

**THE IMPACT OF THRESHOLD AGREEMENTS ON  
ORGANISATIONAL RIGHTS OF MINORITY TRADE UNIONS**

by

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**Submitted in fulfillment of the requirements for the degree**

**DOCTOR OF LAWS**

**In the Department of Mercantile Law**

**Faculty of Law,  
University of Pretoria**

**Completed under the supervision of**

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**November 2017**

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## **ABSTRACT**

The rights of freedom of association, to organise and to bargain collectively are recognised internationally and form part of the constitutional framework of progressive and democratic states. The full enjoyment of these rights by trade unions often is hindered by the imbalance in the power relations between the employer and the representatives of the workers, hence the need for statutory intervention.

The Labour Relations Act 66 of 1995 (LRA of 1995) postulates a collective bargaining regime which is voluntarist in nature and strengthens its effectiveness through a set of organisational rights and the right to strike. Incidentally, the current statutory framework for the enjoyment of organisational rights has had a direct impact on the enjoyment of the right to freedom of association and the right to organise. It is accepted that possession of the right to collective bargaining is internationally recognised as the basis of the authority to set thresholds of representivity in the workplace. The organisational rights framework in this context has been directly impacted upon. It is this direct impact that necessitates an enquiry to determine whether South Africa's framework on the acquisition of organisational rights conforms to international standards set by the ILO and the Constitution, 1996.

This thesis argues that the policy choice of the South African labour relations system in respect of some of the consequences of majoritarianism insofar as representation in individual cases is concerned does not necessarily foster the ideals of the Constitution, 1996 and the principles of international labour standards. The model of democracy as envisaged in the Constitution, 1996 is not one that promotes exclusivity. However, the effect of section 18 of the LRA of 1995, which allows threshold agreements, arguably may foster such exclusivity in the workplace. This situation has resulted in industrial democracy being a terrain of endless conflict between employers and labour, even more among trade unions themselves. As a result, the rivalry between unions in workplaces is exacerbated. The original intent behind the organisational rights of trade unions and their right to strike was to bolster their capacity to bargain collectively. It was meant to get

them to focus on collective bargaining gains they can secure and to bargain more effectively. However, the current framework that favours majority trade unions has the effect of minority trade unions generally finding their existence threatened and their being systematically excluded from the acquisition of organisational rights. This study questions the power of majority trade unions to enter a collective agreement with an employer in the workplace and set unjustifiable thresholds of representivity in respect of organisational rights. This arrangement creates a hurdle in respect of the provisions of the LRA that seek to promote industrial democracy, the enjoyment of the rights to freedom of association, to organise and to engage in collective bargaining.

Recent amendments to the LRA of 1995 are an attempt to mitigate the effect of sections 18 and 20 on the enjoyment of organisational rights. The CCMA, *inter alia*, has been granted powers to grant organisational rights to trade unions that do not meet the set threshold in terms of the empowering provisions of the LRA of 1995 if they meet certain requirements. However, these amendments do not go far enough to prevent employers and majority trade unions from continuing to set unjustifiable thresholds that can have potential to replace the determinations of the CCMA.

Therefore, the study discusses the question whether the provision in the LRA of 1995 on the setting of thresholds of representivity for the acquisition of organisational rights and the concomitant amendments are in line with the democratic model envisaged by the Constitution, 1996 and to international labour standards which recognise the rights to freedom of association of minority trade unions. This research concludes by advancing recommendations pertaining to threshold agreements and the rights of minority trade unions and to what extent it is justifiable to permit them to enjoy them.

## ACKNOWLEDGEMENTS

First and foremost, all praises to the Most High, the Elohim of Abraham, Isaac and Jacob for giving me strength through his Truth, which provides light and the wisdom. Through many trials and tribulations that I have had to endure during this period of writing this thesis, my Father was always there with me. His rod and His staff comforted me.

My greatest gratitude goes to my supervisor, Professor Van Eck who has been my pillar of strength and source of encouragement throughout the writing of the thesis. His guidance and patience are invaluable.

Significantly, I am extremely grateful to my two daughters Lebogang and Didintle for their encouragement. I am also indebted to my two sons Temo and Atle who have had to bear living without being able to enjoy my company and my being there for them as a father. My greatest appreciation goes to my mother, Mrs Joan Esitang who has been my pillar of strength and my source of inspiration and sanity. Many thanks to my sister, Tumi, to whom I could beckon and get audience at will whenever I required sisterly counsel.

My special gratitude goes to Mr Sonty Monakhisi from the Law Library University of Pretoria who consistently assisted me with securing research material from the law library. My special thanks also go to Professor Manfred Weiss who has guided me on the structure of the international standards and the comparative analysis chapters including the rationale and main focus of the LRA of 1995 of which he was part during its drafting.

Finally, my great appreciation also goes to my two line managers, Mr Ivan Fredericks and Mr Tahir Maepa who allowed me the opportunity to complete my doctoral thesis despite work pressures. I also wish to thank Mr Malachi Dawson with whom I shared the premise of this study. Last but not least, I also thank Tsholofelo who gave me hope for a good life and helped me have the courage to accept the things I cannot change. There is always light at the end of the tunnel.

## LIST OF ACRONYMS

ACTWUSA	Amalgamated Clothing and Textile Workers Union of South Africa
AJIL	American Journal of International Law
AJLS	African Journal of Legal Studies
AMCU	Association of Mineworkers and Construction Union
AJLS	African Journal of Legal Studies
ANC	African National Congress
BAISEMWU	Black Allied Iron, Steel, Engineering and Metallurgical Workers Union
BCEA	Basic Conditions of Employment Act
BCLR	Butterworth Constitutional Law Reports
Boston CLR	Boston College Law Review
BJELL	Berkeley Journal of Employment Law
BLLR	Butterworth Labour Law Reports
CC	Constitutional Court
CCMA	Commission for Conciliation, Mediation and Arbitration
CEACR	Committee of Experts on Application of Conventions and Recommendations
CFA	Committee on Freedom of Association
CILSA	Comparative and International Law Journal of Southern Africa
CLLPJ	Comparative Labour Law and Policy Journal
DLJ	Dalhousie Law Journal
EEA	Employment Equity Act
EER	European Economic Review
EJCL	Electronic Journal of Comparative Law
ELJ	Employment Law Journal
ELRC	Education Labour Relations Council
FAWU	Food and Allied Workers Union
GPSSBC	General Public Service Sectoral Bargaining Council
HC	High Court
IC	Industrial Court
IFP	Inkatha Freedom Party

IJCLLIR	International Journal of Comparative Law and Industrial Relations
IJLI	International Journal of Legal information
IL	International Lawyer
ILJ	Industrial Law Journal
ILO	International Labour Organisation
IPU	Inter-Parliamentary Union
IRLJ	Industrial Relations Law Journal
ISPR	International Political Science Review
JILPT	Japan Institute for Labour Policy and Training
JPAK	Journal of the Philosophical Association of Kenya
LAC	Labour Appeal Court
LC	Labour Court
LDD	Labour Development and Democracy
LLAICLJ	Loyola of Los Angeles International and Comparative law Journal
LRA	Labour Relations Act
NAACP	National Association for the Advancement of Coloured People
NPSU	National Police Service Union
NUM	National Union of Mineworkers
NUMSA	National Union of Metalworkers of South Africa
MAWU	Metal and Allied Workers Union
MLR	Minnesota Law Review
OULR	Osaka University Law Review
POPCRU	Police and Prisons Civil Rights Union
PSA	Public Servants Association
PSCBC	Public Service Co-ordinating Bargaining Council
SAJLR	South African Journal of Labour Relations
SANDU	South African National Defence Union
SSSBC	Security Safety Sectoral Bargaining Council
SCA	Supreme Court of Appeal
SACTWU	Southern African Clothing and Textile Workers Union
SACCAWU	South African Commercial, Catering and Allied Workers

	Union
SASBO	South African Society of Bank Officials
SJIL	Standard Journal of International Law
STILR	Suffolk Transnational Law Review
TSAR	Tydskrif Vir Suid Afrikaanse Reg
UPJLEL	University of Pennsylvania Journal
UPLR	University of Pennsylvania Law Review
YLJ	Yale Law Journal of Labour and Employment Law

# Chapter 1

## General Introduction

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*“Minority unions were not given much encouragement by the drafters of the current Labour Relations Act 66 of 1995, which openly avows a preference for larger unions and protects them from competition by small interlopers. But as some former majority unions have recently discovered, members don’t remain loyal forever, and unions with seemingly secure majority statuses have suddenly found their roles reversed.”<sup>1</sup>*

### 1. Introduction

South Africa had a labour relations framework before the dawn of the democratic dispensation in 1994 that was premised on the policy of racial segregation.<sup>2</sup> However, this framework, especially after the introduction of the Industrial Court and the notion of unfair labour practice, served as a useful tool for a future labour dispensation.<sup>3</sup> This framework was closely linked to the policies of the Nationalist Party (NP) government which prescribed separate labour relations systems for white and black workers.<sup>4</sup> The trade union movement under the leadership of the Congress of South African Trade Unions (COSATU) played a significant role in

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<sup>1</sup> Grogan *EL* (2015) 11.

<sup>2</sup> See Chapter 4 at 3 and 4.2.

<sup>3</sup> See Chapter 4 at 3.7 on the significance of the Industrial Court era.

