

Appeared in (2016) *Industrial Law Journal* pages 763-778

***Minority Trade Unions and the Amendments to the LRA: Reflections on Thresholds,
Democracy and ILO Conventions****

Temogo Geoffrey Esitang**

Stefan van Eck***

Abstract

A dominant feature of LRA collective bargaining framework is that it strongly favours majority trade unions. The proverbial ‘big kids on the block’ can prevent newcomer trade unions from getting a ‘foot in the door’. S 18 of the LRA permits employers and majority trade unions to conclude collective agreements establishing a threshold of representativeness required in respect of organisational rights. The Labour Relations Amendment Act of 2014 seeks to ameliorate the negative effect of s 18 agreements in two key respects. In the first instance, a trade union may apply for organisational rights despite the existence of a s 18 agreement. Secondly, a trade union not representing a majority of workers at a workplace may apply for all of the organisational rights as long as there is no other trade union at the workplace which holds majority status. This article questions whether, after the amendments, the South African framework of labour democracy: is aligned to the democratic model envisaged by the Constitution; complies with the fundamental labour rights contained in the Constitution; and adheres to ILO conventions. The contribution finds the amendments wanting in so far as it does not do enough to establish the type of multiparty democracy which the Constitution envisages. Furthermore, the limitations which the LRA place on minority trade unions are disproportional in as far as they limit the constitutional and ILO norms pertaining the freedom to association and the right to organise.

Strongly

1 Introduction

On 27 April 2015 South Africa celebrated 21 years of democracy. The adoption of a modern constitution in 1996 (the Constitution) was preceded by Nelson Mandela’s release from prison and a process of negotiations for a new political order. The dominant parties were the former, mainly

* This article is based on research conducted for purposes of T G Esitang’s doctoral studies at the University of Pretoria and a paper presented at the 21st World Congress of the International Society for Labour and Social Security Law in Cape Town on 18 September 2015.

** BA BProc LLM (UP) and currently an LLD student at the University of Pretoria.

*** Professor of Labour Law, Head: Department of Mercantile Law, Faculty of Law, University of Pretoria.

white National Party (NP) and the African National Congress (ANC) which spearheaded the struggle for social equality. Smaller political parties also took part in the negotiations at the Convention for a Democratic South Africa (CODESA).¹ The negotiating parties adopted an approach of inclusivity and their negotiations set the scene for a multi-party democratic model which was adopted in the final Constitution.

Shortly after the adoption of the Constitution a fresh set of labour laws was implemented.² Aided by the International Labour Organisation (ILO) and represented by eminent scholars such as Professors Sir Bob Hepple and Manfred Weiss, the Labour Relations Act of 1995 (LRA) established a ‘new’ collective bargaining framework.³ The LRA aspires to advance economic development and social justice and the ideals of promoting ‘labour peace and the democratisation of the workplace’,⁴ were prominently positioned in s 1 of the LRA.

The LRA’s collective bargaining model purports to give effect to the principles contained in the Constitution.⁵ The system is based on a voluntaristic collective bargaining regime (which is bolstered by the right to strike) and a set of trade union rights, referred to as ‘organisational rights’.⁶ The Labour Court in *Police & Prisons Civil Rights Union v Ledwaba NO & others*⁷ recently confirmed that a dominant feature of this framework is that it favours majority trade unions. The proverbial ‘big kids on the block’ can claim generous labour rights and they have mechanisms to prevent newcomer trade unions from getting a ‘foot in the door’.⁸ The central questions posed in this contribution are whether the South African framework of labour democracy

¹ Numerous political parties participated in the process. After the negotiating parties had agreed to and signed the initial declaration of intent, working groups were elected to deal with five main issues, namely the new Constitution, the setting up of the interim government, the future of the homelands, the time period for the implementation of the changes, and the electoral system. See <http://www.sahistory.org.za/codesa-negotiations> accessed on 3 September 2015.

² The trilogy of laws was the Labour Relations Act 66 of 1995, the Basic Conditions of Employment Act 75 of 1997 and the Employment Equity Act 55 of 1998.

³ Explanatory Memorandum (1995) 16 ILJ 278, 280.

⁴ s 1 of the LRA 66 of 1995.

⁵ *ibid.*

⁶ ss 64 and 11-17 of the LRA 66 of 1995.

⁷ (2014) 35 ILJ 1037 (LC) (POPCRU).

⁸ See M Brassey *Employment and Labour Law: Commentary on the Labour Relations Act* (2006) A3-21; L Corazza & E Fergus ‘Representativeness and the Legitimacy of Bargaining Agents’ in B Hepple, R le Roux & S Sciarra *Laws Against Strikes: The South African Experience in an International Comparative Perspective* (2015) 88.

