who will be covered; and each employee organisation that is a bargaining representative of those employees.

[110] Naughton (2011) *AJLL* 217. A special low-paid determination may only be imposed on employers that have not been previously covered by an enterprise agreement.

[111] S 262(4) of the FWA and Naughton (2011) *AJLL* 217.

[112] S 272 of the FWA provides that the determination must include terms such that the determination would, if it were an enterprise agreement, pass the better off overall test.

of the extension of collective agreements, except that the low-paid determination is not an agreement – rather a directive on specified issues. Naugton and Pittard state that the low-paid authorisation and determination provisions are exceptions to the general expectation that collective bargaining takes place at enterprise level:[113]

> "The low-paid bargaining provisions in pt 2-4 of the *Fair Work Act* raise the prospect of multi-employer or industry-wide bargaining in certain low-paid sectors. Arguably, at least, these provisions enable workers who have traditionally been deprived of the benefits of enterprise bargaining to enter the enterprise bargaining stream. In some circumstances these provisions may also invest FWC with general powers of arbitration in relation to classes of low paid employee."

In practice, however, low-paid workplace determinations are not often issued.[114] This may be due to the onerous substantive requirements that need to be met for the approval of such a determination. Naughton states that the requirement that employers must be able to remain competitive provides employers with an opportunity to limit the operation of the low-paid determination provisions.[115]

3.4 Comparison with International Labour Standards

Australia is a member of the ILO and has ratified both the Freedom of Association and Protection of the Right to Organise Convention and the Right to Organise and Collective Bargaining Conventions.[116] The Collective Agreements Recommendation[117] therefore plays an important role in assessing whether the Australian model passes scrutiny in terms of international norms. The Collective Bargaining Recommendation also plays a role, as is discussed below.

Naughton provides a summary of the Australian government's deliberations in including the low-paid authorisations and determinations provisions into the FWA – which favour a decentralised platform for collective bargaining by way of workplace agreements. He states that there were concerns that the Australian system restricted multi-employer bargaining and that this was inconsistent with overseas practice and the prescripts of the ILO.[118] The low-paid authorisation and determination procedures

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[113] (2013) *ALR* 136.
[114] Naughton and Pittard (2013) *ALR* 137.
[115] Naughton (2011) *AJLL* 218.
[116] ILO website (accessed at http://www.ilo.org/asia/countries/australia/lang--en/index.htm on 3 May 2018, 16:01).
[117] 91 of 1951.
[118] Naughton (2011) *AJLL* 219.

were specifically implemented to allow for multi-employer and industry-wide bargaining, even though making use of these procedures have proven difficult due to onerous substantive requirements.

As with the study of Namibia and its compliance with the standards of the ILO, this study refers to the ILO guidelines identified in Chapter 2 in assessing Australia's compliance with international standards.

Firstly, article 5(2)(a) of the Collective Agreements Recommendation requires that "the collective agreement already covers a number of the employers and workers concerned which is, in the opinion of the competent authority, sufficiently representative". The Australian model of extending collective agreements is unique – it is a system whereby application is made for a low-paid determination to be applicable to specified employers and their employees and an arbitration process is followed to have the outcome decided by the FWC. There is no existing collective agreement in place, and the act of "extending" takes place by a dual process of citing employers to be bound by the arbitration outcome. Strictly speaking, article 5(2)(a) of the Collective Agreements Recommendation is not complied with in this model of extension. However, this non-compliance is not material as the prerequisites which must be in place for such an arbitration to take place include that a collective agreement had been negotiated in principle; that there are certain items agreed on between the parties which should form part of the agreement but could not be agreed upon; and that the application must specify the employees who agreed to be covered by the low-paid determination. This implicitly confirms that the process of issuing a low-paid determination involves a consideration that the proposed enterprise agreement (theoretically) covers a "sufficiently representative" number of employers and employees.

Secondly, article 5(2)(b) of the Collective Agreements Recommendation provides that "as a general rule, the request for extension shall be made by one or more organisations of workers or employers who are parties to the agreement". Only proposed parties to an enterprise agreement may apply for a low-paid determination and may only do so where the parties have reached deadlock or cannot conclude the enterprise agreement. As with the previous consideration there is no agreement in place but there is an agreement in principle. It is concluded, in the context of the Australian labour

relations system, that the low-paid determination system is compliant with article 5(2)(b) of the Collective Agreements Recommendation.

Thirdly, article 5(2)(c) of the Collective Agreements Recommendation provides that "prior to the extension of the collective agreement, the employers and workers to whom the agreement would be made applicable by its extension should be given an opportunity to submit their representations". The process of passing a low-paid determination envisages an arbitration process, which by its very nature requires the parties to submit their representations.

And finally, the ILO's committees of experts have recommended that a prior tripartite analysis of the possible effects of the extended collective agreement be done. A feature of the FWA and its system of enterprise agreements entails the "better off overall" test, which entails that the FWC must analyse whether the employees will benefit from any proposed enterprise agreement or whether their current conditions of employment are more beneficial. The "better off overall" analysis is not a tripartite analysis but focuses on the possible effect of an enterprise agreement or low-paid determination.

This study finds that the Australian model of extending conditions of employment is compliant with the Collective Agreements Recommendation, when one considers that such recommendation is to be applied by way of machinery "appropriate to the conditions existing in each country".

3.5 Comparing Australia and South Africa

South Africa's extension mechanism cannot easily be compared with the low-paid authorisation and determination procedures of Australia. The first major difference is that no collective agreement *per se* is in place prior to the approval of a low-paid determination. While central bargaining is one of the objectives of the South African LRA, it is not a common occurrence in Australia where the low-paid authorisation and determination procedures have been put in place to create some space for multiple-employer or industry-wide collective agreements. Even though these procedures have been put in place with the express purpose to allow for industry-wide bargaining, it is telling that the substantive procedures for the approval of low-paid authorisations and determinations have had the effect that these procedures are not used very often. While in South

Africa extending collective agreements are the order of the day, the same cannot be said of Australia.

The objective of the low-paid authorisation and determination procedures is to “assist and encourage low-paid employees and their employers who have not historically had the benefits of collective bargaining”. The objectives of extending bargaining council agreements include the prevention of unfair competition between employers; to make provision for industry-wide uniform terms and conditions of employment; and to promote labour peace and central bargaining.

Furthermore, as was illustrated in Chapter 4, the South African extension mechanism provides that a bargaining council agreement must be extended when it complies with the requisite numerical and jurisdictional requirements. These include that the bargaining council must be sufficiently representative of the sector concerned; that the majority of the bargaining council parties vote in favour of the extension; and that the collective agreement itself contains specified provisions. Although the requirements are strict, and possibly cumbersome, onerous substantive requirements do not prevent applicants seeking extension from having their agreement extended and they may be sure of the outcome of their collective bargaining processes.

Also, the Australian model of “extending terms and conditions of employment” requires the FWC to consider several issues before issuing a low-paid determination. These considerations include whether it would promote future bargaining for enterprise agreements; whether it would enhance productivity and efficiency in the workplaces; the interests of the employers and employees to be covered by the determination; and whether it would ensure that the employers are able to remain competitive. These issues to be considered are open for interpretation, and appear to be focused on employer interests over employee protection.

In assessing the Australian “extension model” this study concludes that there is no one-size-fits-all approach to the promotion of central bargaining and that each legal system will have its own unique circumstances and challenges. While the Australian model of extension is seemingly too far removed from the South African extension mechanism, it nevertheless offers a valuable insight into features which could be considered by South Africa. Chief amongst the positive insights is the “better off overall”

test that allows the focus to be on the welfare of employees and the interactive arbitration process that takes place prior to the publishing of a low-paid determination. The Australian model also illustrates the importance of avoiding too onerous substantive requirements for the approval of a low-paid determination (or for the extension of a collective agreement). Whatever prerequisites are in place for such an extension, it must not be near impossible for parties to meet such requirements lest the extension-mechanism becomes obsolete.

4. Netherlands

4.1 Introduction

The Netherlands was chosen to be compared with South Africa because it is a European country in which collective agreements are routinely extended. The Netherlands is a member state of the ILO and has ratified both the Freedom of Association and Protection of the Right to Organise and Collective Bargaining Conventions. Also, the Dutch Constitution expressly guarantees the right to freedom of association as a fundamental right.[119]

4.2 Background

Unlike the position in Australia and Namibia, centralised bargaining occurs in many European countries, including the Netherlands.[120] Collective agreements cover most employees because of the extension of such agreements.[121]

The Constitution of the Kingdom of Netherlands[122] guarantees the right to freedom of association,[123] but does not address issues such as industrial action and the right to form and join trade unions.[124]

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[119] The Constitution of the Kingdom of the Netherlands 2008, s 8.
[120] Du Toit *et al* (1995) 73.
[121] Du Toit *et al* (1995) 74; and Minutes of Meeting of European Labour Court Judges (2006) 2.
[122] 2008.
[123] Article 8.
[124] However, Van Hoek (2003) 251 states that the lack of constitutional protection does not hamper union development and industrial relations because the courts favour compliance with international conventions.