<sup>4</sup> Godfrey *et al* (2010) 50 and 51.

bringing about a new labour relations framework that sought to treat all workers equally, and which ushered in a new labour relations system that respects international standards.<sup>5</sup> The role of the labour movement spearheaded by COSATU was embedded in the collective effort of its major alliance partner, the African National Congress (ANC).<sup>6</sup>

Because of a policy of apartheid and to avoid being officially excluded from the International Labour Organisation (ILO), South Africa withdrew in March 1964.<sup>7</sup> However, with a new democratic dispensation of 1994, South Africa resumed its membership of the ILO.<sup>8</sup> After rejoining, South Africa faced an obligation to align its labour laws to the principles of international law. The Constitution, 1996 recognises the value of international law.<sup>9</sup>

South Africa has adopted a modern constitution with liberal workers' rights and in accordance with a particular model of multi-party democracy.<sup>10</sup> This model of democracy does not envisage that parties should be so dominated that their existence is threatened by majority parties. Based on this constitutional premise of multi-partism and the desire to cater for diversity, this thesis argues that the right of a majority trade union to enter a collective agreement with an employer to exclude a minority trade union from exercising organisational rights to the extent that they cannot represent members in individual cases does not comply with the model of democracy and the protection of minority interests in the Constitution, 1996. All this takes place against the backdrop of a dispensation that provides for threshold agreements that have the effect of limiting the right to freedom of association in a manner that may be constitutionally unjustifiable.<sup>11</sup> This state of affairs has resulted due to the fact that the South African model of collective bargaining is based on majoritarianism.

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<sup>5</sup> See O'Regan *ILJ* (1997) 897-898.

<sup>6</sup> See Slabbert and Swanepoel (2002) 34-35.

<sup>7</sup> Grawitzky Paper (2013) 6.

<sup>8</sup> As above.

<sup>9</sup> S 39 of the Constitution, 1996.

<sup>10</sup> See Chapter 3 at 3, 4 and 7. This chapter provides the constitutional premise for all institutions of democracy and the principle of multi-partism that encompasses the deliberate participation and protection of minority entities.

<sup>11</sup> Ss 14 and 16 provides for organisational rights exclusively enjoyed by majority trade unions in terms of the LRA of 1995. Ss 25 and 26 of the LRA of 1995 provides for agency and closed shop agreements that can only be entered by majority trade union. S 81 of the LRA of 1995 also provides for the establishment of a workplace forum only by a representative trade union.



It is not the intention of this study to discuss the security arrangements of the LRA of 1995. The thesis is also not going to analyse workplace democracy *per se*, but will rather shed light on the drafting process of the LRA of 1995 and will explain what the drafters had in mind to institutionalise workplace democracy. In doing this, the thesis will provide context through the principles of the Constitution, 1996. These principles are embedded in the model of constitutional democracy, the right to freedom of association and the right to engage in collective bargaining. The right to engage in collective bargaining is not to be seen as limitless. However, when evaluating threshold agreements both constitutional imperatives and international norms should be taken into consideration.

The South African legislature promulgated the Labour Relations Act of 1995 (LRA of 1995) including a new collective bargaining framework. It favours pluralism but with a strong slant towards majoritarianism. The right to organise has not replaced the duty to bargain, but is rather used as a tool to encourage collective bargaining. The right to organise is embodied in the organisational rights dispensation and the right to strike.<sup>12</sup> The inclusion of these rights served as a compromise to appease trade unions and led to their agreeing to the then draft new labour legislation.<sup>13</sup>

In broad terms, this thesis emphasises the shortcomings and problems associated with the right of employers and majority trade unions or bargaining councils to conclude threshold agreements which set thresholds and have the effect to exclude minority trade unions from the workplace. This reflection is made within the context of the purpose of the LRA of 1995 to advance labour peace and to democratise the workplace.<sup>14</sup> It also fosters the notion that the right to freedom of association provides minority trade unions to be afforded the right to be active in the workplace. The activity referred to may be representation in individual matters and representation in collective bargaining processes. The first instance of activity refers to the right to represent members in grievance and disciplinary proceedings as examples of individual cases.<sup>15</sup> The second instance considers the question of

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<sup>12</sup> See Chapter III, Part A of the LRA of 1995.

<sup>13</sup> Van Niekerk *et al* (2015) 387.

<sup>14</sup> S 1 of the LRA of 1995.

<sup>15</sup> See Chapter 5 at 2, 5 and 6. In this chapter the content and significance of organisational rights within the context of individual cases and collective bargaining is discussed.

representation in collective bargaining and the role that minorities play within the context of international law and South Africa's constitutional framework.<sup>16</sup>

## 2. Contextual Background

### 2.1 Freedom of Association and the Collective Bargaining Framework

The labour legislation from the 1920s to just prior the advent of democratic rule for South Africa in 1994 developed in phases.<sup>17</sup> Just before the work of the Ministerial Legal Task Team (Ministerial Task Team)<sup>18</sup> the previous legislation was clearly geared towards balancing the interests of the white workers against those of black workers within the context of racial segregation, which was in favour of white workers. This dispensation over years was reformed through various commissions and legislation and eventually established through the Industrial Court principles of representivity in the workplace that drew on the right to freedom of association as informed by international norms.

Chapter II was introduced into the LRA of 1995 in response to the recognition by the Ministerial Task Team that the previous labour statute, the Labour Relations Act 28 of 1956 (LRA of 1956)<sup>19</sup> did not protect the right to freedom of association of employees in a sufficiently comprehensive manner.<sup>20</sup> Under the heading "Collective Bargaining", Chapter III of the LRA of 1995 provides that organisational rights are to be enjoyed by sufficiently representative trade unions. The majority trade union enjoys all organisational rights,<sup>21</sup> any sufficiently representative trade union enjoys some rights,<sup>22</sup> whereas minority trade unions enjoy no statutory organisational rights at all.<sup>23</sup> Sections 18 and 20 of the LRA of 1995 permit the

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<sup>16</sup> See Chapter 5 at 2, 5 and 6 where the content and significance of organisational rights within the context of individual cases and collective bargaining is discussed.

<sup>17</sup> See Chapter 4 at 2 and 3.

<sup>18</sup> See Chapter 4 at 4.

<sup>19</sup> LRA of 1956.

<sup>20</sup> See Explanatory Memorandum (1995) 289.

<sup>21</sup> This includes the rights that are exclusively enjoyed by the majority trade union, namely the right to elect representatives (s 14) and the right to disclosure (s 16).

<sup>22</sup> Ss 11, 12, 13, 14, 15 and 16 of the LRA of 1995. Ss 14 and 16 are rights that are enjoyed by a majority trade union, whereas the remainder are enjoyed by representative trade unions.

<sup>23</sup> Whether indirectly or directly, the effect of the threshold agreement in terms of sections 18 and 20 of the LRA of 1995 are the provisions that foster majoritarianism. Ss 18, 23(1), 25 and 26 are also provisions of the LRA that support the view that the LRA is in favour of majoritarianism. These other provisions do not form part of the thesis and therefore are not part of the discussion. See also

establishment of thresholds by parties to collective bargaining as a pre-requisite for the enjoyment of organisational rights.

It is the power of majority trade unions and bargaining councils to set these thresholds with employers in the collective bargaining process that has led to the intrusion into the right to freedom of association. This power and the legal authority provided for by national legislation is the focus of this study.<sup>24</sup> It is submitted that this power encroaches on the right to freedom of association at the minimal level of representation of members in individual cases despite the international norms and the principles of the Constitution, 1996 that are at play. Boda and Myburg<sup>25</sup> have also considered suggestions that majoritarianism is no longer appropriate. In this regard the presenters mentioned that:

“the statute’s embrace of majoritarianism is no longer appropriate. This is because it enforces a winner takes all approach. This was developed and adopted when there was fair degree of union stability, and a growing consolidation within the trade union movement. Those conditions have avowedly changed: but the statute has not.”<sup>26</sup>

In relation to individual cases, item 4 of Schedule 8 of the LRA of 1995 permits employees to be assisted by a trade union representative in disciplinary proceedings.<sup>27</sup> A minority trade union excluded from organisational rights through a threshold agreement will not be in a position to represent its members in terms of this Item.<sup>28</sup> Further, there is no indication in Schedule 8 of the LRA of 1995 that the trade union required to assist in a disciplinary hearing is to meet a threshold of representivity.<sup>29</sup> Further, section 200 of the LRA provides that all registered trade unions act on their own behalf and in the interests of their members without mentioning thresholds.<sup>30</sup> These are the problems where there are thresholds that exclude minority trade unions from acquiring organisational rights.

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Kruger and Tshoose *PELJ* (2013) 295 on how the provisions of ss 25 and 26 of the LRA of 1995 impact negatively on minority trade unions.

<sup>24</sup> See ss 18 and 20 of the LRA of 1995.

<sup>25</sup> Boda and Myburg SASLAW Presentation (2017).

<sup>26</sup> As above.

<sup>27</sup> See Chapter 5 at 3.3.

<sup>28</sup> See Chapter 2 at 5.2.4.

<sup>29</sup> See Chapter 5 at 3.3.

<sup>30</sup> See Chapter 5 at 5.4.

Bargaining councils in the public and private sectors are established in terms of section 27 of the LRA of 1995. The adopted constitution of a bargaining council may determine the requirements for membership and what are the threshold requirements for the acquisition of organisational rights.<sup>31</sup> Where employers and sufficiently representative trade unions have established a bargaining council the member trade unions enjoy statutory organisational rights.<sup>32</sup> A trade union that is not a member of a bargaining council due to its inability to meet the threshold set in terms of either a section 18 or a section 20 collective agreement effectively is excluded from a number of activities. For example, they are restricted from organising in the workplace and from representing their members' interests in disciplinary or grievance processes.<sup>33</sup>

According to Du Toit *et al*<sup>34</sup> section 18 agreements prevent minority trade unions from “getting a foothold in the workplace” and this has the potential to violate the rights of the trade union and its members. Due to the abuse of power by parties to the threshold agreements, permission has been granted to put in place deliberate measures that ensure that organisational rights are out of reach for minority trade unions.<sup>35</sup>

Due to their exclusion from the enjoyment of organisational rights, minority trade unions find themselves denied the right to simply exist in situations where thresholds are implemented. The averment by Esitang and Van Eck is that the study confronts majoritarianism in which:

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<sup>31</sup> S 30 of the LRA of 1995.