- (a) is aligned to the democratic model envisaged by the Constitution;
- (b) complies with the fundamental labour rights contained in the Constitution; and
- (c) is in line with International Labour Organisation (ILO) conventions.

Our appraisal consists of four parts. The first considers the methods of obtaining organisational rights in South Africa and the setting of thresholds in collective agreements and at bargaining councils. Here we explain why we are critical of the existing pro-majoritarian model. The second part analyses the Constitution's envisaged model of multi-party democracy. It also analyses a selection of labour rights associated with collective bargaining contained in the Bill of Rights. The third part traverses ILO norms associated with collective bargaining. The final part concludes with a commentary on the current structure and suggestions as to how industrial democracy could have been improved in South Africa.

2 Acquisition of Organisational Rights and the Setting of Thresholds

During the era of the Industrial Court, roughly between 1980 and 1995, the LRA of 1956 did not define the term 'organisational rights'⁹ and the collective bargaining scene was characterised by a multiplicity of trade unions at both plant and industry levels.¹⁰ During this period, the Industrial Court's initial hands-off voluntaristic approach gradually developed into one where the courts were prepared to enforce the duty to engage in collective bargaining.¹¹ In an attempt to commit employers to participate in collective bargaining, trade unions often approached the Industrial Court to force an employer to provide them with access to the workplace, to give them the right to deduct trade union dues and to provide them with information which would enable them to engage in collective bargaining. In essence, these disputes centred on the acquisition of non-statutory trade union rights in order to enable trade unions to establish themselves sufficiently for purposes of engaging in collective bargaining.

⁹ Despite this, s 78(1C) of the LRA of 1956 did make provision for a process whereby a trade union could seek to compel an employer to deduct trade union subscriptions.

¹⁰ See J Theron 'Plus ça Change: Reinventing Inequality in the Post-apartheid Workplace' in O Dupper & C Garbers (eds) *Equality in the Workplace* (2009) 124; J Theron, S Godfrey & E Fergus 'Organisational and Collective Bargaining Rights through the Lens of Marikana' (2015) 63 *ILJ* 853-4.

¹¹ See the 'Explanatory Memorandum n 3 above 280; S Vettori 'A Judicially Enforceable Duty to Bargain?' (2005) *De Jure* 382; and *National Union of Mineworkers v Ergo* (1991) 12 *ILJ* 1221 (A).

The Ministerial Task Team which drafted the LRA of 1995 chose to remove the enforceable duty to engage in collective bargaining. In its place, and depending on their size, trade unions could claim a suite of statutory organisational rights in respect of a particular ‘workplace’.¹² The LRA makes no mention of the term ‘bargaining unit’ and despite the difference which may exist between occupational categories or between white and blue collar workers at the same workplace, the mentioned rights accrue per union for a particular workplace. Today, these statutory rights serve as the organisational oxygen of trade unions. As pointed out by Mischke, organisational rights not only provide trade unions with an essential mechanism for securing an organisational ‘foothold’ in the employer’s workplace, but they also lay the foundation for future collective bargaining with the employer.¹³

At present the LRA lists five statutory organisational rights which could potentially accrue to a registered trade union at a workplace, namely, the rights to access to the workplace (s 12); to deduct trade union subscriptions (s 13); to elect trade union representatives (s 14); to leave for trade union officials (s 15); and to the disclosure of information for the purpose of collective bargaining (s 16). These rights promote majoritarianism in an unblinking fashion.¹⁴

Majority trade unions are entitled to all five rights, and the rights pertaining to the election of union representatives (or shop stewards) and the right to disclosure of information accrue to them exclusively.¹⁵ ‘Sufficiently representative’ trade unions, which do not represent a majority of workers at a workplace, are only eligible to claim the remaining three rights to access, stop or-

¹² s 213 of the LRA currently defines a ‘workplace’ within two contexts. In the context of the private sector it ‘refers to the place or places where the employees of an employer work’ and in the public service it refers to the ‘registered scope of the Public Service Co-ordinating Bargaining Council or a bargaining council in a sector in the public sector, as the case may be’.

¹³ C Mischke ‘Getting the Foot at the Door: Organisational Rights and Collective Bargaining in terms of the LRA (2004) *CLL* 60.

¹⁴ Brassey n 8 above A3-23. See also *United Association of SA & another v BHP Billiton Energy Coal SA Ltd & another* (2013) 34 *ILJ* 2118 (LC) 2127 paras 47-8 where Steenkamp J confirms that majoritarianism underlies South Africa’s collective policy choice. Despite this, E Fergus & S Godfrey ‘Bidvest and Beyond: Legal and Political Challenges to Organising Across the Value Chain in South Africa’ LLRN conference paper (2015) 6 fn 39 confirm that this has been criticised for ‘suppressing the rights of minority unions (and their constituencies) at times’. See also J Kruger & C Tshoose ‘The Impact of the Labour Relations Act on Minority Trade Unions: A South African Perspective’ (2013) 16 (4) *PELJ* 295.