Collective agreements are afforded the status of contracts under civil law, but only bind the members of the contracting parties. Two types of collective agreements are prevalent, namely, employer-specific agreements and those covering whole economic sectors.[125] This study focuses only on those agreements covering entire economic sectors. These agreements are typically concluded by employers' organisations rather than individual companies.[126]

There is no general obligation to bargain in the Netherlands, but due to the prevalence of collective agreements most employers are amicable to collective bargaining.[127] A collective agreement is defined as

> "an agreement concluded by one or more employers or one or more associations of employers having full legal capacity and one or more associations of employees having full legal capacity, providing in particular or exclusively for the employment conditions to be observed in employment contracts".[128]

Before trade unions may enter into collective agreements, their constitutions must expressly state that they may conclude collective agreements.[129] There are no requirements pertaining to representation that places a bar on the conclusion of binding collective agreements.[130] Therefore, this system allows employers to choose with which trade unions they wish to bargain. However, once a collective agreement has been concluded it applies to all the employees of the employer party to the agreement.[131] Once an employer is bound by a collective agreement it has to comply with the conditions of the collective agreement, not only in relation to those employees who are members of the party trade union, but also its non-unionised employees.[132]

For a collective agreement to come into force, the Minister of Social Affairs ("the Minister") must be notified of the collective agreement, where after he or she sends a notification of receipt.[133] The Minister has the authority to extend collective agreements

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[125] Van Hoek (2003) 255.
[126] Van Hoek (2003) 255 states that these agreements typically apply throughout the Netherlands.
[127] Van Hoek (2003) 252.
[128] S 1 of the *Wet op de collectieve arbeidsovereenkomst*, 1927 ("Collective Agreement Act"). See Labour Foundation Informal Opinion to the ILO 2.
[129] S 2 of the Collective Agreement Act.
[130] See Labour Foundation Informal Opinion to the ILO 2.
[131] Van Hoek (2003) 253.
[132] See Labour Foundation Informal Opinion to the ILO 3; and Van Hoek (2003) 253.
[133] Van Hoek (2003) 253.

(termed "*erga omnes*" agreements) to non-parties which results in the collective agreement being akin to secondary legislation.[134]

4.3 Extension of Collective Agreements

The Minister, on the advice of the Labour Foundation,[135] may extend an industry-level collective agreement to non-parties to make such agreement applicable to the whole industry.[136] The Minister must be approached on application by a party to the collective agreement to commence such process.[137] The prerequisite for such application is that the agreement must cover, prior to its extension, a sufficiently representative number of the employees in the industry concerned.[138]

Once the Minister receives a request for the extension of a collective agreement, he or she must publish a notice in the *Government Gazette* and afford stake holders an opportunity to submit representations.[139] The Minister is entitled to consult with the Labour Foundation regarding the extension of a collective agreement.[140] A collective agreement is extended by way of publication in the *Government Gazette*, and such publication contains the collective agreement, the duration of the agreement and a description of the area or sector in question.[141]

The purpose of the extension mechanism has been described as follows:[142]

> "The legislator intended the legal extension of collective labour agreements to be an instrument to promote collective bargaining and the conclusion of collective labour agreements and thereby stability in industrial relations, industrial peace and self-regulation by social partners. In order to be able to bring about these

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134 Minutes of Meeting of European Labour Court Judges (2006) 2. The DESifo DICE Report 2/2016 59 states that *erga omnes* provisions are a regular feature in most European countries. This provision causes employees to be bound by a collective agreement by virtue of their employer being a party to a collective agreement.

135 The Labour Foundation is a national consultative body established in 1945, comprised of the three main trade union federations and the three main employers' organisation federations. See Labour Foundation Informal Opinion to the ILO (2004) 2.

136 The *Wet op het algemeen verbindend en onverbindend verklaren van bepalingen van collectieve arbeidsovereenkomsten*, 1937 ("Extension of Collective Agreements Act").

137 S 4(1) of the Extension of Collective Agreements Act.

138 Eurofound website (accessed at https://www.eurofound.europa.eu/efemiredictionary/extension-of-collective-agreements-4 on 7 May 2018, 20:29). The collective agreement must already cover 55% of the relevant employees.

139 S 4(3) of the Extension of Collective Agreements Act.

140 S 4(4) of the Extension of Collective Agreements Act.

141 S 5 of the Extension of Collective Agreements Act.

142 See Labour Foundation Informal Opinion to the ILO 3.

> positive effects, the legislator deemed it necessary to protect and support the collective labour agreement."

The purpose of extending collective agreements is addressed in the Extension of Collective Agreements Act and includes the attainment of labour peace, to promote and encourage employers and employees to join associations of employers or employees and to achieve the equal treatment of organised and unorganised employees.[143]

A distinction is drawn between substantive and procedural clauses in collective agreements. Substantive clauses regulate terms and conditions of employment of employees, whilst procedural clauses regulate the rights and entitlements of the parties to the collective agreement. Substantive clauses may be extended to cover a whole industry whilst procedural clauses may not.[144] This requirement is of interest as it places the focus of extending collective agreements on employee interests, whilst still achieving the goal of combating unfair competition between employers. It does so whilst ensuring that the extension mechanism cannot be used as a tool of oppression against minority trade unions.

The Minister may exempt an employer, or a sub-sector of an industry, from the ambit of an extended collective agreement where it applies for exemption and where there is another collective agreement in place.[145] The Minister must decide whether to grant exemption within 14 weeks of receipt of the application for exemption.[146] In making such a decision the Minister only considers whether a valid and binding workplace agreement is in place. It is thus evident that the Dutch system favours collective agreements voluntarily concluded rather than those imposed upon a sector of economic activity.[147]

Where a collective agreement is extended, nothing prevents non-party trade unions to conclude a collective agreement with employers bound by the extended collective agreement, although their collective agreement will lack legal effect in those instances

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[143] S 2(5) of the Extension of Collective Agreements Act.
[144] CESifo (Centre for Economic Studies Munich) Dice Report 2/2016 60.
[145] See Labour Foundation Informal Opinion to the ILO 6; and s 7a of the Extension of Collective Agreements Act.
[146] S 7a(2) of the Extension of Collective Agreements Act.
[147] Van Hoek (2003) 264.

where clauses are incompatible with or in contravention of the clauses of the extended collective agreement.[148]

4.4 Comparison with International Labour Standards

The Netherlands has ratified both the ILO's Collective Bargaining Convention and the Freedom of Association Conventions and has applied the Collective Agreements Recommendation in its deliberations regarding the extension of collective agreements.[149]

In 2004 the Minister and the Labour Foundation requested an opinion from the ILO's Labour Standards Department regarding its policy on the extension of collective agreements.[150] The question was posed whether it is permissible to extend a collective agreement containing a clause in terms of which specified deviations are allowed at decentralised level.[151] The request contained the following description of the Dutch system:[152]

> "The instrument of legal extension of a collective labour agreement is generally regarded as supporting the right to collective bargaining as meant in Article 4 of ILO Convention no. 98. Legal extension of a collective labour agreement does not prejudice the right of employees' organisations who are not a party to that collective labour agreement to negotiate about separate collective labour agreements and to enter into them. However, these separate collective labour agreements will, during the period of validity of the extension order, lack legal effect insofar as they are in contravention with the legally extended collective labour agreement. Therefor it is indisputable that this consequence of the extension instrument does not cause it to be in contravention with the ILO Conventions nos. 98 and 87."

The ILO's committee of experts considered both the Collective Bargaining and the Freedom of Association Conventions to determine whether the policy was aligned with ILO principles. As far as the Freedom of Association Convention was concerned, it was noted that the provisions would not impede the ability of trade unions to form and

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148 See Labour Foundation Informal Opinion to the ILO 8.
149 See Labour Foundation Informal Opinion to the ILO 8.
150 Labour Foundation Informal Opinion to the ILO, Annexure 1.
151 Labour Foundation Informal Opinion to the ILO 4, where it is stated that the so-called "decentralisation provisions" were a response to a demand for tailored employment conditions. The decentralisation provisions allowed a trade union, who was a party to the original collective agreement, to conclude a separate collective agreement with a party-employer at workplace level.
152 Labour Foundation Informal Opinion to the ILO 8.

operate, nor would employees be prevented from joining trade unions. Much the same was noted about the Collective Bargaining Convention. Governments are encouraged to support the right to organise and to make use of the tools of collective bargaining. One of these tools is the extension mechanism. It was found that the extension of collective agreements does not violate the functioning of trade unions and that it does not restrict the right to organise or the encouragement of voluntary negotiations.[153]

The Collective Agreements Recommendation and the Collective Bargaining Recommendation[154] were considered. It was confirmed that where a collective agreement has been extended at sectoral level, negotiations may still take place at enterprise level.[155]

The ILO opinion is insightful as it provides a clear indication that the ILO is not opposed to the extension of collective agreements in jurisdictions where collective bargaining takes place at enterprise level.

Taking into account the opinion of the ILO's committee of experts, this study finds that the Dutch system of extending collective agreements substantially complies with international norms. The Dutch model requires that, prior to extension, these agreements should cover a number of employers and employees that are "sufficiently representative". The collective agreement must cover at least 55% of employees in the sector prior to extension. The request to extend must be submitted by a party to the collective agreement and non-parties are afforded the opportunity to make prior representations before the agreement is extended.

4.5 Comparing the Netherlands and South Africa

Similar to the situation in Namibia and Australia, the Netherlands does not have institutions like South Africa's bargaining councils. Despite this, central bargaining enjoys a high premium and the extension mechanism is viewed as a significant tool to promote sectoral bargaining. As in South Africa, the extension of collective agreements is a prominent feature of industrial relations in the Netherlands. The countries share the following objectives through the extension mechanism: it promotes labour peace;

[153] Labour Foundation Informal Opinion from the ILO 3.
[154] 163 of 1981.
[155] Labour Foundation Informal Opinion from the ILO 1.

it encourages sectoral bargaining; and it nurtures equality between unionised and non-unionised employees.

The South African extension mechanism is more nuanced than its Dutch counterpart. In South Africa both numerical and jurisdictional requirements need to be met. South Africa measures prior representivity by means of the extent to which the bargaining council is representative of the employees in the sector, whereas representivity in the Dutch system relies on the number of employees already under the ambit of the collective agreement in relation to the sector.