<sup>32</sup> S 19 of the LRA of 1995. See also *NUMSA v Feltex Foam* [1997] 6 BLLR 798 (CCMA) 806. The LRA guarantees the enjoyment of the rights in section 12 and 13. Organisational rights are automatically enjoyed by admitted trade unions. Ss 14 and 16 of the LRA. The two specific provisions stipulate that the rights identified in the two sections are enjoyed exclusively by majority trade unions.

<sup>33</sup> See Chapter 6 at 2.3 and 2.4. Based on these provisions the employer, the majority trade union or the bargaining council are placed in a position that permits them to limit a minority trade union's enjoyment of organisational rights. See Registered Trade Unions in South Africa available at <http://www.labourguide/trade-unions-in-south-africa> (accessed November 2016). According to the Department of Labour, the total number of trade unions that are registered in South Africa and active in the private and public sector as at November 2016 is 191. There are 23 federations in total to which trade unions are affiliated, however there are trade unions that are not affiliated to these federations. See also Bargaining Councils, available at <http://www.labour.gov.za/DOL/documents> (accessed November 2016). According to the Department of Labour there are 38 registered bargaining councils in the private sector, 6 in the public sector and 3 statutory councils.

<sup>34</sup> See Chapter 5 at 4. See also Du Toit *et al* (2015) 261.

<sup>35</sup> See Chapter 2 at 5.1.

“[t]he 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.”<sup>36</sup>

This thesis considers whether this state of affairs within the context of the constitutional right to freedom of association and to organise is reasonable and justifiable even where a member state has opted for majoritarianism as its model of collective bargaining.

As a member of the ILO South Africa has adopted the Freedom of Association and the Right to Organise Convention No 87 of 1948 (Convention No 87 of 1948) and the Right to Organise and Collective Bargaining Convention No 98 of 1949 (Convention No 98 of 1949).<sup>37</sup> These international instruments establish minimum standards in relation to the rights of trade unions and the right to conduct their activities without interference from the state and to promote collective bargaining.<sup>38</sup> It is important to note that in the respective conventions, the right to organise enjoys recognition in conjunction with two other rights. First, it is associated with the right to freedom of association, and secondly with the right to engage in collective bargaining.

The Constitution, 1996 provides the rights to freedom of association<sup>39</sup> and to organise.<sup>40</sup> It also provides for the right to engage in collective bargaining which is regulated in terms of national legislation.<sup>41</sup> It provides, further, that when interpreting the Bill of Rights international law must be considered.<sup>42</sup>

## 2.2. Democratisation of the Workplace

The preamble of the LRA of 1995 provides as its objective the promotion of “employee participation in decision-making through the establishment of the workplace forums.” It further provides that its purpose is to advance “labour peace”

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<sup>36</sup> Esitang and Van Eck *ILJ* (2016) 764.

<sup>37</sup> Ratifications of ILO Conventions, available at [http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200\\_COUNTRY\\_ID:102888](http://www.ilo.org/dyn/normlex/en/f?p=1000:11200:0::NO:11200:P11200_COUNTRY_ID:102888). (accessed June 2016).

<sup>38</sup> Van Niekerk *et al* (2015) 25.

<sup>39</sup> S 18 of the Constitution, 1996 provides that “[e]veryone has the right to freedom of association.”

<sup>40</sup> S 23(4)(b) of the Constitution, 1996 stipulates “[e]very trade union and every employers’ organisation have the right to organise.”

<sup>41</sup> See s 23(5) of the Constitution, 1996.

<sup>42</sup> S 39 of the Constitution, 1996.

and the “democratisation of the workplace.”<sup>43</sup> In comparing the LRA of 1956 and the LRA of 1995, Grogan<sup>44</sup> mentions that the latter piece of legislation “expressly encourages collective bargaining and commits employers and employees to workplace democracy”.

Section 79 of the LRA of 1995 provides that the functions of workplace forums are as follows:

- “(a) they must seek to promote the interests of employees in the workplace;
- (b) must seek to enhance efficiency in the workplace;
- (c) is entitled to be consulted by the employer, with a view to reaching consensus, about the matters referred to in section 84; and
- (d) is entitled to participate in joint decision-making about the matters referred to in section 86.”

The recognition of the need of an employee voice in decision-making in the workplace is essential as it gives workers a say in the business that affect their daily lives and get them to enjoy democracy in the workplace. Therefore, Summers is on point in stating that “no industrial society can compete and prosper in the world market, unless there is co-operation and mutual problem solving between management and workers.”<sup>45</sup>

According to Steadman<sup>46</sup> the objective of the workplace forum in terms of the LRA of 1995 is to promote the interests of “all employees.” This denotes that it does not matter whether the referred to employees belong to a minority trade union or no trade union at all, their interests are intended to be protected and promoted. This is likely the reason for the fear that these minority interests and the non-unionised employees will be strengthened as they would be able to participate alongside representative trade unions in the workplace forums.<sup>47</sup> In the context of South Africa where minority interests matter this might not be inconsistent with the concept of democracy within the context of the Constitution, 1996.<sup>48</sup>

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<sup>43</sup> S 1 of the LRA of 1995.

<sup>44</sup> Grogan (2015) 368.

<sup>45</sup> Summers *ILJ* (1995) 806.

<sup>46</sup> Steadman *ILJ* (2004) 1171.

<sup>47</sup> Steadman *ILJ* (2004) 1202.

<sup>48</sup> See Chapter 3 at 3.

Inasmuch as workplace forums are intended to promote the interests of all employees, Tshoose and Kruger lament the pro-majoritarian legislative provisions on workplace forums and state that:

“[t]he concept of the workplace forum is one that holds great potential to ensure that the constitutional right to engage in collective bargaining is effectively recognised. For minority trade unions and their members this would have been a welcome and excellent instrument to ensure that their voice is heard in the workplaces where majority trade unions for all practical purposes are calling the shots. The fact that the legislature saw fit to leave the key for the establishment of a workplace forum in the hands of majority unions has undone the potential that this concept has in our labour dispensation. For minority trade unions this means that their voice (and that of their members) is again stifled by legislation that on the face of it seems neutral and aimed at promoting collective bargaining, but in practice ensures that majority trade union monopoly is maintained.”<sup>49</sup>

It is submitted that an argument that minority trade unions are to be included in the workplace forums defeats the principle of majoritarianism which is the premise of the LRA of 1995.<sup>50</sup> Further, the premise of the workplace forums is according to Botha<sup>51</sup> meant to supplement collective bargaining which is premised on the very principle of majoritarianism and not to replace it.

The greatest challenge of workplace forums is that they are not only seen in a negative light by proponents of a minority trade union voice in the workplace, but majority trade unions and management too. Du Toit<sup>52</sup> reflects that unions are fearful of workplace forums as they will undermine their role.<sup>53</sup> According to Summers<sup>54</sup> the fears of employers were that they regarded them as the ceding of their control to labour in the running of the workplace, whilst on the other side labour saw workplace forums as an attempt to pursue a hidden agenda by “white oppressors.”

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<sup>49</sup> Kruger and Tshoose *PELJ* (2013) 485.

<sup>50</sup> See Chapter 2 at 4.1 on the content of majoritarianism as a collective bargaining model. See ss 14 and 16 of the LRA of 1995 as discussed in Chapter 5 at 5.4 and 5.6.

<sup>51</sup> Botha *PELJ* (2015) 1816. According to Summers *ILJ* (2000) 1545, the fears were that when workplace forums were introduced they were ceding control of the running of the workplace to labour, and labour saw these as an attempt to pursue a hidden agenda by “white oppressors.”

<sup>52</sup> Du Toit *LDD* (1997) 56.

<sup>53</sup> See Du Toit *LDD* (1997) 56 where the author shares the concerns and fears raised by trade unions about workplace forums. See also Steadman *ILJ* (2004) 1170 on her study on whether workplace forums have achieved their purpose.

<sup>54</sup> Summers *ILJ* (2000) 1545.

The argument for the inclusion of minority trade unions in workplace forums could be justified by reference to the Constitution, 1996 in its quest to protect and promote minority interest irrespective of the association where it manifests itself.<sup>55</sup> The Constitution, 1996 has accordingly deliberately made provision for minority political parties to still participate in institutions of democracy, such as the proceedings of the national and provincial legislatures amongst others. The constitutional premise of including participation of political associations in institutions of democracy despite their minority status is what this thesis seeks to invite for consideration into the workplace's institutions of democracy such as the workplace forum and collective bargaining.

That collective bargaining is strongly inclined towards majoritarianism may be justifiable because that is exactly the reason why international norms recognise the exclusion of minority trade unions in collective bargaining matters as this consolidates the collective efforts of workers.<sup>56</sup> Furthermore, unlike the constitutional provisions which are expressive in promoting the participation of minority political formations in Parliament, no such express provision exists within labour legislation premised on the participation of minority trade unions in workplace forums and collective bargaining institutions.

### 2.3 Co-operation or Adversarialism

The drafters of the LRA of 1995 sought to change the South African employment relationship model into one that moved significantly from adversarialism to co-operation and from an erratic relationship between the employer and the trade union to one that is continual.<sup>57</sup> This took place with the backdrop of what Davis and Le Roux<sup>58</sup> regard as the existence of a dominant strain on the nature of corporation in South African corporate law, that:

“the company can best be described as a series of contracts concluded by self-interested economic actors including equity investors...employees. Taken together, these contracts make up the structure of the company.

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<sup>55</sup> See Chapter 5 at 2 and 5 on the purpose and significance of organisational rights within the context of both the exercise of the right to freedom of association and the right to engage in collective bargaining.