¹⁵ A majority union is a registered trade union that has as members a total of 50% plus one in the workplace.

der facilities and leave for union activities.¹⁶ The terms ‘small’ or ‘minority’ trade union are not defined in the LRA, but for present purposes we refer to such unions as those which do not represent a majority and whose membership does not constitute a sufficiently representative trade union. Even though such unions may try their hand at a strike to gain organisational rights, they do not qualify for any of the mentioned statutory rights.¹⁷ The LRA also promotes majoritarianism by means of closed shop agreements, agency shop agreements and the establishment of workplace forums. Only majority trade unions are entitled to engage in such agreements and fora.¹⁸

The LRA stipulates that when an application for organisational rights is lodged the arbitrator should seek to limit the proliferation of trade unions and the concomitant financial burden placed on employers by the recognition of multiple trade unions. Furthermore, the arbitrator should take into account a basket of rather vague factors – such as the nature of rights sought, the nature of the workplace and the sector, and the organisational history of the workplace – before granting organisational rights.¹⁹

Three mechanisms are available to establish these rights. A registered trade union can claim the rights through the Commission for Conciliation Mediation and Arbitration (CCMA); all trade unions who are members of a bargaining council qualify for the automatic enjoyment of two organisational rights (namely, the right to access to an employer’s premises and the right to stop order facilities);²⁰ and organisational rights can be acquired by means of collective bargaining directly between an employer and an employee.²¹ The enjoyment of the mentioned rights is subject to the contested s 18 of the LRA, which provides that:

¹⁶ The LRA does not define the term ‘sufficiently representative trade union’. However, s 11 does state that a trade union can only acquire these rights if it is ‘a registered trade union, or two or more registered trade unions acting jointly that are sufficiently representative’.

¹⁷ *National Union of Metalworkers of SA & others v Bader Bop (Pty) Ltd & another* (2003) 24 ILJ 205 (CC).

¹⁸ See ss 25 and 26 of the LRA.

¹⁹ s 21(8) of the LRA. See also *South African Clothing & Textile Workers Union v Marley (SA) (Pty) Ltd t/a Marley Flooring (Mobeni)* (2000) 21 ILJ 425 (CCMA) 429G-H where the commissioner refused to grant the applicant union the rights to stop order facilities and union representatives even though it had 42.3% membership in the workplace. At 428C-D the CCMA said that the refusal to grant organisational rights ‘avoids fragmentation of the workforce and that workers speak with one voice’. See also D du Toit et al *Labour Relations Law — A Comprehensive Guide* (2015) 259 regarding the application of s 21(8).

²⁰ s 19 of the LRA.

²¹ s 20 of the LRA provides that ‘[n]othing in this Part precludes the conclusion of a collective agreement that regulates organisational rights’. It is important to note that s 20 does not differen-

‘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.’

These threshold agreements have some semblance to a closed shop agreement. A closed shop agreement provides majority trade unions with a monopoly in so far as the workers are not entitled to join rival trade unions.²² There is a strong argument to be made that on its own, s 18 may be in conflict with the LRA’s detailed right to freedom of association. Amongst others, s 4(2) of the LRA provides that every member of a trade union has the right:

- ‘(a) to participate in its lawful activities;
- (b) to participate in the election of any of its office-bearers, officials or trade union representatives.’

The LRA’s right to freedom of association does not require a minimum threshold and applies to every member of a trade union.²³ The problem is this. Should an employee belong to a minority trade union, or even one that has significant representativity but which has been excluded from gaining organisational rights by virtue of a s 18 collective agreement, he or she is not entitled to vote for a trade union representative of his or her choice. Trade union representatives play an important role at the workplace by, for example, representing fellow trade union members at grievance and disciplinary enquiries. All of this would not be possible if the trade union is not a majority trade union.

tiate between statutory and non-statutory organisational rights. We argue that such agreements could potentially cover both these categories of organisational rights. See also *POPCRU v Ledwaba* n 7 above where an employer initially concluded an agreement with a minority trade union regarding organisational rights. The employer and the majority trade union POPCRU subsequently agreed to a new collective agreement setting higher thresholds. The court held that the effect of the new agreement was that it replaced the earlier agreement to the exclusion of the minority trade union.

²² See s 26 of the LRA.

²³ According to S Tregaskis ‘Freedom of Association and the Closed Shop: A Balancing of Rights?’ *HLR* 84 (1985) 84-5 the freedom of association involves coming together to achieve a common goal and the right to form and join a trade union is an aspect of such freedom of association. The purpose of this association is to give workers enough power to enable them to balance that of the employer for the ultimate purpose of collective bargaining.