The ILO's committees of experts employed the following rationale when they considered the Dutch system of extending collective agreements: The extension of collective agreements should not impede upon a trade union's functioning; it should not restrict the right to collective bargaining; and extensions should allow for bargaining to continue at enterprise level. The ILO committee of experts found that the Dutch system did not clash with international labour standards.

The question can be posed whether the South African extension mechanism would pass the same test. It is submitted that the South African extension mechanism does impact on non-party trade unions in so far as certain provisions are made applicable to their members, but it does not influence their functioning.[156] Employees are not precluded from joining non-party trade unions and they may participate in the activities of that union.[157] The same applies to employers and employers' organisations.[158] At most it can be said that the extension of collective agreements requires both trade unions and employers' organisations to employ creative measures to ensure its continued existence. Added to this, collective agreements may still be concluded at workplace level. However, such agreements may not contain provisions which are already arranged in the extended collective agreement. Therefore, this study finds that the South African extension mechanism would probably pass international muster should the same tests of the ILO committee of experts be applied as was the case with the Netherlands.

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[156] S 8 of the LRA provides that every trade union *inter alia* has the right to determine its own constitution and rules, hold elections and plan and organise its administration and lawful activities.
[157] S 4 of the LRA.
[158] Ss 6 and 8 of the LRA.

The Dutch extension mechanism substantively complies with the prescripts of the ILO's conventions and recommendations. However, this study highlights one aspect – that of a prior opportunity to submit representations. The South African extension mechanism only requires prior notice where the requisite majority requirements had not been met. In contrast, the Dutch system affords such an opportunity to all parties before an agreement may be extended. The prior notice requirements are lacking from the South African extension mechanism as far as mandatory extension is concerned. This is an aspect of the South African model that probably does not comply with the international prescripts recommended by the ILO.

5. Conclusion

This chapter explored three legal systems and their mechanisms to establish uniform conditions of employment via an extension process in order to assess whether lessons may be learnt from other legal systems.

This chapter found that Namibia has introduced a centralised collective bargaining framework, although there are no forums like South Africa's bargaining councils. The Labour Act of 2007 provides that an exclusive bargaining agent may extend a collective agreement industry wide. This study found that the requirement that only collective agreements concluded with an exclusive bargaining agent may be extended, would probably comply with the Collective Agreements Recommendation. It was concluded that importing such a system to South Africa would be ill-advised. This is because the South African industrial relations system strongly favours majority trade unions, but does not preclude sufficiently representative trade unions from engaging in collective bargaining.

A positive aspect of the Namibian extension mechanism is that in all instances non-parties are notified of an application for the extension of a collective agreement. The prior notification must be done in such a manner as to ensure that non-parties will in fact receive notice. The notice must be printed in the *Government Gazette* and a widely-circulated newspaper. All objections are sent to the parties to the collective agreement who have a right to respond. The Minister must consider all objections and

responses thereto. These requirements comply with the criteria developed by the Collective Agreements Recommendation in so far as non-parties should be granted an opportunity to make representations before the collective agreement is extended.

Another aspect that may be of value to South Africa is the requirement that the Namibian Minister must consider whether the employees sought to be covered, will enjoy more beneficial terms and conditions of employment under the extended collective agreement. This requirement emphasises the ultimate objective that the extension of collective agreements should achieve, namely, that employees should benefit from the extension of a collective agreement. The South African model does not contain a similar objective. It is submitted that bargaining councils do not always take the best interests of employees into account when requesting the extension of collective agreements. The inclusion of such a requirement would improve the working conditions of all workers.

The Australian legal system is unlike most other models. This country's industrial relations system combines voluntarism with elements of compulsion. Australia's extension mechanism provides for the low-paid determination procedure in terms of which an entire industry may be compelled to apply the same terms and conditions of employment regarding "low paid" employees. It is significant to note that parties who seek a low-paid determination must overcome burdensome prerequisites. Amongst others, the following aspects must be considered: the public interest; the interests of low-paid employees who historically did not have access to collective bargaining; the bargaining history of the industry; and the respective bargaining strength of the employers and employees. These requirements set an extremely high bar for approval of low-paid determinations. This is also why a low number of low-paid determinations are issued.

The study found that there is not only one ideal model pertaining to the extension of conditions of service to all workers in a sector. Australia does not have institutions similar to bargaining councils. It is clear that different mechanisms operate more effectively in differing bargaining systems. The lessons that may be learnt from Australia are that onerous prerequisites hamper the extension of conditions of service.

Turning to the Netherlands, the study found that the extension of collective agreements has been a central feature of the Dutch industrial relations system for a long

time. The ILO's committees of experts evaluated the Dutch system pertaining to the extension of collective agreements. These committees concluded that the Dutch model is not objectionable as long as trade unions (and employers' organisations) are not impeded in their functions; that employees' right to freedom of association is not restricted; and that the extension of collective agreements should not result in a prohibition of the conclusion of workplace agreements.

The Dutch model contains the significant requirement that only collective agreements containing substantive provisions are capable of extension. Substantive provisions relate to terms and conditions of employment of employees, whereas issues surrounding the rights of trade unions fall under procedural provisions. This study found that this feature is admirable as it places the interests of employees at the forefront and reduces the possibility of the extension mechanism being used as a tool against minority trade unions.

This chapter concluded that both the Namibian and Dutch models illustrate that prior notification of any extension is absolutely necessary, and that this requirement echoes the ILO's guidelines regarding the extension of collective agreements

Chapter Six: Conclusion and Recommendations

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1. Introduction

This study set out to analyse the extension of bargaining council agreements in South Africa against the background of the challenges experienced locally due to the implementation of the majoritarian principle. It is one of the main assumptions of this research that the extension of collective agreements may have a negative effect on minority trade unions and their members. Therefore, this dissertation set out to determine whether the perceived negative consequences of the extension of collective agreements are severe enough to justify the abolition of the extension mechanism.

A social justice approach was used as point of departure. Not only does the Constitution of the Republic of South Africa, 1996 provide that South Africa is a society based on democratic values, social justice and fundamental human rights, but the Labour Relations Act[1] ("LRA") also has as one of its main goals the achievement of

[1] 66 of 1995.

social justice for all workers. Because of the lasting effects of apartheid and colonialism this is a particularly commendable and pressing ideal to achieve.

The following research questions informed this study:[2]

i. Does South Africa comply with its international law obligations regarding the extension of bargaining council collective agreements?
ii. Are the prerequisites pertaining to the extension of bargaining council collective agreements sufficient to protect the interests of non-parties?[3]
iii. Should the mechanisms that provide for the extension of bargaining council agreements be amended to ensure that they are compliant with South Africa's international obligations?

Apart from considering the international norms, the study traversed the historical developments pertaining to the extension of collective agreements and analysed the South African regulatory framework.[4] This was followed by a comparative study of Namibia, Australia and the Netherlands.[5] This chapter answers the questions mentioned above by setting out the key findings of the different chapters and concludes with recommendations on how the extension mechanism ought to be amended. This, it is argued, will ensure that the South African extension mechanism will be compliant with the Constitution and South Africa's international law obligations.

2. Key Findings

2.1 South Africa's International Obligations

The International Labour Organisation ("the ILO") played a significant role in opposing the apartheid government of South Africa. The government was criticised by the ILO's Fact-Finding and Conciliation Commission ("FFCC") due to the degree in which

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2 Ch 1 para 5.
3 This question was to be answered with reference to the requirement to publish a sectoral determination in terms of the Basic Conditions of Employment Act 75 of 1997 ("the BCEA").
4 Ch 3.
5 Ch 5.

the Minister of Labour ("the Minister") could interfere in the outcomes of collective bargaining.

With the fall of the apartheid government and South Africa becoming a democratic society with a sovereign constitution in 1994, South Africa once more became a member state of the ILO. In Chapter 2 it was found that that the South African government declared its support for the values endorsed by the ILO by ratifying all core conventions since 1994. Added to this, South African courts have consistently upheld the ILO's conventions, recommendations and the rulings of its supervisory bodies. The study found that the South African legislator placed a positive obligation on those applying the law to take the ILO core values into account. This much is clear in that the Constitution and the LRA both provide that international law must be considered when legislation is interpreted.

As regards the question whether South Africa complies with its international law obligations, Chapter 2 identified a number of key conventions and recommendations as being fundamental for the purposes of the research.[6] Compliance with the right to freedom of association was central to this study. This flowed from the Right to Organise and Collective Bargaining Convention[7] ("the Collective Bargaining Convention") and the Freedom of Association and Protection of the Right to Organise Convention ("the Freedom of Association Convention").[8]

The Freedom of Association Convention refers to a number of elements that ought to be present in any labour relations system. The following components promote freedom of association: employees and employers should have the right to join organisations of their own choice; trade unions and employers' organisations should be allowed to draw up their own constitutions and rules; and these organisations should have the right to elect their own representatives without government interference.

In turn, the Collective Bargaining Convention provides that ILO member states are directed to implement measures to encourage and promote voluntary negotiation between employees and employers, in order that terms and conditions of employment may be established and enforced by way of voluntary collective agreements.

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6 Ch 2 paras 4.2 and 4.3.
7 98 of 1949.
8 87 of 1948.