<sup>56</sup> See Chapter 2 at 4.3 on the ILO's attitude towards both majoritarianism and pluralism.

<sup>57</sup> Raju & Stilwell *Mousaion* (2007) 6.

<sup>58</sup> Davis & Le Roux *Acta Juridica* (2012) 307.



When these various sets of contracts are evaluated, those which are concluded with equity investors hold sway, and the company operates ultimately to serve their interests.”

The authors elaborate that when the equity investors purchase shares in the company they do so with one thing in mind and that is maximising profit.<sup>59</sup>

Davis and le Roux<sup>60</sup> concede to the fact that the interests of principally the investors and labour may be in conflict, although they may overlap. The authors correctly point out that the dominant role of investors is one of the factors that worsens this conflict.<sup>61</sup> The removal of this domination is not easy. Therefore, the legal rules governing the function of co-operation have to play a significant role in resolving the conflict.<sup>62</sup> The author in seeking a resolution of this partisan interest ridden company law structure pursues the consideration of a model that focusses on the Companies Act<sup>63</sup> and the provisions thereto that seek a greater co-operative role by labour in governance. The corporate law dimension of employee participation in boards is not the focus of this thesis. Neither is this thesis placing emphasis on workplace forums as the identified vehicle for the democratisation of the workplace in terms of the LRA of 1995. This is due to the fact that the focus of the thesis is the impact that organisational rights under threshold setting by majority trade unions or bargaining councils have on the enjoyment of labour rights, especially the right to freedom of association.

Workplace forums may have both potential and capacity to play a pivotal role in enhancing employee participation in the affairs of the employer’s business. It was hoped that this would bring about stability in the economy and the possibility of industrial peace as employees would also see themselves as participants in the greater good and success of the company. Whether workplace forums are a viable option for employee participation in the affairs of the company is a question that Botha<sup>64</sup> seeks to answer. The author does this through an assessment of the functions of workplace forums and collective bargaining. According to Botha<sup>65</sup>

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<sup>59</sup> As above.

<sup>60</sup> Davis & Le Roux *Acta Juridica* (2012) 308.

<sup>61</sup> As above.

<sup>62</sup> As above.

<sup>63</sup> Act 71 of 2008.

<sup>64</sup> Botha *PELJ* (2015) 1812.

<sup>65</sup> According to Botha *PELJ* (2015) 1812. The workplace forums in the LRA of 1995 are drawn from the German system which seek to have employee participation and adversarialist collective

collective bargaining is premised on the use of power which is a counter to managerial prerogative, whilst workplace forums seek to ensure participation and provide employees with a voice through consultation and joint decision making in the workplace. The former is described as greater protection of unionism by providing a “greater degree of protection for employees and unions” whilst “seeking to maintain the principles of voluntarism and free collective bargaining.”<sup>66</sup>

The adversarial nature of labour relations in South Africa which has been dominant in labour relations for years before the advent of democracy was sought to be addressed through workplace forums in the LRA of 1995.<sup>67</sup> However, these were not well received by trade unions. The main reason was that trade unions did not relinquish their hold on production related issues to workplace forums<sup>68</sup> and there were suspicions from both the trade unions and the employers.<sup>69</sup> This was the thorn in the popularity of workplace forums as the purpose of workplace forums was seen heavily as being focussed on providing a less adversarial platform for dealing with production related issues such as restructuring.<sup>70</sup> Collective bargaining was the preferred option for the achievement of workplace democracy with labour and capital being represented by trade unions and capital by employers’ organisations respectively.<sup>71</sup>

### 3. Aims of the Study and the Research Questions

The research aims of this thesis are as follows:

- To provide an exposition of the right to freedom of association<sup>72</sup> and how organisational rights impact on the protection and promotion of this constitutional right.<sup>73</sup>

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bargaining living side by side. See Chapter 7 at 5 for the analysis of the German labour relations model.

<sup>66</sup> Raju and Stilwell *Mousaion* (2007) 7.

<sup>67</sup> See Botha *PELJ* (2015) 1817-1818.

<sup>68</sup> As above at 1828. See also Manamela *SA Merc LJ* (2002) 736 who mentions that the trade union perceptions against supporting the establishment workplace forums are based on fears that trade union relevance might be replaced, representatives with low literacy levels might be unable to address complex matters and employers may dominate weak trade unions in these forums.

<sup>69</sup> Steadman *ILJ* (2004) 1190.

<sup>70</sup> Botha *PELJ* (2015) 1827.

<sup>71</sup> Botha *PELJ* (2015) 1815.

<sup>72</sup> See Chapter 2, 3 and 4.

<sup>73</sup> See Chapter 2 at 3, 4,5 and 4; Chapter 5 at 2 and 5 and Chapter 6 at 2, 3, 4 and 5.

- To identify international norms<sup>74</sup> and constitutional principles<sup>75</sup> relating to the right to freedom of association, and to determine whether the organisational rights dispensation is compatible with these constitutional principles and international norms.<sup>76</sup>
- To provide an exposition of the extent of the exercise of the right to engage in collective bargaining by parties and in what instance and extent it impacts on the right to freedom of association within the context of South Africa's obligation to comply with international norms and model of constitutional democracy.<sup>77</sup>

The main question of the study is whether the current sections 18 and 20 of the LRA of 1995, as authority for threshold agreements and embodying the principle of majoritarianism conform to the international norms and South Africa's constitutional model of democracy.<sup>78</sup>

#### 4. Significance of the Study

The study considers the impact that organisational rights have on the exercise of the right to freedom of association. The study also considers the relevance of constitutional democracy as a yardstick and context to measure and enhance workplace democracy. The granting of statutory organisational rights which are located within the collective bargaining structure for trade unions that enjoy the right to collective bargaining, arguably has led to trade union rivalry in the workplace amongst the trade unions enjoying most if not all the organisational rights and those that are not enjoying such rights.<sup>79</sup>

Organisational rights have thus become a terrain of contestation between majority trade unions and those seeking to establish themselves.<sup>80</sup> The study therefore

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<sup>74</sup> Chapter 5 at 2 and 5 and Chapter 6 at 2, 3, 4 and 5.

<sup>75</sup> Chapter 2 at 3 and 4.

<sup>76</sup> Chapter 5 at 2 and 4 and Chapter 6 at 2.2, 3, 4 and 5.

<sup>77</sup> See Chapter 3 at 4, 5 and 6 and Chapter 5 at 5.4.

<sup>78</sup> See Chapter 2, 3, 5 and 6.

<sup>79</sup> See Chapter 6 at 3.4.

<sup>80</sup> See *National Union of Mineworkers v Lonmin Platinum Comprising Eastern Platinum Ltd and Western Platinum Ltd and another* (2013) 10 BLLR 1029 (LC), *Police & Prisons Civil Rights Union v Ledwaba NO and others* (2016) 37 ILJ 493 (LC) and the discussion of the rivalry in the workplace attributable to the current labour relations dispensation in *Ngcukaitobi ILJ* (2013) 836. See also *National Union of Metalworkers of SA and others v Bader Bop (Pty) Ltd* (2017) 38 ILJ 831 (CC) and *another and AMCU v Chamber of Mines* (2017) 38 ILJ 831 (CC).

explores the possibility that the organisational rights dispensation meant to supplement the collective bargaining process may be a source of conflict in the workplace compromising peace and workplace democracy. Also considered is the fact that when the LRA of 1995 was drafted there was a single strong federation, COSATU, and a stable collective bargaining platform. Politics and the trade union landscape have changed and now there are other role-players.<sup>81</sup> The majoritarian model of collective bargaining that was appropriate when the COSATU dominated the labour relations space might not necessarily be ideal and appropriate in circumstances where there are other role players.

The study will provide an exposition of the different organisational rights as enjoyed by trade unions that meet the threshold requirement and explain the impact that this requirement has on minority trade union rights to freedom of association, to organise and to engage in collective bargaining.<sup>82</sup> This study at the same time seeks to develop an approach that serves as an instrument to avoid the unjustifiable limitation of the right to freedom of association and effectively provides for the ability of trade unions to represent their members in disciplinary and grievance processes and effectively get their foot at the door.<sup>83</sup> The thesis does this by exploring the intersection between the right to freedom of association and the right to engage in collective bargaining, recognising the organisational rights that require to be acquired and enjoyed in order to effectively exercise these labour rights.<sup>84</sup> In conclusion, the thesis makes recommendations on what needs to be done in order to ensure that the right to freedom of association is protected.

## 5. Research Methodology

The research method adopted by the study is a critical appraisal of primary and secondary materials from libraries and the internet. The study traverses the

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<sup>81</sup> See Esitang and Van Eck *ILJ* (2016), Corazza and Fergus in Hepple *et al* (2015) and (2017) 38 *ILJ* 1496. See also the Boda and Myburg presentation at 8 presented at the 2017 SASLAW Conference “Protecting the Rights of Minority Union: The AMCU Litigation.”

<sup>82</sup> See *South African Clothing and Textile Workers Union v Marley (SA) Pty Ltd t/a Marley Flooring (Mobeni)* (2000) 21 *ILJ* 4245 (CCMA) 425 where it is demonstrated how thresholds are abused to stifle competition between majority trade unions and new and vibrant trade unions. Chapter 6 discusses this aspect.

<sup>83</sup> See Chapter 5 at 4.3.