A threshold agreement has the effect that a dominant trade union and an employer could agree to set a potentially unrealistic threshold, which would make it impossible for a rival trade union to establish itself.²⁴ Brassey makes the cogent point that the LRA's manifestation of workplace majoritarianism allows for a situation where majority trade unions tend 'to connive with employers to raise or lower the drawbridge as considerations of expediency dictate'.²⁵ In the same tone Du Toit et al²⁶ state that s 18 of the LRA may prevent minority trade unions from 'getting a foothold in a workplace' and that this may potentially violate the basic rights of employees and their trade unions.²⁷

The LRA was amended in January 2015 to ameliorate the mentioned negative effect of s 18 agreements in two key respects. In the first instance, a trade union, or more than one trade union acting together, may apply for organisational rights despite the existence of a s 18 agreement as long as the following requirements are met:

- (a) the trade union which is party to the collective agreement must be present at the arbitration when the organisational rights are applied for; and
- (b) the trade union (or unions acting together) must represent 'a significant interest' or represent a 'substantial number of employees' in the workplace.²⁸

Secondly, majoritarianism is watered down in so far as a trade union not representing a majority of workers at a workplace may still apply for all of the organisational rights as long as there is no other trade union at the workplace which holds majority status.²⁹

²⁴ See *POPCRU v Ledwaba* n 7 para 46 where the Labour Court confirmed the LRA's goal of majoritarianism when it held that employers and majority trade unions are entitled to prevent minority trade unions from gaining organisational rights. In a similar vein, *Transnet SOC Ltd v National Transport Movement & others* (2014) 35 ILJ 1418 (LC) confirmed that a collective agreement can limit the organisational rights of a minority trade union, hence leading to the need to strike to attain such rights by the minority trade union. See also J Grogan 'Majority Rules of Thresholds and Extended Agreements' (2014) EL 14 and P le Roux 'Organisational Rights for Minority Unions: Democratic Rights and Orderly Collective Bargaining' (2014) CLL 69.

²⁵ Brassey n 8 above A3-23.

²⁶ See Du Toit et al n 19 above 261. The facts of *Oil Chemical General & Allied Workers Union v Volkswagen of SA (Pty) Ltd & another* (2002) 23 ILJ 220 (CCMA) illustrate the point. The collective agreement increased the threshold from 30% to 40% in respect of the acquisition of ss 12, 13 and 15 rights. At 231H-I the commissioner confirmed that s 18 'permits employers and majority unions ... to keep potential rival unions out of the workplace'.

²⁷ ibid. See also s 23(2) of Constitution and ss 4 and 8 of the LRA.

²⁸ s 21(8C)(a) and (b) of the LRA.

²⁹ s 21(8A)(a) and (b) of the LRA.

We agree with the fact that the amendments provide minority trade unions with more leeway to organise. However, despite these positive changes, the new provisions will not be without interpretational problems. The amendments do not define the terms ‘a significant interest’ or a trade union which represents a ‘substantial number of employees’.³⁰ We suggest that the first term should be interpreted to refer to the concept ‘bargaining unit’ as it had developed in terms of the former LRA of 1956. We also submit that this may have been an excellent opportunity to provide certainty about a percentage, for example 25% or 30%, which could provide direction to the notion of a ‘substantial number’ of employees rather than leaving it to the vagueness associated with the basket of factors approach.

Furthermore, there is nothing that limits a trade union’s right to strike in order to acquire organisational rights. The new model holds the potential to usher in a new species of disputes which could place collective bargaining on a collision course with the powers of arbitrators as the amendments provide commissioners with the power to disregard thresholds as agreed upon during collective bargaining. As pointed out by Rycroft, violent and procedural strikes have become the norm rather than the exception in South Africa.³¹ Opening an avenue to minority trade unions to gain organisational rights via statutory means without the need to engage in strike action may have gone some way towards limiting strikes for the purpose of gaining recognition at the workplace.

The tension which exists in respect of the right to freedom of association and the enjoyment of organisational rights also prevails in the domain of bargaining councils. As referred to above, the LRA *inter alia* provides that ‘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’.³²

Despite the fact that the LRA does not specifically provide for this, members of bargaining councils also agree on thresholds of membership before a party may become a member of a bargaining council. So, for example, the constitution of the Public Service Co-ordinating Bargaining

³⁰ s 21(8C)(a) and (b) of the LRA.

³¹ A Rycroft ‘Strikes and the Amendments to the LRA’ (2015) 36 *ILJ* 1, 3.

³² s 18 of the LRA.

Council³³ (PSCBC) provides for two requirements before a trade union can become a member of the bargaining council, namely that:

- ‘7.1 Any single trade union party may apply for admission to the Council if it –
 - (a) meets the threshold requirement of 50 000 members; and
 - (b) is admitted to a Sectoral Council.’