Apart from the two mentioned conventions, Chapter 2 also identified two relevant recommendations, namely, the Collective Bargaining Recommendation[9] and the Collective Agreements Recommendation.[10] These recommendations provide valuable guidelines to member states regarding collective bargaining and the extension of collective agreements. The chapter identified the following significant principles in these recommendations and the rulings of the ILO's supervisory bodies:[11]

i. Measures should be implemented by member states to ensure that "representative" employers' organisations and trade unions are recognised for the purposes of collective bargaining.
ii. Where appropriate, member states should implement measures to extend collective agreements industry wide.
iii. Where collective agreements are extended certain conditions should be present, including:
    a. Prior to extension, the collective agreement must already apply to a sufficiently representative number of employees.
    b. The request to extend should be initiated by one of the parties to the collective agreement.
    c. Prior to the agreement being extended, potentially affected employers and employees should be notified and they should be given the opportunity to submit representations.
iv. Where a collective agreement is extended industry wide, a prior tripartite analysis of the potential consequences of the extension should be done.
v. Member states should implement measures to ensure that collective bargaining is possible at both enterprise and industry level.

Chapter 2 concluded that it is evident that the ILO endorses the principle of majority support during collective bargaining. Furthermore, the ILO supports the idea that requirements regarding representation may be introduced before a collective agreement is extended. Apart from the numerical component, this research found that

9 163 of 1981.
10 91 of 1951.
11 Ch 2 para 6.

non-parties should ideally receive prior notice and should be given the opportunity to respond to such applications.

Lastly, Chapter 2 found in accordance with the soft-law approach favoured by the ILO, that the ILO does not provide specific instructions regarding the circumstances in which a collective agreement must be extended. The ILO merely provides flexible guidelines that member states may incorporate into national legislation. This approach acknowledges that different legal systems have different needs.

2.2 Historical Considerations

Chapter 3 delved into South Africa's historical development of collective bargaining and revealed that the extension mechanism and central bargaining forums have served as key features of South African labour law at least since 1924 with the enactment of the Industrial Conciliation Act.[12]

Early labour legislation favoured white employees at the expense of black employees. Not only were black employees excluded from the definition of "employee", but no provision was made for forums for the purposes of collective bargaining.[13] Legislation governing the extension of industrial council agreements was amended to include black employees for the sole purpose of preventing the situation whereby the employment of black employees, rather than white employees, would circumvent the outcomes of an extended collective agreement.[14]

Research on the historical developments established that the original rationale of the extension of collective agreements was to curtail unfair competition by levelling the playing field in industries that rendered the same products or services. The extension of collective agreements also aimed to ensure that the maximum number of employees enjoyed the benefits of collective bargaining, and it also sought to promote participation in collective bargaining at central level.

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12 11 of 1924.

13 It was only in 1983 that the 1956 ICA was amended to include all employees, regardless of race, in the definition of "employee". It was from this stage that black employees and their trade unions could participate in industrial councils.

14 Ch 3 para 2.2.

Although the extension mechanism was initially quite rudimentary with no avenue for affected non-parties to apply for exemption it later evolved to include an exemption and appeal procedure.[15]

The 1956 Industrial Conciliation Act[16] saw the imposition of various prerequisites.[17] The Minister had to consider and be satisfied with the fact that parties to the collective agreement were sufficiently representative of the sector; the nature and situation of the industry; the restrictive nature of collective agreements on business; the degree of consultation with non-parties prior to the request to extend; whether the industrial council considered dissenting views; and what opportunities small businesses had to obtain exemption. Added to this, the Minister was obliged to publish a provisional notice in the *Government Gazette* that invited non-parties to object to the proposed extension.

Chapter 3 concluded that at that point in time, South African legislation had become fragmented and inappropriate. Administrators and adjudicators had been granted too wide a discretion in their decision-making powers regarding the extension of industrial council agreements. The FFCC and the Cheadle Task Team observed that these extensive powers clashed with the principle of freedom of association because they allowed for state interference in the outcomes of collective bargaining. It became clear that there was a need for change.[18]

2.3 The South African Position: The Extension of Bargaining Council Agreements

Chapter 4 evaluated the current legislative framework pertaining to the extension of collective agreements. The LRA aims to give effect to the constitutional principles of freedom of association and the right to engage in collective bargaining.

Added to this, the LRA is aimed at promoting economic development, social justice, labour peace and the democratisation of the workplace. To this end the LRA has

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15 Ch 3 para 2.2.
16 28 of 1956.
17 Ch 3 para 2.4.1.
18 Ch 3 para 2.5.

established collective bargaining structures and it promotes collective bargaining at sectoral level.

The provisions of the LRA must be interpreted to ensure that effect is given to the LRA's primary objectives, in compliance with the Constitution and South Africa's international law obligations.[19]

Chapter 4 noted that the LRA promotes majoritarianism. However, the study has shown that the current majoritarian model is increasingly being criticised and challenged. Perceptions abound that the system is being abused to promote the interests of majority interest groups at the expense of minority trade unions and their members, as well as non-unionised workers. Disenfranchised employees seek avenues outside of the established bargaining structures.[20]

This study has identified and analysed the LRA's two types of extension mechanisms relating to bargaining council agreements.[21] The mandatory and the discretionary extension mechanisms are almost identical. However, the discretionary extension mechanism directs that in instances where the numerical majoritarian requirements are not met the Minister has a discretion whether or not to extend the collective agreement. This study identified a significant shortcoming in the mandatory extension mechanism. This procedure does not include the requirements of prior notice and the opportunity to make prior representations before the collective agreement is extended.

This study agrees with the main aims sought to be achieved through the extension of collective agreements. This includes that unionised employees should not have their livelihood threatened by non-unionised employees who may accept inferior working conditions; employers should be prevented from engaging in unfair competition by paying their employees lower wages and thus undercutting their products or services; and non-party employers should be encouraged to participate in central bargaining structures.

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19 Ch 4 para 3.
20 Ch 4 para 5.
21 S 32 of the LRA. See Ch 4 para 4.

However, whilst acknowledging the benefits that may be gained from extending bargaining council agreements, this research also identified a number of negative aspects. Firstly, minority trade unions' right to represent their members may be severely limited by majority trade unions and employers. Secondly, sections 23 and 32 of the LRA have the potential of significantly limiting the right to strike. By curtailing the right to strike, all inputs by minority trade unions during collective bargaining are negated. Thirdly, the study showed that there is a perception that large stakeholders at bargaining councils do not necessarily act in the best interests of all employees. These dominant parties are motivated by their own wellbeing rather than the best interests of all workers. To prevent this, the principles that apply to the Employment Conditions Commission ("ECC"), as established by the Basic Conditions of Employment Act ("BCEA"), when a sectoral or ministerial determination is passed should also apply when a bargaining council agreement is extended.[22]

Having assessed relevant case law this research has made the following key findings:[23]

i. When interpreting the LRA effect should be given to its primary purposes, in accordance with the Constitution and public international law obligations.
ii. Where it is possible to give effect to a broad interpretation that does not infringe upon a constitutional right, such interpretation should be preferred to a narrow interpretation. In this regard, even though the LRA might create the overall impression that the majority principle is endorsed to the exclusion of minority trade unions, such impression loses sight of the views of the ILO's supervisory bodies and such interpretation would not avoid the limitation of constitutional rights.
iii. Even though the extension mechanism does limit the right to strike the limitation is both reasonable and justifiable because it promotes orderly collective bargaining.
iv. The policy choice of the legislator reflected in the LRA is that the will of a majority must prevail over that of a minority. This is conducive to orderly collective bargaining and discourages the proliferation of trade unions in a workplace or sector.

[22] Ch 4 para 7.
[23] Ch 4 para 6.

v. The purpose of the extension mechanism is to prevent unfair competition by establishing minimum wages and conditions of employment to be applied across the board; the promotion of collective bargaining at sectoral level; the promotion of majoritarianism; and the benefit of employees who lack bargaining power.
vi. The various processes forming part of the extension mechanism may be subject to an administrative law review.
vii. The majoritarian principle negates the Minister's discretionary powers and ensures certainty and predictability of collective bargaining outcomes.

This study concludes that even though the extension of bargaining council agreements are beneficial to employees in general, the strict application of the majoritarian principle may hold negative consequences for minority trade unions. It is submitted that the current model should be subjected to minor amendments to align it with constitutional and international norms.[24]

The study also found that the proposed amendment of the LRA by the Labour Relations Amendment Bill of 2017 is a positive development in the face of the various challenges raised against the extension mechanism. It places a higher premium on determining whether the majority numerical requirements have been met. A further positive development is the fact that the Minister will be empowered to provide guidelines to bargaining councils as to when exemptions should be granted.

2.4 International Comparisons and Lessons Learnt

Chapter 5 compared the South African extension mechanism with the models adopted in Namibia, Australia and the Netherlands.

Namibia has not introduced central bargaining forums but its labour legislation nevertheless promotes central bargaining. The Namibian model of extension allows for a collective agreement to be extended industry wide where the agreement was concluded by an exclusive bargaining agent – a single trade union with majority status. This study concludes that it would be ill-advised to implement an exclusive bargaining

[24] Ch 4 para 7.

agent procedure into South African labour legislation. The South African system recognises sufficiently representative trade unions within the majoritarian model. Furthermore, the bargaining council extension mechanism at least provides a platform where minority interests may be deliberated upon, even though majority vote prevails.[25]

This research suggests that South Africa may learn from the Namibian extension mechanism in that non-parties are not only given prior notice of an impending extension but they are also invited to submit objections.

Not only is prior notice given by way of Namibia's equivalent to South Africa's *Government Gazette*, but the Minister of Labour must ensure that the notice is also published in a widely circulated publication to ensure that the maximum number of potentially affected non-parties are aware of the application. The Minister does not only consider objections and responses but he or she must also do a further analysis, namely, whether the terms of the collective agreement will be more beneficial than the terms and conditions applicable to the employees prior to extension. This is more compliant with article 5(2)(c) of the Collective Agreements Recommendation than the South African extension mechanism that only provides for prior notice in case of discretionary extension.