<sup>84</sup> See Chapter 4 and 6. See also Explanatory Memorandum *ILJ* (1995) 282, *National Union of Mineworkers v Lonmin Platinum Comprising Eastern Platinum Ltd and Western Platinum Ltd and another* (2014) 35 *ILJ* 486 (LC) and Theron *et al ILJ* (2015) 849.

relevant international conventions, the Constitution, 1996, the national legislation and the application and interpretation thereof by the courts.<sup>85</sup> The point of departure is that South Africa has adopted a particular perspective to democracy which recognises diversity through the promotion and protection of rights of minority associations within the different institutions of democracy.<sup>86</sup>

After rejoining the ILO South Africa became reintegrated into a global economy and it became necessary to include a comparative enquiry in order to reflect how developed countries apply international standards within their collective bargaining systems.<sup>87</sup> The comparative analysis seeks to provide South Africa with options and to make recommendations that will create a harmonious synergy between these obligations, the relevant provisions of the Constitution, 1996 and national legislation.

## 6. Important Concepts and Definitions

For the purposes of this study certain concepts need to be understood in order to shed light on the proper legal context in which they are utilised. The concept of “democracy” is referred to several times in the study. Democracy is commonly described as “government of the people, for the people, and by the people”.<sup>88</sup> Workplace democracy denotes the participation of employees in the decisions that affect them and draws on the different facets of political democracy for its realisation.<sup>89</sup> Constitutional democracy in the South African context refers to the various facets of democracy that the Constitution, 1996 espouses especially its emphasis of the protection and promotion of minority interests and their associations.

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<sup>85</sup> See Chapters 2, 3 and 6 respectively.

<sup>86</sup> See Chapter 3 at 4.

<sup>87</sup> See Chapter 2 at 3. South Africa effectively became part of the global community after the establishment of a democratic order when it rejoined the ILO and ratified the Protection of the Right to Organise and Right to Organise and Collective Bargaining Convention No 98 of 1949. See also Chapter 7 for an exposition of the labour relations systems of the United States of America, Japan and Germany.

<sup>88</sup> Mbatha *Codicillus* (XLIV). According to Fleck and Hanssen *JLE* (2006) 5 the concept has its origins in two Greek words “demos” which refers to “the people” and “kratos” which means “to rule.” See also Roux in Woolman *et al* (2014) 10:2 and Chapter 3 at 2 for detailed discussion of the different types of “democracy”.

<sup>89</sup> See Pateman (1970) 67 for their analysis of the concept of democracy in the workplace and their exposition of the element of participation.

According to the definition in the LRA of 1995, “trade union” means “an association of employees whose principal purpose is to regulate relations between employees and employers, including any employers' organisation.”<sup>90</sup> A “start-up trade union” for purposes of the study refers to a newly formed trade union that relatively has fewer members than the trade union already recognised in a workplace or bargaining council.<sup>91</sup>

In general, “majoritarianism”<sup>92</sup> refers to the doctrine whereby representatives of a trade union are elected by the majority of employees in a particular bargaining unit for purposes of collective bargaining with the employer.<sup>93</sup> Grant<sup>94</sup> defines majoritarianism as “a system whereby the plant is divided into bargaining units, and a single union is recognised as representing all the employees (including non-members) in that unit.” “Pluralism”<sup>95</sup> is a system in terms of which more than one trade union in a workplace is recognised, notwithstanding their level of representivity. The “All Comers Approach”<sup>96</sup> accepts that all minority trade unions and individual employees have the right to be recognised and to participate in collective bargaining.

A “majority trade union” is a registered trade union that represents the majority of employees in a workplace.<sup>97</sup> The LRA does not provide definitions of majority and sufficiently representative trade unions. However, the LRA of 1995 does provide that sufficiently representative trade unions are those trade unions that do not have as their members the majority of employees in the workplace, and may require acting together to constitute the requisite levels of representivity.<sup>98</sup>

For purposes of this study, the term “minority trade union” refers to a registered trade union that is unable to meet a set threshold for recognition in a workplace or

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<sup>90</sup> S 213 of the LRA of 1995.

<sup>91</sup> See Chapter 5 at 2 for a discussion of what purpose do organisational rights serve.

<sup>92</sup> See Chapter 4 at 3.4 on the cases that are inclined towards majoritarianism.

<sup>93</sup> *Food Workers Council of South Africa v Bokomo Mills* (1994) 15 ILJ 1371 (IC) 1374 paras F- I. The determination on what majoritarianism entails was already determined in *Radio Television Electronic & Allied Workers Union v Tedelelex (Pty) Ltd & another* (1990) 11 ILJ 1272 (IC) 1280 at para D where majoritarianism was held to entail that the employer negotiates “only with the majority union and on the basis that any agreement arrived at would be binding on all employees within the bargaining unit.”

<sup>94</sup> Grant ILJ (1993) fn 1.

<sup>95</sup> See Chapter 4 at 3.5 on the cases that demonstrate pluralism.

<sup>96</sup> See Chapter 4 at 3.6 on the cases that demonstrate the all comers approach.

<sup>97</sup> See *Esitang and Van Eck ILJ* (2016) 766.

<sup>98</sup> *Van Niekerk et al* (2015) 359.

is not admitted to a bargaining council.<sup>99</sup> It also refers to a union that is excluded from becoming a party to a bargaining council. A sufficiently representative trade union may be regarded as a minority trade union as and when it is excluded from the bargaining council or is unable to meet thresholds of representivity in respect of organisational rights set by the employer and a majority trade union in a workplace.<sup>100</sup> The term is also interchangeably used with “unrepresentative” trade unions.

The term “organisational rights” refers to the statutory rights provided for in sections 12 (trade union access to the workplace), 13 (deduction of union subscriptions), 14 (election of representatives), 15 (leave for trade union activities), and 16 (disclosure of information) of the LRA of 1995.<sup>101</sup> These organisational rights may also be acquired in terms of collective agreements entered into in terms of sections 18 and 20 of the LRA of 1995. Majority trade unions acquire these organisational rights through the section 21 procedure of the LRA of 1995.<sup>102</sup>

For purposes of this thesis the “majoritarian system” of collective bargaining is the system of labour relations in which in the acquisition of organisational rights there is room only for the majority trade union. The additional dimension is that this is made possible by permitting the majority trade union in the bargaining council to set thresholds of representivity to exclude trade unions that do not meet a threshold.<sup>103</sup>

The opposite to the majoritarian system of collective bargaining is a “pluralist system.” This is a system that enables sufficiently representative trade unions to acquire organisational rights. The thesis focusses on the possibility of introducing a pluralist system that can accommodate the acquisition of organisational rights by minority trade unions so as to ensure that they are able to exercise their right to freedom of association especially for the right to represent members in individual cases.

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<sup>99</sup> *Police and Prisons Civil Rights Union v Ledwaba NO and others* [2013] 11 BLLR 1137 (LC) para 5.

<sup>100</sup> Esitang and Van Eck *ILJ* (2016) 766 fn 15. Sufficiently representative trade unions are technically minority trade unions in relation to a majority trade union that has a collective agreement with the employer or where a bargaining council sets up a threshold that they are unable to meet.

<sup>101</sup> See Chapter 5 at 5.

<sup>102</sup> See Chapter 5 at 4.3.

<sup>103</sup> See Chapter 6.

## 7. Overview of the Chapters

### Chapter 1: General Introduction

The aim of the study, its significance and the contextual background which entails the contextual and legal framework for the study are introduced and outlined in this chapter.

The contextual background inclusive of workplace forums as the envisaged vehicle of employee participation in the workplace is discussed. The threshold provisions of the LRA of 1995 that are the focal point of the thesis are discussed in this part. This chapter therefore provides an outline of all the components that the study will entail and what the study the study seeks to achieve.

### Chapter 2: International Labour Standards

This chapter provides an exposition of the principles that emanate from Conventions no 87<sup>104</sup> and 98<sup>105</sup> and includes a discussion of the approach by the ILO and its expert committees to these conventions.

The position of the ILO regarding thresholds of representivity is outlined and where it identifies relevance for them. This position offers guidance to member states that opt for either majoritarianism or pluralism as models of collective bargaining.<sup>106</sup> The ILO accepts that collective bargaining is the ultimate goal for trade unions. However, it jealously protects the rights to freedom of association.<sup>107</sup> This chapter considers the ILO's approach regarding the intersection of these rights, including the extent to which the right to freedom of association may be justifiably limited.

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<sup>104</sup> Freedom of Association and the Right to Organise No 87 of 1948 available at [www.ilo.org.za](http://www.ilo.org.za) (accessed in May 2012). See also Chapter 2 paras 3.2 and 3.4.

<sup>105</sup> Right to Organise and Collective Bargaining Convention No 98 of 1949 available at [www.ilo.org](http://www.ilo.org) (accessed in May 2012). See also Chapter 2 para 3.3 and 3.4.

<sup>106</sup> *Digest of Decisions* (2006) para 517. See also Case No 1968 (1998) para 500. This case demonstrates the consistent position of the ILO on minority trade unions in the context of majoritarian systems of collective bargaining.

<sup>107</sup> See Chapter 2 at 4.



The ILO as an international institution has not shown partisanship towards a particular model of collective bargaining as that is a matter that it leaves to the members states and the relevant parties, namely, employers and trade unions subjects to principles of Convention No 87 of 1948 and Convention No 98 of 1949. The ILO is clear on the extent to which a member state may limit the right to freedom of association where the member state opts for a majoritarian system and the nature of the pluralist system of collective bargaining that is not necessarily compromising to the collective effort of workers.<sup>108</sup>

### Chapter 3: Constitutional Framework

The constitutional labour rights are limited only in terms of section 36(1) of the Constitution, 1996.<sup>109</sup> The thresholds of representivity in the constitutions of bargaining councils<sup>110</sup> and those that are contained in collective agreements must therefore comply.<sup>111</sup> This, it does through an exposition of constitutional labour rights.<sup>112</sup> In this regard both the right to organise and the right to engage in collective bargaining are accepted as incidents of the right to freedom of association. It will also explore the concept of democracy and consider the protection of minority interests in institutions of democracy.<sup>113</sup>

The ultimate question will be whether thresholds comply with the principles of the Constitution, 1996 insofar as the extent to which they limit the right to freedom of association. In this regard what is considered is whether the model of democracy espoused by the Constitution, 1996 provides a context and an instrument capable to influence the content of workplace democracy.