Trade unions that do not meet the 50 000 threshold are unable to associate with or become members of the PSCBC. Also keep in mind that all trade unions which are members of a bargaining council qualify for the automatic enjoyment of two organisational rights, namely the right of access to an employer’s premises and the right to stop order facilities.³⁴ The practical effect of this is that a trade union which is unable to canvass 50 000 members is also not eligible to acquire these basic organisational rights.³⁵

The inability of minority trade unions to become members of bargaining councils impact on the ability of their members to be represented by their trade union representatives during disciplinary proceedings. So, for example, the disciplinary code and procedures for the general public service, which are embodied in PSCBC Resolution 1 of 2003, provide that an employee who is subjected to a disciplinary hearing may be represented by a fellow employee or ‘the representative of a recognised trade union’. The part of the PSCBC Resolution relating to disciplinary processes defines ‘recognised trade union’ as ‘all unions admitted to the PSCBC as well as any trade union that enjoys organisational rights from a particular department’. The bargaining council system also precludes minority trade unions from engaging in their right to organise in so far as they

³³ The PSCBC is established in terms of s 36 read with s 213 of the LRA of 1995. See also paras 4(a)-(o) of the constitution of the PSCBC. The powers and duties of the PSCBC are, inter alia, to negotiate matters of mutual interest, to conclude collective agreements and to resolve disputes through dispute resolution mechanisms.

³⁴ s 19 of the LRA.

³⁵ Any trade union wishing to be a party to the PSCBC also needs to be admitted to the relevant sectoral council before being admitted to the PSCBC. The General Public Service Sectoral Bargaining Council (GPSSBC) is an example of such a sectoral council and, in turn, its constitution provides that trade unions must meet a prescribed threshold. Paras 6.2(a) and (b) of GPSSBC Resolution 2 of 2003 provide that a ‘registered trade union which meets the threshold requirement of 30 000 members; or two or more registered trade unions acting together as a single party, provided their combined membership meets the threshold requirement of 30 000 members’ may apply to become a party to the bargaining council.

are excluded from becoming party to the statutory institutions which are established for, amongst others, collective bargaining activities.

We return to these and other aspects in our discussion of the South African Constitution and of ILO norms in the sections that follow.

3 The Constitution, Labour Rights and Democracy

Is the model of workplace democracy as formulated in the LRA compatible with the type of multi-party democracy envisaged by the Constitution? Furthermore, is this model in harmony with the Constitution's right to freedom of association and the right to organise and to engage in collective bargaining?

The ANC and the former NP government did not exclude smaller parties during the negotiations regarding South Africa's new political dispensation and 19 political parties formed part of the constitutional writing process at CODESA.³⁶ During the course of negotiations some of the smaller political parties withdrew of their own accord.³⁷ However, they were not excluded on grounds of not meeting thresholds of representivity or by virtue of agreements between larger parties which placed a restraint on their participation. This resulted in an interim Constitution which accommodated political parties with low levels of representivity. Rather than opting for a winner takes all model, the interim Constitution established a multi-party government of national unity which entitled minority parties with 5% of the national vote to a position in the cabinet.³⁸

This idea was carried over into the final Constitution. Section 1 provides that South Africa is founded on the values of human dignity and the advancement of human rights and, important for the purpose of our discussion, an electoral model which is based on 'regular elections and a multi-party system of democratic government'.³⁹ This multi-party model is also given effect to in

³⁶ See <http://www.sahistory.org.za/codesa-negotiations> accessed on 3 September 2015.

³⁷ S Woolman & J Swanepoel 'Constitutional History' in S Woolman & M Bishop *Constitutional Law of South Africa* (2014) 2:37.

³⁸ R Hopper 'Post-Apartheid South Africa: Evaluating South Africa's Institutional Design' (2008) 1 available at <http://www.opticon1826.com/articles/abstract/10.5334/opt.050803/> accessed May 2015. See also T Roux 'Democracy' in S Woolman and M Bishop *Constitutional Law of South Africa* (2014) 10.2.

³⁹ The Constitution does not provide a clear definition of democracy, but rather provides adjectives to describe the type of democracy envisaged by the Constitution. It is from these adjectives that the content of democracy can be deciphered. Sections 199(8) and 236 of the Constitution

the electoral model.⁴⁰ It ensures that minority political parties are given a voice in the established political party space. At present there are 13 political parties in the National Assembly.⁴¹ The ruling party secured 62.15% of the votes during the previous election in 2014 which gave the ANC 249 out of 400 seats.⁴² The African People's Convention secured 0.17% of the votes during the 2014 election and it is the smallest political party with one seat in Parliament.⁴³

The model of democracy espoused by the Constitution promotes a system in terms of which voters are free to associate with political parties of their choice, irrespective of their size. All political parties are treated equally in respect of the canvassing of votes. They are equivalent in respect of their rights to freedom of speech, access to public facilities and, importantly so, to elect and to be represented by representatives of their political party. As alluded to above, a party can have less than 1% of voters and still secure a seat in Parliament.