The Australian labour relations system differs substantively from the South African and Namibian models. This illustrates that there is no one-size-fits-all regulation of the protection of workers' rights. Although the Australian low-paid determination process is not a collective bargaining process, it is nonetheless a procedure that has some of the same objectives regarding extending majority collective agreements. It ensures industry-wide uniform conditions of employment.[26]

It is noteworthy that the Fair Work Commission ("FWC") must be satisfied that the publication of the low-paid determination will promote future bargaining; will promote productivity and efficiency; and will be in the public interest. The interests of employees and employers must be considered and businesses must remain competitive. The FWC has adopted the "better off overall test" to determine prior to the approval

[25] Ch 5 para 2.
[26] Ch 5 para 3.

of enterprise agreements whether employees will benefit from an enterprise agreement.

Apart from the positive aspects, it is submitted that the Australian system does not offer a viable alternative to the extension of collective agreements in South Africa. It illustrates the importance of not setting too high substantive requirements for the extension mechanism, as this may lead to such mechanism not being used to its full capacity or falling into disuse.

Finally, this study assessed the Dutch extension mechanism.[27] The Dutch Minister of Social Affairs is required to publish a prior notice in the *Government Gazette* and non-parties are invited to submit their representations regarding any potential extension. Furthermore, only collective agreements that already apply to at least 55% of the employees in the sector or area are capable of extension. As in South Africa, the Dutch system does not require the Minister to undertake a prior assessment of the effects of the extended collective agreement. However, the Dutch model relies on the majoritarian principle to provide the impetus to extend a collective agreement industry wide.

An interesting requirement of the Dutch system is that only collective agreements arranging substantive requirements, directly relating to terms and conditions of employment of employees, are capable of extension. This differs from the position in South Africa where there is no distinction between the issues that may be covered by a collective agreement. This research found that this requirement is beneficial to minority trade unions, as opposed to a system like that of South Africa where the extension mechanism may be used as a tool to exclude non-parties from participation in central bargaining arenas.[28]

The Dutch system also provided an opportunity to assess how the ILO supervisory bodies regard the extension of collective agreements. As regards the right to freedom of association, the ILO's committee of experts advised that the extension of collective agreements should not impede a trade union's functioning, should not restrict the

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[27] Ch 5 para 4.

[28] For example, the Safety and Security Services Bargaining Council has imposed a threshold in terms of which a single trade union needs at least 50 000 members to be admitted as a party to the council.

right to collective bargaining and should allow for bargaining to continue at enterprise level. Based on this rationale, Chapter 5 concluded that the South African extension mechanism does have a limiting impact on non-party trade unions and employers' organisations but that it does not affect their functioning. Furthermore, in South Africa employees and employers are not precluded from joining associations of their choice and they are not prohibited from participating in the activities of such associations. At most, the effect of the extension of bargaining council agreements is that these associations are required to use creative measures to ensure their continued existence.[29]

3. Recommendations

The extension mechanism has formed part of South African labour legislation since the first labour instruments were enacted. Likewise, central bargaining has always formed an integral part of the South African labour law framework. Abolishing the extension mechanism would not promote orderly collective bargaining and would not promote collective bargaining at sectoral level. Although sections 65 and 32 of the LRA have of late not been a bar to violent strike action, they nevertheless serve as an impediment to unnecessary strike action.[30] The extension of bargaining council agreements serves as encouragement for employers to participate in the central bargaining structures or else to be at the mercy of imposed terms and conditions of employment.

The fact that the current extension mechanism has survived the repeated legal challenges brought against it is a testament to its validity and relevance.[31]

Recent case law has seen the courts look to the ILO and its core values and the decisions of its supervisory bodies. The obligations of South Africa as a member state of the ILO cannot be lightly ignored, and the study identifies three aspects which

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[29] Ch 5 para 5.

[30] Employers faced with an unprotected strike may launch urgent proceedings to stop the strike and participation in such a strike may lead to disciplinary procedures against employees.

[31] See Ch 4 where the *Free Market Foundation v Minister of Labour* (2016) 37 *ILJ* 1638 (GP) matter is discussed in so far as it was found that s 32 of the LRA was a deliberate choice by the legislature to promote collective bargaining at sectoral level; would promote majoritarianism; prevent unfair competition; benefits employees who lack bargaining power; and promotes a pluralistic industrial relations system based on voluntarism.

could ensure that the South African extension mechanism is more compliant with these international obligations.

3.1 Prior Notice Requirements

The study found that the ILO's Collective Agreements Recommendation recommends that where provision is made for the extension of collective agreements, certain conditions should be in place. The first requirement is that prior to any extension, potentially affected employers and employees should receive notice of the impending extension.

In South Africa the Minister only informs potentially affected non-parties in the case of an impending discretionary extension of a bargaining council agreement. The proposed amendments to the LRA provide non-parties with a longer period in which to submit their representations, but this requirement still only relates to the discretionary extension of a collective agreement. Historically the 1956 ICA provided for prior notice to non-parties.

Furthermore, in both Namibia and the Netherlands non-parties are afforded the opportunity of prior notice.

Although the discretionary extension mechanism in South Africa complies with the prior notice requirement the mandatory extension mechanism does not provide for any measure of prior notice to potentially affected parties. Consequently, this study recommends that the LRA should be amended to provide for a prior notice requirement in relation to the mandatory extension mechanism.

3.2 Opportunity to make Prior Representations

The Collective Agreements Recommendation further provides that prior to the extension of a collective agreement, non-parties should be given the opportunity to comment on the impending extension.

As stated in Chapter 4, non-parties are only afforded the opportunity to submit their prior representations in relation to the discretionary extension of a collective agreement. This opportunity is not afforded where the collective agreement sought to be

extended enjoys majority support from the bargaining council and where the bargaining council is sufficiently representative of the industry concerned.

Chapter 3 highlights the fact that the 1956 ICA provided such an opportunity to non-parties and that the Minister was obliged to consider these representations before extending the collective agreement. Added to this, in both Namibia and the Netherlands prior notice is given to potentially affected non-parties who are granted the opportunity to comment prior to the extension of the collective agreement. The Australian model in turn allows for an arbitration process in order to ensure that potentially affected parties can participate in the process of establishing industry wide uniform conditions.

This research concludes that the strict application of the majoritarian principle to the mandatory extension mechanism, seemingly as justification to negate the need for prior notice and the opportunity to submit prior representations, falls foul of the Collective Agreements Recommendation. This practice is also not supported by international best practice as adopted by Namibia and the Netherlands. Therefore, this study recommends that an amendment be made to the mandatory extension mechanism, namely, that potentially affected parties be given the opportunity to make prior representations before a collective agreement is extended.

3.3 Prior Analysis of the Consequences of the Extension

The ILO's supervisory bodies found that a prior tripartite analysis of the consequences that the extension of a collective agreement may have on an industry should ideally be done before a collective agreement is extended.

Neither the mandatory nor the discretionary extension mechanism allows for a prior analysis of the effects that an extended bargaining council agreement may have on the industry or area concerned. Both mechanisms merely require the Minister to be satisfied of a numerical aspect (either majority support or that the bargaining council is sufficiently representative of the industry or area) and jurisdictional aspects.

It is interesting to note that the extension mechanism under the 1956 ICA complied with the prior analysis requirement. Under the 1956 ICA the Minister did not rely only on numerical factors in determining whether the parties to an industrial council were

sufficiently representative but had to consider the reality of the industry or area. The additional factors to be considered included the restrictive nature of collective agreements on businesses; the degree of consultation which had preceded the request to extend the collective agreement; the extent to which dissenting views had been considered by the industrial council; the allowance made for wage differentiation per area; and the opportunities for small business to obtain exemption from the terms of the extended collective agreement. After considering these factors, the Minister exercised his or her discretion whether to extend the collective agreement in question.

It is acknowledged that the prior analysis requirement under the 1956 ICA was not retained in the LRA to remove the wide discretion of the Minister in response to the ILO's FFCC report. It is, however, submitted that the total removal of such a prior analysis process was not the only possible response to the criticism levelled by the FFCC and was perhaps an overreaction.

It is argued that lessons may be learnt from the comparison of the various models or regimes. In Namibia the Minister must consider certain factors before extending a collective agreement. This includes an analysis of whether the terms of the agreement are on the whole not less beneficial than the terms which applied immediately before the extension. In Australia, the FWC also considers specified factors before approving an enterprise agreement. These include whether the employees will enjoy an overall benefit from the approval of the agreement. It is submitted that a prior analysis process is not only recommended by the ILO, but in fact is not an uncommon occurrence in the international arena when collective agreements are extended.

In South Africa the current extension mechanism leaves no room for the Minister to consider the motives of the parties requesting the extension, nor to consider the effect that the extended agreement may have on employees. Allowing some form of prior analysis of the effects that the extended agreement may have on the industry will allay fears surrounding the motives of the parties to the bargaining council, and any subsequent fears of undue considerations may be challenged by way of review proceedings.

In terms of section 54 of the BCEA, the ECC already performs a similar analysis when the Minister seeks to publish sectoral determinations. It is submitted that the ECC's tasks and functions should be adapted to include analysing proposed extensions.

The ECC should ideally investigate and report to the Minister on *inter alia* the ability of employers to carry on with their businesses; the operation of small to medium business enterprises and new entrants into the market; the cost of living; the alleviation of poverty; conditions of employment; and the likely impact of any proposed condition of employment.

By broadening the ECC's scope of work the Minister's powers will not be too wide as was the case under the apartheid regime. In any instance where a bargaining council's request for an extension is refused because of a negative finding by the ECC, the finding may be questioned by way of a review application to test the rationality thereof.