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<sup>108</sup> Chapter 2 at 4.2 and 4.3.

<sup>109</sup> See ss 2 and 36 of Constitution, 1996. See also Moseneke *SALJ* (2012) 12-16. Justice Moseneke explains why South Africa opted for a constitution that is supreme and what is the purpose of the limitation clause.

<sup>110</sup> See s 27 of the LRA of 1995.

<sup>111</sup> S 36(1) of the Constitution, 1996. See also Chapter 6 at 6.2.

<sup>112</sup> See Woolman in Woolman *et al* (2014) 44:02.

<sup>113</sup> See Chapter 3 at 2.2. Ss 57(2), 116(2), 105 and 157 of the Constitution, 1996 on the implications of this stance on trade unions as institutions of democracy.

## Chapter 4: Early Developments Regarding Collective Bargaining and the Rights of Minority Trade Unions

This chapter looks into the history of and rationale of the South African collective bargaining structure since 1924, when the Industrial Conciliation Act 11 of 1924 was promulgated.<sup>114</sup> The Wiehahn Commission and its far-reaching recommendations, including the establishment of the Industrial Court are discussed in this chapter.<sup>115</sup>

The jurisprudence of the Industrial Court and some of the cases demonstrating how it interpreted the unfair labour practice definition also are discussed in this chapter. In this regard the Industrial Court also had opportunities to consider conduct that may be considered as protective and promoting the right to freedom of association. This discussion is followed by an exposition of the Ministerial Task Team's stance on the unfair labour practice definition and the collective bargaining system under the previous LRA of 1956, including its responsibility to usher a new law relations framework that takes cognisance of international norms and the Constitution, 1996.<sup>116</sup>

## Chapter 5: Statutory Organisational Rights and the Right to Engage in Collective Bargaining

The different organisational rights and the purposes they serve within the context of "getting a foot in the door" are discussed in this chapter.<sup>117</sup> The purpose of doing this is to demonstrate that organisational rights do not only seek to serve collective bargaining but are also pertinent when exercising the right to freedom of association. In this chapter provisions of Chapter III Part A of the LRA of 1995, which provide content to the constitutional rights to organise and to engage in collective bargaining are discussed. In this regard the methods of acquisition of organisational rights in terms of national labour legislation for specifically majority trade unions and bargaining councils are discussed.

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<sup>114</sup> See Chapter 4 at 2 and 3. The racially exclusive labour relations system went through various amendments which justifiably were regarded as reformist and were not supported by the black trade unions.

<sup>115</sup> See Chapter 4 at 2.1. See also O'Regan *ILJ* (1997) 897.

<sup>116</sup> See Chapter 4 at 4 for a detailed discussion of the Ministerial Task Team and its work.

<sup>117</sup> See Chapter 5 at 3 and 4. See also Chapter III of the LRA of 1995.

This chapter also provides an analysis of the definition of “workplace” in the contexts of the public and private sectors. This discussion is meant to look at the consideration for possible review of the definition of workplace through emphasis on the purpose to enhance due protection and promotion of the right to freedom of association.<sup>118</sup>

The analysis of the definition of “workplace” in the contexts the Constitutional Court judgement of *Association of Mineworkers and Construction Union v Chamber of Mines (AMCU)*<sup>119</sup> is discussed in this chapter to denote the current definition of a “workplace”.

## Chapter 6: Acquisition of Organisational Rights by Collective Agreement

The issue of the acquisition of organisational rights and thresholds was considered by the Ministerial Task Team.<sup>120</sup> However, inasmuch as the LRA of 1995 was able to regulate the organisational rights of majority trade unions and sufficiently representative trade unions, it did not indicate how a minority trade union could acquire organisational rights.

The Constitutional Court<sup>121</sup> has pronounced that majoritarianism as a model of collective bargaining does not entail excluding minority trade unions to enter into collective agreements and should be able to represent their members in individual cases. This chapter, significantly, discusses the case law on the rights of minority trade unions and threshold agreements between employers and majority trade unions or the bargaining council. The Labour Appeal Court (LAC) in *South African Correctional Services Workers Union v Police and Prisons Civil Rights Union*<sup>122</sup> offered some clarity on the rights of minority trade unions in the context of a majoritarian collective bargaining system.

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<sup>118</sup> S 213 of the LRA of 1995.

<sup>119</sup> (2017) 38 *ILJ* 831 (CC).

<sup>120</sup> See Chapter 4 at 4. The extent of the power of the social partners to decide who should enjoy organisational rights in the workplace was also considered by the Task Team and is discussed. See also Explanatory Memorandum (1995) 294.

<sup>121</sup> *National Union of Metalworkers of SA and others v Bader Bop (Pty) Ltd and another* 2003) 24 *ILJ* 305 (CC) and *AMCU* (2017) 38 *ILJ* 831 (CC).

<sup>122</sup> (2017) 38 *ILJ* 2009 (LAC).

## Chapter 7: Comparative Analysis: Majoritarianism and Pluralism

For the purposes of the comparative study the United States of America's system of labour relations, and the Japanese and the German systems are evaluated. The two systems of the United States of America (USA) and Japan are at extreme opposites and provide alternatives to South Africa's system of collective bargaining and how to ensure it is compliant with international standards. The Japanese system of collective bargaining is an example of a pluralist model of collective bargaining. This model's weaknesses are identified to provide South Africa with a complete understanding of a possible negative side to pluralism which it should guard against.<sup>123</sup> The German system is a semblance of both systems, whilst at the same time it recognises the majority status of trade unions and still seeks to ensure that the right to freedom of association of minority trade unions is recognised.<sup>124</sup>

This chapter discusses how the systems of the three countries offer guidance to South Africa in the development of its policy and possible statutory reform on thresholds of representivity for the enjoyment of organisational rights.<sup>125</sup>

## Chapter 8: General Conclusion

South Africa has a past which the Constitution, 1996 recognises. The provisions of the Constitution, 1996 on democratic values and principles proposing that the majority interests are to be dominant and decisive do not go as far as subjugation of minority views and interests. Notwithstanding the South African courts' stance on pluralism and majoritarianism, including the content it provides to the concepts, the protection and promotion of minority associations are still a major consideration. The provisions pertaining to political parties in the Constitution,

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<sup>123</sup> See Chapter 7 at 8.2. See also Summers (1998) 51 where the author provides a comparison of states that are said to have systems of collective bargaining that resemble majoritarianism.

<sup>124</sup> See Chapter 7 at 5.

<sup>125</sup> See Harcourt and Lam *DLJ* (2011) 117. That the labour relations system of the United States is a majoritarian one is outlined, including the infringement of the labour rights of minority trade unions. See also Morito *JLPT* (2006) 3 on the Japanese model as a highly inclusive form of majoritarianism in allowing minority trade unions the right to exist and to bargain collectively on behalf of its own members.

1996 serve as a useful point of reference in the effort to democratise the workplace and ensure labour peace and stability in the workplace.

This chapter delineates the findings of the study and offers recommendations regarding the provisions of the LRA of 1995 so that they conform to the determinations of the supervisory bodies of the ILO and the constitutional provisions that promote the rights of minority entities in institutions of democracy.<sup>126</sup>

## 8. Limitations of the Study

This research analyses the impact of threshold agreements on organisational rights and the limiting effect on the rights and freedoms of minority trade unions. The study does not explore the rights of majority trade unions to extend collective agreements to minority trade unions and non-union members.<sup>127</sup> The security arrangements as species of majoritarianism are also excluded because the emphasis is only on the impact of threshold provisions on organisational rights and the impact this has on the right to freedom of association.

Although the LRA of 1995 introduced the workplace forums as a vehicle of democracy in the workplace, trade unions have opted for a different path towards securing their participation in workplace activity. The option taken by trade unions is real and they view whether justified or not, workplace forums with suspicion. Therefore, the study focusses rather on the rights to freedom of association and to engage in collective bargaining as instruments that may be utilized in advancing labour peace and the democratisation of the workplace.

This study covers three countries for purposes of the comparative study and the focus is how far do they protect and promote the right to freedom of association

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<sup>126</sup> See Chapter 2 at 4.1 and Chapter 3 at 2.1 – 2.2. The position of the ILO is that thresholds are relevant in particular circumstances, and in majoritarian collective bargaining systems the right of freedom of association for minority trade union needs to be protected. The Constitution, 1996 provides for the protection and participation of minority entities in institutions of democracy.

<sup>127</sup> See s 23(1) of the LRA of 1995 and Van Eck *ILJ* (2017) 1496. S 32 of the LRA of 1995 provides for the method, the time frame and other conditions set for when requests are made to the Minister of Labour for the extension of collective agreements concluded in the bargaining councils to non-parties to such agreements. See also *National Employer's Association of South Africa and others v Minister of Labour and others* [2012] 2 BLLR 198 (LC) and *National Employers Association of South Africa v Metal and Engineering Industries Bargaining Council and others* (2015) 36 *ILJ* 2032 (LAC).

and what role thresholds play where they do. The system in the United States of America (USA) serves as an example of majoritarianism and Japan illustrates a pluralist system. The German model of collective bargaining will also be discussed to draw on the possible lost opportunity for South Africa's labour framework in espousing workplace forums. This study covers South African law as it stands on 1 September 2017 and cases and materials that were published after this date have not been taken into consideration.

## Chapter 2

### International Labour Standards

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#### 1. Introduction

As referenced in Chapter 1 this thesis focuses on the issue of setting thresholds in collective agreements in relation to the acquisition of organisational rights. This practice, it is submitted, potentially has negative implications for unrepresentative trade unions with low levels of representivity. This chapter deals with international

standards and the focus is on the International Labour Organisation's (ILO) Conventions and Recommendations that relate to freedom of association, collective bargaining and organisational rights.