The labour rights contained in the Constitution are not dependent on thresholds of representativity. The most significant rights for purposes of this discussion are the rights to freedom of association, to organise and to collective bargaining in particular. It cannot be disputed that both political and workplace democracy start with the right to freedom of association. Section 18 of the Constitution provides that 'everyone' has the right to freedom of association. In *SA National Defence Union v Minister of Defence*⁴⁴ the Constitutional Court agreed with this in so far as the collective bargaining rights 'taken together protect the right of individuals not only individually to form and express opinions, of whatever nature, but to establish associations and groups of like-minded people to foster and propagate such opinions'.⁴⁵

The right to freedom of association is the springboard for all of the other fundamental labour rights contained in the Constitution. If it were permissible to place limitations on this right, the rest of the rights which confirm trade unions' right to organise and the right to engage in collective bargaining would become superfluous. The right of trade unions to organise finds its origin in s 23(2) of the Constitution which provides that 'every worker' has the right:

specifically provide for a democracy that is multi-party in nature in the business of government or political activity.

⁴⁰ See the Electoral Act 73 of 1989.

⁴¹ State of Parties in the National Assembly available at www.parliament.gov.za accessed August 2015.

⁴² *ibid.*

⁴³ 2014 National Election Results available at www.elections.org.za accessed August 2015.

⁴⁴ *SA National Defence Union v Minister of Defence & another* (1999) 20 ILJ 2265 (CC).

⁴⁵ *ibid* para 48.

- ‘(a) to form and join a trade union;
- (b) to participate in the activities and programmes of a trade union; and
- (c) to strike.’

Furthermore, the right to organise finds expression in s 23(4) which provides that:

- ‘every trade union and employers’ organisation has the right -
- (a) to determine its own administration, programs and activities;
- (b) to organise; and
- (c) to form and join a federation.’

The Constitution does not provide that these rights may be limited by means of labour legislation that gives effect to these rights or trade union security arrangements. Therefore, it can be argued that, should the LRA make provision for a model of labour democracy which does not allow ‘every worker’ the right to participate in the ‘activities and programmes’ of its trade union as provided for in s 23(2)(b), or to organise in terms of s 23(4)(b), such limitation would potentially not pass constitutional muster. Taken on its own, any trade union member’s right to be elected as a shop steward, or to be represented at a hearing by a trade union representative of choice, surely constitutes ‘activities of trade unions’ which are protected by the Constitution. On the same basis it can be argued that any provision in labour legislation which permits agreements to be concluded by majority trade unions and employers that explicitly exclude minority trade unions from engaging in trade union activities would be unconstitutional.

In relation to the right to engage in collective bargaining, s 23(5) of the Constitution 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).’

Section 23(6) also provides that ‘national legislation may recognise union security arrangements contained in collective agreements’. This section refers to closed shop and agency shop agreements. As regards the right to engage in collective bargaining, it seems that the drafters of the Constitution may have foreseen that, in the LRA environment, restrictions (such as thresholds) could be placed on this right as long as they complied with s 36(1). However, from the above exposition it is clear that the Constitution makes no reference to any limitations, such as thresholds, which could apply in respect of the rights to freedom of association and the right to organise. We

argue that any model of labour democracy which places limits on these rights may have difficulty in justifying such limitations.

Returning to the LRA, the limitations on minority trade unions in relation to their organisational rights in the workplace deny them the right to establish a foothold in a workplace. At the inception of any trade union, the focus is on the recruitment of employees and organising them into a functioning establishment. It is only after growing into a position of strength in numbers that it will contest for recognition in the workplace and ultimately to engage in collective bargaining. Even though the relevance of thresholds could possibly be tolerated in the sphere of collective bargaining in the context of the Constitution, it is not desirable when it resides within the realm of the granting of organisational rights.

It goes without saying that the labour rights in the Constitution are not absolute. However, should these rights be limited, it must be done by taking the factors listed in s 36(1)(a)-(e) into account.⁴⁶ Any limitation of a constitutional right must be ‘reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom’. The limitation must be proportional.⁴⁷ Currie and De Waal explain that the law which limits a right must be reasonable in the sense that it should not invade rights any further than it needs to in order to achieve its purpose and that there is sufficient proportionality between the harm done by the law and the benefits to be achieved.⁴⁸

We recognise the principle that a unified trade union movement may be more effective during collective bargaining than in a situation where workers are represented by a fragmented array of minority unions. However, this principle should not prevent minority trade unions from gaining an organisational foothold at the outset. To us, such limitations would be disproportionate. Should there be no statutory avenue for workers to organise themselves into a union which has access to a workplace and should they not be in a position to claim the right to be represented by their union representatives during grievance or disciplinary proceedings, it could lead to frustration and to workers taking the law into their own hands to enforce these basic labour rights.