In the final instance this study recommends that the functions of the ECC should be broadened to enable it to draft a report regarding the consequences of any proposed extension of collective agreements, similar to those drafted for purposes of a sectoral determination.[32]

It therefore is suggested that section 32 of the LRA in its current form be amended to include provisions that would comply with all the objectives of the LRA as well as the recommendations of the ILO. Such amendments will not influence the collective bargaining rights of majority or sufficiently representative parties and would maintain the principle of no executive interference with the collective bargaining process, whilst achieving the concept of social justice for all affected parties.

[32] Under s 51 of the BCEA.

BIBLIOGRAPHY

Books and Chapters in Books

Title	Mode of Citation
Bendix S *Industrial Relations in South Africa* Juta (2010)	Bendix (2010)
Bendix S *Industrial Relations in South Africa* Juta (2015)	Bendix (2015)
Davidov G and Langille B *Boundaries and Frontiers of Labour Law* Hart Publishing (2006)	Davidov and Langille (2006)
Davies ACL *Perspectives on Labour Law* Cambridge University Press (2004)	Davies (2004)
Du Toit D (ed) *Exploited, Undervalued – and Essential: Domestic Workers and the Realisation of their Rights* PULP (2013)	Du Toit (2013)
Du Toit D, Bosch D, Godfrey S, Cooper C, Giles G, Cohen T, Conradie B and Steenkamp A *Labour Relations Law: A Comprehensive Guide* LexisNexis (2015)	Du Toit *et al* (2015)
Du Toit D, Godfrey S, Goldberg M, Maree J and Theron J *Protecting Workers or Stifling Enterprise? Industrial Councils and Small Business* Butterworths (1995)	Du Toit *et al* (1995)
Du Toit D, Woolfrey D, Murphy J, Godfrey S, Bosch D and Christie S *The Labour Relations Act of 1995* Butterworths (1998)	Du Toit *et al* (1998)
Godfrey S, Maree J, Du Toit D and Theron J *Collective Bargaining in South Africa: Past, Present and Future?* Juta (2010)	Godfrey *et al* (2010)
Grogan J *Collective Labour Law* Juta (2014)	Grogan (2014)
Grogan L *Workplace Law* Juta (2017)	Grogan (2017)
Hepple B, Le Roux R and Sciarra S *Laws Against Strikes* Juta (2016)	Hepple *et al* (2016)
Hoexter C *Administrative Law in South Africa* Juta (2007)	Hoexter (2007)
Jones RA and Griffiths HR *Labour Legislation in South Africa* McGraw-Hill (1980)	Jones and Griffiths (1980)
Kahn-Freund O *Labour and the Law* Stevens and Sons (1977)	Kahn-Freund (1977)
Mancuso S and Fombad CM *Comparative Law in Africa Methodologies and Concepts* Juta (2015)	Mancuso and Fombad (2015)
Morris C and Murphy C *Getting a PHD in Law* Hart Publishing (2011)	Morris and Murphy (2011)
Owens R, Riley J and Murray J *The Law of Work* Oxford University Press (2011)	Owens *et al* (2011)
Van Hoek A *Collective Agreements and Individual Contracts of Employment in Labour Law: the Netherlands* in *Collective Agreements and Individual Contracts of Employment* Kluwer (2003)	Van Hoek (2003)
Van Niekerk A and Smit N *Law@Work* LexisNexis (2018)	Van Niekerk and Smit (2018)
Watkins D and Burton M *Research Methods in Law* Routledge (2013)	Watkins and Burton (2013)

Journals

Title	Mode of Citation
Aletter C and Van Eck S "Employment Agencies: Are South Africa's Recent Legislative Amendments Compliant with the International Labour Organisations' Standards?" (2016) *SA Mercantile Law Journal* 285	Aletter and Van Eck (2016) *SA Merc LJ*
Anstey M "National Bargaining in South Africa's Clothing Manufacturing Industry: Problems and Prospects of Multi-employer Bargaining in an Industry under Siege" (2004) *Industrial Law Journal* 25 1829	Anstey (2004) *ILJ*

Baskin J "South Africa's Quest for Jobs, Growth and Equity in a Global Context" (1998) *Industrial Law Journal* 19 986	Baskin (1998) *ILJ*
Bell M "Between Flexicurity and Fundamental Social Rights: The EU Directives on Atypical Work" (2012) *European Law Review* 37 31.	Bell (2012) *E.L. Rev*
Benjamin P "Labour Law Beyond Employment" (2012) *Acta Juridica* 21	Benjamin (2012) *AJ*
Bogg A, Forsyth A and Novitz T "Worker Voice in Australia and New Zealand: the Role of the State Reconfigured?" *Adelaide Law Review* 1 (2013)	Bogg *et al* (2013) *ALR*
Botes A "The History of Labour Hire in Namibia: A Lesson for South Africa" 2013 (16) 1 *Potchefstroom Electronic Law Journal* 506	Botes (2013) *PELJ*
Brand D "Judicial Deference and Democracy in Socio-Economic Rights Cases in South Africa" (2011) *Stellenbosch Law Review* 614	Brand (2011) *Stell LR*
Brassey M "Fixing the Laws that Govern the Labour Market" (2012) *Industrial Law Journal* 33 1	Brassey (2012) *ILJ*
Brassey M "Labour Law After Marikana: Is Institutionalised Collective Bargaining in SA Wilting? If So, Should We Be Glad or Sad?" (2013) *Industrial Law Journal* 34 823	Brassey (2013) *ILJ*
Calitz A "The Extension of Bargaining Council Agreements to Non-parties" (2015) *SA Mercantile Law Journal* 27 (1)	Calitz (2015) *SA Merc LJ*
Cheadle H "Regulated Flexibility: Revisiting the LRA and the BCEA" (2006) *Industrial Law Journal* 27 663	Cheadle (2006) *ILJ*
Cohen T "The Efficacy of International Standards in Countering Gender Inequality in the Workplace" (2012) *Industrial Law Journal* 19	Cohen (2012) *ILJ*
Collins H "Regulating the Employment Relation for Competitiveness" (2001) *Industrial Law Journal* 30 17	Collins (2001) *ILJ*
Collins H "The Productive Disintegration of Labour Law" (1997) *Industrial Law Journal* 26 295	Collins (1997) *ILJ*
Creighton B, Denvir C and McCrystal S "Defining Industrial Action" *Federal Law Review* (2017) 45 (3)	Creighton *et al* (2017) *FLR*
Davis DM and Klare K "Transformative Constitutionalism and the Common and Customary Law" (2010) *South African Journal of Human Rights* 403	Davis and Klare (2010) *SAJHR*
Du Toit "Collective Bargaining and Worker Participation" (2000) 21 *Industrial Law Journal* 1544	Du Toit (2000) *ILJ*
Du Toit D "The Extension of Bargaining Council Agreements: Do the Amendments Address the Constitutional Challenge?" (2014) *Industrial Law Journal* 35 2637	Du Toit (2014) *ILJ*
Du Toit D "The Small Business Sector: Deregulation or Collective Bargaining?" (1993) *Industrial Law Journal* 14 570	Du Toit (1993) *ILJ*
Du Toit D and Ronnie R "Regulating the Informal Economy: Unpacking the Oxymoron - From Worker Protection to Worker Empowerment" (2014) *Industrial Law Journal* 35 1802	Du Toit and Ronnie (2014) *ILJ*
Dukes R "Wedderburn and the Theory of Labour Law: Building on Kahn-Freund" (2015) *Industrial Law Journal* 357	Dukes (2015) *ILJ*
Dworkin R "Hart and the Concepts of Law [comments]" *Harvard Law Review Forum*, volume 119 (2005)	Dworkin (2005) *HLRF*
Erasmus G and Jordaan B "South Africa and the ILO: towards a new relationship?" (1993/94) 19 *South African Yearbook of International Law* 65	Erasmus and Jordaan (1993/94) *SAYIL*
Esitang TG and Van Eck S "Minority Trade Unions and the Amendments to the LRA: Reflections on Thresholds, Democracy and ILO Conventions" (2016) *Industrial Law Journal* 763	Esitang (2016) *ILJ*
Fenwick C "Labour Law in Namibia: Towards an Indigenous Solution" (2006) *South African Law Journal* 665	Fenwick (2006) *SALJ*
Forere MA "From Exclusion to Labour Security: To what Extent does section 198 of the Labour Relations Amendment Act of 2014 strike a Balance between Employers and Employees?" (2016) *South African Mercantile Law Journal* 375	Forere (2016) *SA Merc LJ*
Forsyth A "The Impact of Good Faith Obligations on Collective Bargaining Practices and Outcomes in Australia, Canada and the United States" *Canadian Labour & Employment Law Journal* (2011)	Forsyth (2011) *CLELJ*