South Africa rejoined the international community after its first democratic elections on 27 April 1994. The Constitution, 1996 provides that "[w]hen interpreting the Bill of Rights, a court, tribunal or forum must consider international law".<sup>128</sup> Section 233 of the Constitution, 1996 provides that where there are conflicting interpretations of legislation, each and every court "must prefer any reasonable interpretation of the legislation that is consistent with international law over any alternative interpretation that is inconsistent with international law." In *S v Makwanyane*<sup>129</sup> it was held that public international law refers to both binding and non-binding law and both may be used as an interpretation tool.

The view exists that the role of international law in South Africa is recognised as a "foundation of democracy",<sup>130</sup> which should mean that without international law as a basis the values of the Constitution, 1996 and the labour rights dispensation will not have any international validity.<sup>131</sup> This evaluation portrays the importance of international law to South Africa and its use as a point of reference for the interpretation of labour law.<sup>132</sup>

This part identifies the essential criteria and principles to be followed by member states in assessing the conformity of legislation with international standards. The

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<sup>128</sup> S 39 of the Constitution, 1996. See also Merriam-Webster dictionary available at [www.merriam-webster.com/dictionary/consider](http://www.merriam-webster.com/dictionary/consider) (accessed January 2016) on the word "consider" as not meaning that international law must be followed *per se*, but rather is to be considered carefully. See also s 2 of the Constitution, 1996 that provides that its provisions command compliance over every other law or conduct.

<sup>129</sup> 1995 (3) SA 391 (CC) 415 para 39. See also *Government of Republic South Africa and others v Grootboom* 2000 (11) BCLR 1169 (CC) 1185 para 26. The same principle that the Constitution places an obligation on the courts "to consider international law as a tool to the interpretation of the Bill of Rights" was confirmed. Further, the Constitutional Court held that the weight to be attached to any particular principle or rule of international law will vary. However, where the relevant principle of international law binds South Africa it is applicable.

<sup>130</sup> Van Niekerk *et al* (2015) 21.

<sup>131</sup> S 1 of the Constitution, 1996. South Africa is recognised as a "sovereign democratic state founded on the following values: human dignity, non-racialism and non-sexism, supremacy of the Constitution and universal adult suffrage, a national common voters' roll, regular elections and a multi-party system of democratic government, to ensure accountability, responsiveness and openness."

<sup>132</sup> As above.



operational structure of the ILO,<sup>133</sup> the binding nature of ILO instruments and the attitude of the ILO towards the different models of collective bargaining, namely majoritarianism and pluralism, including the extent to which minority trade unions are to be recognised, are all relevant to that assessment. Therefore, the purpose in this chapter is to identify international norms pertaining to minority trade unions and these principles will be used to measure and assess South African practice.

## 2. The International Labour Organisation (ILO)

### 2.1. The Early Years of the ILO

Even prior to the formal establishment of the ILO, business, labour and governments had an interest in setting international standards.<sup>134</sup> The idea of an international organisation existed before 1919 when the ILO was established. These efforts and the idea of regulating labour at an international level became a reality when the Paris Peace Conference on 29 January 1919 established the Commission on International Labour Legislation.<sup>135</sup> The dominant theme of the Constitution of 1919 was to exert humane conditions for workers principally through the recognition of the principle of freedom of association.<sup>136</sup>

When comparing the right to freedom of association with the right to organise and to engage in collective bargaining, it is interesting to note that the preamble to the 1919 ILO Constitution evidently does not mention the right to organise or the right

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<sup>133</sup> The supervisory bodies of the ILO responsible for the interpretation and application of the conventions and putting forward principles for due observance by the member states are the Committee on Freedom of Association and the Committee of Experts on the Application of Conventions and Recommendations.

<sup>134</sup> Rodgers *et al* (2009) 4 state that on the part of workers there was the International Working Men's Association in 1864, whose aim was the protection, advancement and emancipation of the working class. On the part of governments, in 1889 Germany convened in Berlin an international conference with 14 states in attendance which reached agreement on principles of international law on matters related to child employment, hours of work and labour inspections.

<sup>135</sup> See Introduction to The Provisions of the Peace Treaty available at [http://www.ilo.org/public/libdoc/ilo/1920/20B09\\_18\\_engl.pdf](http://www.ilo.org/public/libdoc/ilo/1920/20B09_18_engl.pdf) (accessed January 2015). See also ILO: Meeting of Governments (1976) 8 where it is stated that the Commission was made up of representatives from Belgium, Cuba, Czechoslovakia, France, Italy, Japan, Poland, the United Kingdom and the USA. The western and developed countries drafted a report that included a Draft Convention creating a Permanent Organisation for the Promotion of the International Regulation of Labour Conditions which was approved, adopted and incorporated into the Peace Treaty of Versailles.

<sup>136</sup> See Article 427 of The Provisions of the Peace Treaties available at [http://www.ilo.org/public/libdoc/ilo/1920/20B09\\_18\\_engl.pdf](http://www.ilo.org/public/libdoc/ilo/1920/20B09_18_engl.pdf) (accessed January 2015).

to collective bargaining.<sup>137</sup> This omission denotes that the right to freedom of association has to be understood and appreciated fully from the perspective of being the origin of other labour rights. Therefore, there is a need to be cautious and not reduce this right to secondary status and of less significance through a collective agreement.<sup>138</sup>

The ILO in its early years recognised that the prevailing conditions and circumstances of member states will inform the extent of compliance by member states and the unique challenges they face.<sup>139</sup> This consideration became significant when the ILO gradually increased its membership. According to Hepple,<sup>140</sup> the ILO trebled in membership between 1946 and 2003 from 52 to a total of 177-member states. The author further states that 15 new African countries joined.<sup>141</sup> The ILO had been established for the purpose of the regulation of and the improvement in the condition of workers' rights internationally, however this was a difficult task due to the disparity between the member states in their socio-economic and political circumstances.<sup>142</sup>

## 2.2. The Operational Structure of the ILO and Participation by Members

The ILO Constitution forms part of Part XIII of the Treaty of Versailles that was signed in 1919. This document establishes the ILO, regulates the composition of the body and contains valuable information about the binding nature of its instruments. The ILO consists of three main bodies, namely the International Labour Conference, the Governing Body and the International Labour Office.<sup>143</sup>

The International Labour Conference is the highest policy-making body of the ILO and is composed of two representatives from government, one from the employer

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<sup>137</sup> That the early constitution of the ILO has the right to freedom of association as central to the improvement of working conditions is critical for this study, as it demonstrates that at the outset the right to freedom of association was not secondary to any other labour right.

<sup>138</sup> See Chapter 3 at 6.2. The discussion entails a demonstration of the nature and significance of the right to freedom of association and its relation to other labour rights.

<sup>139</sup> Thomas (1921) 5. See also Hepple (2005) 34 where the author discusses the challenges that the ILO faced when it started growing and admitting countries previously excluded.

<sup>140</sup> Hepple (2005) 34.

<sup>141</sup> As above.

<sup>142</sup> See See Chapter 2 at 3.1 on how the discussion below ventilates the effect of the recognition of prevailing conditions of member states on the implementation of international standards.

<sup>143</sup> Article 2 of the Constitution of the ILO.

organisations and one from labour.<sup>144</sup> This is the body where new international standards are adopted.<sup>145</sup>

The Governing Body is the executive arm of the ILO and is made up of an equal number of elected representatives of workers and employers, and representatives of government.<sup>146</sup> According to Van Niekerk *et al*, this body has 14 members who are worker representatives, 14 from employers and 28 representatives of government.<sup>147</sup> The Governing Body's tasks are to determine the agenda of the Conference, to manage the budget of the ILO and decide on policy issues.<sup>148</sup>

The International Labour Office is the ILO's bureaucracy and is headed by the director-general who is appointed by the Governing Body for a fixed term.<sup>149</sup> The staff members in the International Labour Office are appointed by the director-general and they perform the day-to-day work necessary to give effect to the ILO's mandate.<sup>150</sup> It is required that the staff members be selected from different nationalities and a certain number are required to be women.<sup>151</sup>

The Constitution of the ILO confirms that representivity in the member state serves as the yardstick for participation in ILO structures and provides that:

“The Members undertake to nominate non-government delegates and advisers chosen in agreement with the industrial organisations, if such organisations exist, which are most representative of employers or workpeople as the case may be in their respective countries.”<sup>152</sup>

It is significant to note that the International Labour Conference and the Governing Body are constituted by persons nominated by the most representative national employer and worker bodies respectively. This provision creates the impression that organisations that have a small membership base ordinarily are not easily accommodated in the structures of the ILO or are able to participate in them. The weakness identified is that there is no provision in the Constitution of the ILO that

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<sup>144</sup> Article 3 of the Constitution the ILO.

<sup>145</sup> Van Niekerk *et al* (2015) 22.

<sup>146</sup> Articles 7(3) and 7(4) of ILO Constitution.

<sup>147</sup> Van Niekerk *et al* (2015) 23.

<sup>148</sup> As above.

<sup>149</sup> Article 8 and 9 of the ILO Constitution.

<sup>150</sup> Van Niekerk *et al* (2015) 23.

<sup>151</sup> Article 9 of the ILO Constitution.

<sup>152</sup> Article 3(5) of the Constitution of the ILO. See also Van Niekerk *et al* (2015) 20.

specifically encourages diversity as a possibility in its structures, where for example, minority trade unions have a voice in its structures.