⁴⁶ I Rautenbach ‘Proportionality and the Limitation Clauses of the South African Bill of Rights’ (2014) 17(3) *PELJ* 2229, 2248.

⁴⁷ *S v Makwanyane* 1995 (3) SA 391 (CC).

⁴⁸ See I Currie & J de Waal *The Bill of Rights Handbook* (2013) 162; S Woolman & H Botha ‘Limitations’ in S Woolman & M Bishop *Constitutional Law of South Africa* (2014) 34:67-68.

4 The ILO and the Right to Freedom of Association and Collective Bargaining

The Constitution and the LRA enjoin the South African courts to take cognisance of ILO principles. The former provides that when interpreting the Bill of Rights, courts or tribunals ‘must promote the values that underlie an open and democratic society based on human dignity, equality and freedom’. It also provides that decision makers ‘(b) must consider international law; and (c) may consider foreign law’.⁴⁹

ILO standards are characterised by two features, namely, ‘universality’ and ‘flexibility’.⁵⁰ This entails that conventions are established in such a way that they could be applied universally to all states, but that they are flexible enough to be adapted to and applied in all states irrespective of their level of development.⁵¹

To what extent does the LRA’s collective bargaining framework give effect to ILO principles pertaining to the freedom of association and the right to organise? Also, how do the Committee on Freedom of Association (CFA) and the Committee of Experts on the Application of Conventions and Recommendations (CEACR) interpret the ILO’s conventions dealing with these aspects?⁵²

Article 2 of the ILO’s Freedom of Association and Right to Organise Convention 87 of 1948 provides that workers without distinction whatsoever ‘shall have the right to establish and, subject only to the rules of the organisation concerned, to join organisations of their own choosing without previous authorisation’. Article 3 provides that trade unions and employers’ organisations ‘shall have the right to draw up their constitutions and rules, to elect their representatives in full freedom, to organise their administration and activities and to formulate their programmes’. Article 3 also directs that ‘public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof’.

⁴⁹ s 39(1) of the Constitution of South Africa.

⁵⁰ A Trebilcock ‘Putting the Record Straight about International Labour Standard Setting’ (2010) *Comp Labor Law & Pol'y Journal* 556-8 points out that ILO standards are both universal and flexible and that this gives considerable latitude to accommodate specific members countries’ contexts.

⁵¹ *ibid*.

⁵² See *General Survey* (1994) 8 para 20. The nature of the function of the CEACR and the CFA is to apply the same universal principle although their composition differs because when a case is referred they may draw each other’s attention to it.

Despite the fact that the mentioned provisions seemingly do not leave room for limitations being placed on minority trade unions, the rulings of the CFA make it clear that the ILO is fully aware of the negative implications of having a multiplicity of trade unions in any collective bargaining setup.⁵³ Small and weak trade unions compromise unity amongst workers which does not augur well for collective bargaining. Despite this, the CFA remains adamant that the ‘unification of the trade union movement imposed through state intervention by legislative means runs counter to the principle embodied in Articles 2 and 11 of Convention No. 87’. The CFA stated that:

‘A provision authorizing the refusal of an application for registration if another union, already registered, is sufficiently representative of the interests which the union seeking registration proposes to defend, means that, in certain cases, workers may be denied the right to join the organization of their own choosing, contrary to the principles of freedom of association.’⁵⁴

In interpreting the phrase ‘organizations of their own choosing’ in Article 2, the CFA makes the persuasive point that it means that individual employees should be allowed to associate with trade unions of their own choice without giving preference either to a ‘unified trade union movement’ or ‘trade union pluralism’.⁵⁵ The phrase ‘without distinction whatsoever’ was considered the suitable way to express the universal scope of the principle of freedom of association.

Article 4 of the ILO’s Right to Organise and Collective Bargaining Convention, 98 of 1949 provides that:

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

The CFA here also holds the position that member countries are allowed to draw a distinction between the most representative trade union and other trade unions, but it further insists that ‘such a system should not have the effect of preventing minority unions from functioning and at

⁵³ ‘Freedom of Association’ in *Digest of Decisions and Principles of the Freedom of Association Committee of the Governing Body of the ILO* (2006) 67 para 319.

⁵⁴ *ibid* para 328.