Geldenhuys J "Inequality in Equality" (2016) *South African Mercantile Law Journal* 399	Geldenhuys (2016) *SA Merc LJ*
Godfrey S and Witten L "The BCEA: Statutory, Administrative and Case Law Developments" (2008) *Industrial Law Journal* 29 (2406)	Godfrey *et al* (2008) *ILJ*
Hamburger L "The Extension of Collective Agreements to Cover entire Trades and Industries" (1939) *International Labour Review* (Volume 11, number 2) 153	Hamburger (1939) *ILR*
Hepple B "Is South African Labour Law Fit for the Global Economy?" (2012) *Acta Juridica* 1	Hepple (2012) *AJ*
Klare K "Self-Realisation, Human Rights, and Separation of Powers: A Democracy Seeking Approach" (2015) *Stellenbosch Law Review* 445	Klare (2015) *Stell RV*
Klerck G "Labour Market Regulation and the Casualisation of Employment in Namibia" (2003) *South African Journal of Labour Relations*	Klerck (2003) *SAJLR*
Kruger J and Tshoose CI "The Impact of the Labour Relations Act on Minority Trade Unions: A South African Perspective" *PELJ* (2013) 16 (4)	Kruger and Tshoose (2013) *PELJ*
Langille B "Labour Law is not a Commodity" (1998) *Industrial Law Journal* 19 1002	Langille (1998) *ILJ*
Liebenberg S "Social Rights and Transformation in South Africa: Three Frames" (2015) *South African Journal on Human Rights* 446	Liebenberg (2015) *SAJHR*
Liebenberg S "The Value of Freedom in Interpreting Socio-Economic Rights" (2008) *Acta Juridica* 149	Liebenberg (2008) *Acta Juridica*
Malan K "Observations on Representivity, Democracy and Homogenisation" *TSAR* 2010-3	Malan (2010) *TSAR*
Maree J "Trends in Collective Bargaining: Why South Africa Differs from Global Trends" (2011) *South African Journal of Labour Relations* (35)	Maree (2011) SAJLR
Matlou D "Understanding Workplace Social Justice within the Constitutional Framework" (2016) *SA Mercantile Law Journal* 544	Matlou (2016) *SA Merc LJ*
Mceldowney J "One party Dominance and Democratic Constitutionalism in South Africa" (2013) *TSAR* 269	Mceldowney (2013) *TSAR*
Naughton R "The Low Paid Bargaining Scheme – An Interesting Idea, But Can it Work?" *Australian Journal of Labour Law* 24 (3) 2011	Naughton (2011) *AJLL*
Naughton R, Marilyn J and Pittard J "The Voices for the Low Paid and Workers Reliant on Minimum Employment Standards" (2013) *Adelaide Law Review* (34)	Naughton *et al* (2013) *ALR*
Ngcukaitobi T "Strike Law, Structural Violence and Inequality in the Platinum Hills of Marikana" (2013) 34 *Industrial Law Journal* 836	Ngcukaitobi (2013) *ILJ*
Rafudeen A "A South African Reflection on the Nature of Human Rights" (2016) *African Human Rights Law Journal* 225	Rafudeen (2016) *AHRLJ*
Retief J "Paper v Practice - Examining the Scope and Limit of Section 206 of the Labour Relations Act in Providing a Remedy for a Non-Party to an Extended Collective Agreement" (2012) 33 3 *Obiter* 566 - 579	Retief (2012) *Obiter*
Saley S and Benjamin P "The Context of the ILO Fact Finding and Conciliation Commission Report on South Africa" (1992) *Industrial Law Journal* (13)	Saley *et al* (1992) *ILJ*
Seady HM and Benjamin "The Right to Strike and Freedom of Association: an International Perspective" (1990) *Industrial Law Journal* 11 439	Seady *et al* (1990) *ILJ*
Simpson B "Comment: Alan Bogg on Bill Wedderburn and Kahn-Freund, Freedom of Association, and the "autonomy" of labour law" (2015) *Industrial Law Journal* 352	Simpson (2015) *ILJ*
Smit P and Van Eck S "International Perspectives on South Africa's unfair dismissal law" 2010 (43) *The Comparative and International Law Journal of Southern Africa* 46	Smit and Van Eck (2010) *CILSA*
Snyman S "The Principle of Majoritarianism in the Case of Organisational Rights for Trade Unions - is it Necessary for Stability in the Workplace or Simply a Recipe for Discord?" (2016) *Industrial Law Journal* 865	Snyman (2016) *ILJ*
Steenkamp A, Stelzner and Badenhorst N "The Right to Bargain Collectively" (2004) *Industrial Law Journal* 25 943	Steenkamp *et al* (2004) *ILJ*
Tenza M.E "Bypassing Unions during Collective Bargaining and the Right to Freedom of Expression" (2017) *South African Mercantile Law Journal* 66	Tenza (2017) *SA Merc LJ*

Theron J, Godfrey S and Fergus E "Organisational and Collective Bargaining Rights through the Lens of Marikana" (2015) *Industrial Law Journal* 36 849	Theron *et al* (2015) *ILJ*
Van Eck S "In the Name of 'Workplace and Majoritarianism'. Thou Shall Not Strike - *Association of Mineworkers & Construction Union & Others v Chamber of Mines & Others* (2017) 38 *ILJ* 831 (CC) and *National Union of Mineworkers of SA & others v Bader Bop (Pty) Ltd & another* (2003) 24 *ILJ* 305 (CC)" (2017) *Industrial Law Journal* 38 1496	Van Eck (2017) *ILJ*
Van Eck S "Regulated Flexibility and the Labour Relations Amendment Bill of 2012" (2013) *De Jure* 46 (2) 600	Van Eck (2013) *De Jure*
Van Eck S "Temporary Employment Services (Labour Brokers) in South Africa and Namibia" 2010 (13) 2 *Potchefstroom Electronic Law Journal* 107	Van Eck (2010) *PELJ*
Van Niekerk A "Is the South African Law of Unfair Dismissal Unjust? A Reply to Martin Brassey" (2013) *Industrial Law Journal* 34 28	Van Niekerk (2013) *ILJ*
Van Staden M "The Role of the Judiciary in Balancing Flexibility and Security" (2013) *De Jure* 30	Van Staden M (2013) *De Jure*
Van Staden M "Towards a South African Understanding of Social Justice: the International Labour Organisation Perspective" (2012) *Journal of South African Law* 1 91	Van Staden (2012) *TSAR*
Walpole K "The Fair Work Act: Encouraging Collective Agreement Making but Leaving Collective Bargaining to Choice" *Labour & Industry: A Journal of the Social and Economic Relations at Work* (2015)	Walpole (2015) *LISERW*
Webb S "The Economic Theory of a Legal Minimum Wage" (1912) 20 *Journal of Political Economy* 973	Webb (1912) *JPE*
Wisskirchen A "The Standard-Setting and Monitoring Activity of the ILO: Legal Questions and Practical Experience" (2005) *International Labour Review* (volume 144) issue 3	Wisskirchen (2005) *ILR*

LEGISLATION

National Legislation

Black Labour Regulations Act 15 of 1911
Black Labour Relations Act 48 of 1953
Black Labour Relations Regulation Act of 70 of 1973
Black Land Act 27 of 1913
Constitution of the Republic of South Africa, 1996
Explanatory Memorandum to the Draft Labour Relations Bill 1995: Ministerial Legal Task Team (1995) *ILJ* 16 278
Factories Act 28 of 1918.
Group Areas Act 41 of 1950
Industrial Conciliation (Amendment) Act 24 of 1930
Industrial Conciliation Act 11 of 1924
Industrial Conciliation Amendment Act 57 of 1981
Industrial Conciliation Amendment Act 57 of 1981
Industrial Conciliation Amendment Act 94 of 1979
Industrial Conciliation Amendment Act 95 of 1980
Labour Relations Act 28 of 1956
Labour Relations Act 66 of 1995
Labour Relations Amendment Act 2 of 1983
Labour Relations Amendment Act 51 of 1982
Labour Relations Amendment Act 57 of 1981
Labour Relations Amendment Act 6 of 2014
Labour Relations Amendment Bill, 2017
Memorandum of Objects Labour Relations Amendment Bill, 2012
Memorandum on the Objects of the Labour Relations Amendment Bill, 2017
Mines and Works Act 8 of 1911
Native Labour (Settlement of Disputes) Act 48 of 1953
Promotion of Administrative Justice Act 3 of 2000

Riotous Assemblies and Criminal Law Amendment Act 27 of 1914
Suppression of Communism Act 44 of 1950
Workmen's Wages Protection Act 15 of 1914

International Legislation

Australia
Explanatory Memorandum to the Fair Work Bill 2008
Fair Work Act 28 of 2009

Namibia
Conditions of Employment Act 12 of 1986
Constitution of the Republic of Namibia, 1990
Labour Act 6 of 1992
Labour Act 15 of 2004
Labour Act 11 of 2007
Wages and Industrial Conciliation Ordinance 35 of 1952

Netherlands
Constitution of the Kingdom of the Netherlands, 2008
Wet op de collectieve arbeidsovereenkomst, 1927
Wet op het algemeen verbindend en onverbindend verklaren van bepalingen van collectieve arbeidsovereenkomsten, 1937

Reports, Recommendations and Papers

Title	**Mode of Citation**
Die Volledige Wiehahn-Verslag Dele 1–6 met Aantekeninge deur Prof. N.E. Wiehahn, Lex Patria Publishers, 1982	The Wiehahn Report (1982)
Farlam J *Marikana Commission of Inquiry: Report on Matters of Public, National and International concern arising out of the Tragic Incidents at the Lonmin Mine in Marikana, in the North West Province* 13 March 2015	Marikana Report (2015)
Federal Magistrate Lucev T *Explaining Aspects of the Fair Work Act 2009* Australian Human Resources Institute – Human Resources and Industrial Relations Special Interest Group 25 June 2009	Lucev (2009)
Godfrey S, Elsley T and Taal M *Sectoral Collective Bargaining, Productivity and Competitiveness: South Africa's Clothing Industry between a Rock and a Hard Place* (2016) Labour and Enterprise Policy Research Group, University of Cape Town	Godfrey (2016)
Labour Foundation *Een 'informal opinion' van de International Labour Organisation* August 2004	Labour Foundation Informal Opinion to the ILO (2004)
Minutes of ILO: XIVth Meeting of European Labour Court Judges (4 September 2006)	Minutes of European Labour Court Judges (2006)
Nattrass N and Seekings J *Job Destruction and Minimum Wage-setting in the South African Clothing Industry* Development Policy Research Unit Report (2014) University of Cape Town	Nattrass and Seekings Report (2014)
Rankin N *How the Extension of Agreements by Bargaining Councils to Non-Parties Restricts Competition, Raises Prices, Limits Entrepreneurship and creates Unemployment* Stellenbosch University (2013)	Rankin Report (2013)

Van Niekerk A *Regulating Flexibility and Small Business: Revisiting the LRA and BCEA A Response to Halton Cheadle's Concept Paper* Development Policy Research Unit Report (2007)	Van Niekerk (2007)

TABLE OF CASES

National Case Law

AAA Investments (Pty) Ltd v Micro Finance Regulatory Council and Another 2007 (1) SA 343 (CC)
Association of Mineworkers and Construction Union and others v Bafokeng Rasimone Management Services (2017) 38 *ILJ* 931 (LC)
Association of Mineworkers and Construction Union and others v Chamber of Mines of South Africa and others (2016) 37 *ILJ* 1333 (LAC)
Association of Mineworkers and Construction Union and others v Chamber of Mines of South Africa and others (2017) 38 *ILJ* 831 (CC)
Chamber of Mines of SA acting in its own name & on behalf of Harmony Gold Mining Co. Ltd & others v Association of Mineworkers & Construction Union & others (2014) 35 *ILJ* 1243 (LC)
Confederation of Associations in the Private Employment Sector & others v MIBC & others (2015) 36 *ILJ* 137 (GP)
Equity Aviation Services (Pty) Ltd v SA Transport and Allied Workers Union and others (2009) 30 *ILJ* 1997 (LAC)
Free Market Foundation v The Minister of Labour & others (2016) 37 *ILJ* 1638 (GP)
Kem-Lin Fashions CC v Brunton & another (2001) 22 *ILJ* 109 (LAC)
Motor Industry Staff Association v Macun NO & others (2016) 37 *ILJ* 625 (SCA)
National Union of Metalworkers of SA and others v Bader Bop (Pty) Ltd and another (2003) 24 *ILJ* 305 (CC)
NEASA v MEIBC & others (2015) 36 *ILJ* 732 (LC)
NEASA v Minister of Labour & others (2013) 34 *ILJ* 1556 (LC)
Ngcobo and others v Associated Engineering Ltd t/a Glacier Bearings (1980) 1 *ILJ* 126 (D)
Police and Civil Rights Union v Ledwaba (2014) 35 *ILJ* 1037 (LC)
Police and Prisons Civil Rights Union v South African Correctional Services Workers' Union and Others (CCT152/17) [2018] ZACC 24 (23 August 2018)
Ramolesane and another v Andrew Mentis and another (1991) 12 *ILJ* 329
S v Makwanyane 1995 (3) SA 513 (CC)
S v Prefabricated Housing Corporation (Pty) Ltd and Another 1974 (1) SA 535 (A)
SA Breweries v Commission for Conciliation, Meditation and Arbitration and others (2002) 23 *ILJ* 1467 (LC)
SANDF v Minister of Defence (2007) 28 *ILJ* 1909 (CC)
South African Correctional Services Workers Union v Police and Prisons Civil Rights Union (2017) 38 *ILJ* 2009 (LAC)
Transport and Allied Workers Union of South Africa v Putco Ltd 2016 (4) SA 39 (CC)
Unitrans Fuel and Chemical (Pty) Ltd v Transport and Allied Workers Union of SA and another (2010) 31 *ILJ* 2854 (LAC)
Valuline CC v Minister of Labour & others (2013) 34 *ILJ* 1404 (KZP)

International Case Law

Africa Personnel Services (Pty) Ltd v Government of the Republic of Namibia (2011) 32 *ILJ* 205
Appeal by the National Union of Workers against Decision of Gregory C of 30 May 2017 [2017] FWCA 2940: *Re: Signa Company Limited t/a Signa Healthcare* [2017] FWCFB 3892
Application to the Fair Work Commission by United Voice [2014] FWC 6441
Construction, Forestry, Mining and Energy Union v Concrete Solutions [2017] FWCFB 3912

INTERNATIONAL LABOUR ORGANISATION

Conventions

Convention concerning Freedom of Association and Protection of the Right to Organise 87 of 1984
Right to Organise and Collective Bargaining Convention 98 of 1949

Recommendations

Collective Agreements Recommendation 91 of 1951
Collective Bargaining Recommendation 163 of 1981
Social Policy in Dependent Territories (Supplementary Provisions) Recommendation 74 of 1945
Social Policy in Dependent Territories Recommendation 70 of 1944

ILO and UN Publications

Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the International Labour Organisation, Revision 5, 2006

General Survey on the Fundamental Conventions concerning Rights at Work in light of the ILO Declaration on Social Justice for a Fair Globalisation 2008 (Report III (Part 1B) ILO Conference 102nd Session 2012)

Gernigon B, Odero A and Guido H "ILO Standards and the Principles of the Supervisory Bodies " (2000).

ILO ACT/EMP Publications, Da Silva S "Collective Bargaining Negotiations" (1996)

ILO Century Project "From Workplace Rights to Constitutional Rights in South Africa – the Roles and Actions of the Tripartite ILO Constituency in the Challenge to Apartheid and the Transition to Democracy" (November 2013)

ILO Committee of Experts' General Survey on the Fundamental Conventions concerning Rights at Work in light of the ILO Declaration on Social Justice for a fair Globalisation, 2008 (Report III [Part 1B] 101st session 2012)

ILO History Project "The Role of the ILO during and ending Apartheid" (May 2013)

ILO International Institute for Labour Studies, Fenwick C, Kalula E and Landau I "Labour Law: A Southern African Experience" (2007)

ILO Labour Office "International Labour Standards: Rules of the Game for the Global Economy – A Brief Introduction to International Labour Standards" (Revised Edition 2014)

ILO Labour Office "Labour Markets, Institutions and Inequality" (2015)

Report of the Ad-hoc Committee on Forced Labour of the ILO and United Nations (Geneva) E/2431 1953

Report of the Fact-Finding and Conciliation Commission "Prelude to Change: Industrial Relations Reform in South Africa" LXXV, Series B (Special Supplement) GB.253/15/7 (1992)

Special Report of the Director-General on the Application of the Declaration concerning Action Against Apartheid in South Africa and Namibia (26th Special Report) 1989

UN Security Council Resolution 435 (1978)

INTERNET SOURCES

African Union "AU in a Nutshell": https://au.int/en/au-nutshell

AngloBoerWar.com "Boer War 1899–1902": http://www.angloboerwar.com/boer-war

Australia, Fair Work Commission "How the Commission works": goo.gl/6cKLe6

Australia, Fair Work Ombudsman "Awards and agreements": https://bit.ly/2N9m3oK

Australian, Human Rights Commission "Australian Laws of Freedom of Association": goo.gl/Rnz3LS

Brittenden S "Collective Agreements" (2016): http://tinyurl.com/gtrtt98

Eurofound "Collective bargaining coverage and extension procedures" by Taxler F and Behrens M (2012): http://tinyurl.com/jnreurn

International Court of Justice "Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)": http://www.icj-cij.org/en/case/53

International Labour Organisation "General Observation (CEACR) - adopted 1993, published 80th ILC session (1993)": http://tinyurl.com/zxxu4cn

International Labour Organisation home page: http://www.ilo.org/global/lang--en/index.htm

International Labour Organisation "ILO in Australia": goo.gl/JmEgZT

Kirby MD "The Australian Law Journal International Legal Notes – M.D Kirby -Report on the Fact Finding and Conciliation Commission on Freedom of Association in South Africa 1992" (1992): http://tinyurl.com/zjb7jcl.

Namibia Country Review of Collective Bargaining (2010) 10 (accessed at http://www.lrs.org.za/docs/Namibia%20Collective%20Bargaining%20Review%202010.pdf on 23 February 2018, at 08:07).
Nelson Mandela Foundation "The Heart of Hope – South Africa's Transition from Apartheid to Democracy" compiled by O'Malley P (2007): https://omalley.nelsonmandela.org/omalley/
Parliament of South Africa "Labour Laws, Communal Property Associations Amendment Bill and PIC Act Legislative Proposal Get Approval from the National Assembly" (2018): https://www.parliament.gov.za/press-releases/labour-laws-communal-property-associations-amendment-bill-and-pic-act-legislative-proposal-get-approval-national-assembly
South African History "Namibia gains independence" (2011): goo.gl/KwbCbB
Southern African Development Community home page: goo.gl/H6z7kv
Stats SA "Statistical release P0211. Quarterly Labour Force Survey Quarter 2: 2018": http://www.statssa.gov.za/publications/P0211/P02112ndQuarter2018.pdf
The Commonwealth "Australia": https://bit.ly/2sd20aT
United Nations Human Development Report "Namibia": https://bit.ly/2PVkmcO

PUBLISHED AND UNPUBLISHED THESES AND DISSERTATIONS

Aletter CJ *Protection of Agency Workers in South Africa: An Appraisal of Compliance with ILO and EU Norms* (LLD 2016) University of Pretoria
Botes A *Die Regsposisie van Tydelike Werknemers in diens van Tydelike Diensverskaffingsagentskappe* (LLD 2013) North-West University
Gericke SB *Successive Fixed-Term Employment Contracts and the Right to Fair Labour Practices in South Africa* (LLD 2015) University of Johannesburg
Irwin JD *Extension of Bargaining Council Agreements: International Norms and the Situation in South Africa* (LLM 2016) University of Pretoria
Musukubili FZ *Towards an Efficient Namibian Labour Dispute Resolution System: Compliance with International Labour Standards and a Comparison with the South African System* (LLD 2013) Nelson Mandela Metropolitan University
Van Staden MJ *Identification of the parties to the employment relationship: An appraisal of teleological interpretation of statutes* (LLD 2017) University of Pretoria