⁵⁵ *ibid* para 318. See also Case No 2046 332nd Report para 453 and Case No 2258 334th Report para 448.

least having the right to make representations on behalf of their members and to represent them in cases of individual grievances'.⁵⁶

The CFA is clear about the fact that should legislation establish a percentage to determine the threshold of representativeness, such an arrangement would not face any challenge as long as the criteria for determining representativity are ‘objective, precise and pre-established to avoid abuse and bias’.⁵⁷

When measuring the South African model of workplace democracy against these international norms, it is clear that s 18 agreements in terms of the LRA and the custom to set thresholds with bargaining councils do pose problems in relation to the right to freedom to associate and to organise. These limitations not only exclude smaller unions from membership of bargaining councils, but also limit the right of trade union members to be represented by their representatives during individual grievance and disciplinary proceedings. Added to this, clear guidelines have not been established by the amendments pertaining to the notions of ‘a significant interest’ or a trade union which represents a ‘substantial number of employees’.⁵⁸ This falls short of the requirements of the specialist committees of the ILO which require objective and precise criteria to avoid bias against minority unions.

5 Conclusion

The amendments which came into effect in January 2015 are commendable from a minority trade union perspective. The new provisions may have the effect of discouraging employers and dominant trade unions from fixing thresholds that effectively prevent minority trade unions from enjoying organisational rights. They also constitute a positive development in so far as it is now possible for sufficiently representative trade unions to gain all of the organisational rights despite the fact that such unions may not represent a majority of workers at a workplace.⁵⁹

⁵⁶ *Digest of Decisions* (1996) 194 para 974.

⁵⁷ *Digest of Decisions* (2006) 75 para 356. Case No 2153 336th Report para 166. The labour legislation of Algeria provided that a trade union in a single workplace shall be recognised as representative if it has 20% membership of all workers. See also Case No 2132 331st Report para 588. In the case of Madagascar, the CFA asserted that ‘objective, pre-established and precise criteria to determine the representativity of an organization of employers or workers should exist in legislation, so as to avoid any possibility of bias or abuse and that this assessment should not be left to the discretion of governments’ when determining the most representative trade union.

⁵⁸ s 21(8C)(a) and (b) of the LRA.

⁵⁹ A van Niekerk & N Smit *Law@work* (2015) 376.

Nevertheless, we 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.

The fact that s 18 of the LRA remains intact begs the question whether the amendment went far enough in protecting minority trade unions' labour rights. A complete removal of s 18 would have prevented the situation where the dominant parties at a workplace still have the option to be in cahoots and to exclude small and start-up trade unions from establishing traction at a workplace. Under the existing circumstances, policy makers at the very least should have placed the onus on the dominant parties to s 18 agreements to convince the arbitrator why organisational rights should not be granted to minority applicant trade unions in order to counter the negative effects which their anti-competitive behaviour may have.

We accept the ILO's view that trade unions are generally more effective when workers unite and raise their demands through one voice. The LRA also establishes an advantageous environment for trade unions with high levels of representativity. Despite this, the ILO specialist committees are at pains to emphasise that collective bargaining models should always maintain a system which gives effect to the right to freedom of association and does not create a monopoly for trade unions. The CFA's position is that there should be no direct or indirect interference through legislation by the state to establish monopolies and by virtue of article 3 of Convention 87 all workers should have the unfettered freedom to elect their representatives for purposes of individual disputes.

We find the amendments to the LRA wanting in a number of ways. Section 21(8C) requires that the trade union (or unions acting together) must represent 'a significant interest' or it should represent 'a substantial number of employees' in the workplace. This wording is vague and it will not satisfy the ILO principles that any such criteria should be objective, precise and pre-established to avoid abuse in respect of minority trade unions. Furthermore, s 18 does not distinguish between the enjoyment of organisational rights for the benefit of individual member interests in disciplinary hearings or grievance proceedings as opposed to collective bargaining where the question of numbers could remain a primary consideration. The CFA is opposed to a

situation which limits an individual member's right to be represented by his or her trade union because of preference being given to bigger unions.

South Africa is currently experiencing a re-positioning within the trade union movement.⁶⁰ The newcomer Association of Mining and Construction Unions is eroding the support base of the traditional majority trade union National Union of Mineworkers, which is aligned to the ANC. It is desirable that there should be legitimate statutory avenues to effect a change of the guard rather than leaving it to extra-statutory devices, which could include violence and destruction of facilities, to achieve this.

⁶⁰ See J Theron, S Godfrey & E Fergus 'Organisational Rights and Collective Bargaining Through the Lens of Marikana' (2015) 36 *ILJ* 849; In *National Union of Mineworkers v Lonmin Platinum Comprising Eastern Platinum Ltd and Western Platinum Ltd and another* [2013] 10 BLLR 1029 (LC) paras 9 and 11 the two unions NUM and Amcu accused each other of violence and intimidation in the drive to recruit membership. NUM cited the reason for the violence as the 'shift in allegiance' from NUM to Amcu at Lonmin. It is clear that the trade union rivalry impacted negatively on both labour peace and workplace democracy in the workplace at Lonmin.