In member states where there is a distinction between the most representative organisations and others, the Committee on Freedom of Association (CFA) indicates the relevance of thresholds, stating that:

“[s]uch a distinction...should not result in the most representative organisations being granted privileges extending beyond that of priority in representation, on the ground of their having the largest membership, for such purposes as collective bargaining or consultation by governments, or for the purpose of nominating delegates to international bodies. In other words, this distinction should not have the effect of depriving trade union organisations that are not recognised as being among the most representative of the essential means for defending the occupational interests of their members, for organising their administration and activities and formulating their programmes, as provided for in Convention No. 87.<sup>153</sup>

The prescription by the ILO of who qualifies to be a delegate is similar to thresholds of representivity in the acquisition and the enjoyment of organisational rights which prescribe which representative can be active in the workplace. The ILO concedes that reference to “most representative” in relation to delegates has negative connotations<sup>154</sup> however it has declared that the distinction between representative and non-representative as applicable to trade union representation in collective bargaining is restricted to particular instances.<sup>155</sup>

Apart from the three mentioned bodies of the ILO there are also two important supervisory committees in relation to the application of international norms. According to Langille the supervisory system is the key to ILO law and is where the main action of the ILO takes place, making the supervisory bodies the “central legal bodies.”<sup>156</sup> The first supervisory body is the Committee of Experts on the Application of Conventions and Recommendations (CEACR).<sup>157</sup> It is composed of 20 high level jurists who, *inter alia*, are judges of the Supreme Court and law

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<sup>153</sup> *Digest of Decisions* (2006) para 346.

<sup>154</sup> *General Survey* (1994) at 239.

<sup>155</sup> See below at 4.2, for the discussion of these instances where a member state has legislation that draws a distinction between representative and non-representative trade unions.

<sup>156</sup> See also Langille *CLLPJ* (2010) 537.

<sup>157</sup> Report of CEACR (2013) 2 available at [www.ilo.org/wcmsp5/groups/public/@ed\\_norm/.../wcms\\_205472.pdf](http://www.ilo.org/wcmsp5/groups/public/@ed_norm/.../wcms_205472.pdf) (accessed June 2015).

professors and are independent experts at national and international levels.<sup>158</sup> The second body is the Committee on Freedom of Association (CFA) and includes three members from government, three from the employer organisations, three worker representatives and an independent chairperson.<sup>159</sup>

When a member state ratifies a Convention, it is under an obligation to implement its terms in national law and practice. The CEACR's task is to indicate the extent to which each member state's legislation and practice comply with Conventions and the extent to which they fulfil their obligations.<sup>160</sup> It carries out its task by examining national reports produced by member states on the steps they have taken to apply the Conventions that they have ratified and whether states have made an effort to apply international norms to their national legislation.<sup>161</sup> It is the view of Van Niekerk *et al* that the "findings and conclusions of the CEACR take the form of observations and direct requests, comments and surveys."<sup>162</sup>

The mandate of the CFA is to determine whether any given legislation or practice complies with the principles of freedom of association and collective bargaining laid down in the Conventions.<sup>163</sup> The CFA carries out this mandate by an examination "of the laws of member states, to provide guidelines and offer the ILO's technical assistance" and to ensure that the laws in question comply with the principles of freedom of association.<sup>164</sup>

In terms of Article 26(3) of the Constitution of the ILO a Commission of Inquiry may be established to consider a complaint made by a member state with the International Labour Office if it is not satisfied with another member's efforts to observe a convention they have ratified. When South Africa's independent trade unions lodged a complaint about the violation of trade union rights through the ILO

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<sup>158</sup> As above.

<sup>159</sup> Van Niekerk *et al* (2015) 27.

<sup>160</sup> Report of the CEACR (2013) 2.

<sup>161</sup> Report of CEACR (2013) 2. The information made available to the CEACR includes information supplied by member states in their reports, texts of legislation, collective agreements, judgements of the courts. See also Articles 19(7)(b)(iv) of the ILO Constitution, in terms of which states that have not ratified a convention would be called upon to report to the Director General of the ILO its position on its law and practice "showing the extent to which effect has been given or is proposed to be given" to the conventions by legislation and other means.

<sup>162</sup> Van Niekerk *et al* (2015) 26.

<sup>163</sup> *Digest of Decisions* (2006) para 6.

<sup>164</sup> *Digest of Decisions* (2006) para 11. See also Van Niekerk *et al* (2015) 27 where the authors mention that the CFA's responsibility is to recommend whether a case deserves to be examined by the Governing Body and to examine allegations of breaches of freedom of association.

Fact-Finding and Conciliation Commission on Freedom of Association, technical assistance was provided to South Africa to ensure that they observe ILO values in their legislation.<sup>165</sup>

## 2.3. The Nature of International Instruments

### 2.3.1. ILO Conventions and Recommendations

The ILO provides that international labour standards are “legal instruments” that may take the form of conventions or recommendations.<sup>166</sup> On the one hand conventions are legally binding on member states on being ratified and the recommendations, on the other, are guidelines that are not legally binding.<sup>167</sup> According to the ILO the relationship between these two instruments is that the convention “lays down the basic principles” and the recommendations supplement the convention by providing more detailed guidelines on how the convention is to be applied.<sup>168</sup>

Two important conventions discussed in the thesis are Freedom of Association and Protection of the Right to Organise of 1948 and the Right to Organise and Collective Bargaining Convention of 1949.<sup>169</sup> Where member states default on the conventions and the recommendations the ILO may invoke Article 33 of the Constitution of the ILO which provides that:

“In the event of any Member failing to carry out within the time specified in the recommendations, if any, contained in the report of the Commission of Enquiry...the Governing Body may recommend to the Conference such action as it may deem wise and expedient to secure compliance therewith.”

This provision does not mean that states that have not ratified the conventions are not to take steps to apply the standards of the conventions in their national

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<sup>165</sup> Report on Southern Africa (1992) in Record of Proceedings of the ILC (1993) 4/2.

<sup>166</sup> See ILO Conventions and Recommendations available at [ilo.org/global/...to.../conventions-and-recommendations/.../index.htm](http://ilo.org/global/...to.../conventions-and-recommendations/.../index.htm) (accessed June 2014).

<sup>167</sup> As above. See also Paper by Bockman titled Decision-Making on ILO Conventions and Recommendations at 28 and 29 available at <ftp://ftp.zew.de/pub/zew-docs/docus/dokumentation/0003.pdf> (accessed December 2016). The ratification of a convention creates the obligation to apply the standard set out in the convention and to co-operate with the ILO’s supervisory bodies. Bockman at 30, explains further that the implementation of a standard need not be in a law, but can be in a collective agreement or through arbitration awards.

<sup>168</sup> As above.

<sup>169</sup> See ILO Declaration of 1998.

legislation. Article 2 of the Declaration on Fundamental Principles and Rights at Work declares that all members of the ILO “have an obligation arising from the very fact of the membership in the Organisation, to respect, to promote and to realise” the principles of freedom of association and to engage in collective bargaining. The reports to the ILO determining the extent of their compliance are required to be submitted by member states.

### 2.3.2. The Declarations of the ILO

In 1944 the ILO adopted the Declaration of Philadelphia in order to adapt its aims and purposes to the new reality and to new aspirations aroused by hopes of a better world.<sup>170</sup> The Declaration of 1944 uses general language so as to prevent any of its provisions from becoming obsolete, as had been the case with some provisions of Article 41 of the original Constitution.<sup>171</sup> The ILO defines Declarations as resolutions to the International Labour Conference used to make a formal and authoritative statement and to reaffirm the importance which constituents attach to certain principles and values.<sup>172</sup>

Article V of the Declaration of Philadelphia affirmed that the principles set forth are to be fully applicable to all peoples everywhere, while the manner of their application must be determined with due regard to the stage of social and economic development. This is a significant article as it directs that the principles apply both to members and non-member states irrespective of their first or third world status. In other words, it is not an excuse to claim lack of development as a reason not to apply the principles of the ILO.

The 1919 Constitution of the ILO sets out the three objectives of international standards as social justice, international peace and the regulation of international competition, and the Declaration of 1944 reaffirms the fundamental principles on which the ILO is based, in particular that labour is not a commodity, and on freedom of expression and of association, among others.<sup>173</sup> Paragraph I of the Declaration

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<sup>170</sup> Sulkowski (1957) 287.

<sup>171</sup> Sulkowski (1957) 289.

<sup>172</sup> As above.

<sup>173</sup> Rodgers *et al* (2009) 251.

of 1944 significantly affirms the principle that “freedom of expression and of association are essential to sustained progress”.<sup>174</sup>

On workplace democracy and in pursuit of the interests of workers and employers, paragraph III(e) of the ILO Declaration of 1944 calls for “the effective recognition of the right of collective bargaining, the cooperation of management and labour in the continuous improvement of productive efficiency, and the collaboration of workers and employers in the preparation and application of social and economic measures.”

A second declaration of the ILO that is equally significant is the Declaration on Fundamental Principles and Rights at Work of 1998 (Declaration of 1998). This declaration declares that all members of the ILO, even if they have not ratified the fundamental Conventions, have an obligation by virtue of membership in the ILO, “to respect, to promote and to realise, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights.”<sup>175</sup>

The Declaration on Social Justice for a Fair Globalisation of 2008 (ILO Declaration of 2008) is the third declaration to be adopted by the ILO and builds on the declarations that precede it. The commitment in this declaration is to have the ILO assist member states in their efforts to implement its principles in accordance with their “national needs and circumstances.”<sup>176</sup> It further provides that the ILO is to ensure that the leadership in government and the decision makers in member states are able to reconcile the solutions at home that connect with their people, “while also offering a common platform for governance at the international level”.<sup>177</sup> Therefore the ILO considers context when applying its principles.

This pronouncement by the director-general on the need to reconcile the norms of the ILO and its efforts to offer home-grown solutions that connect with the people of the national state is significant. Again, the commitment of the ILO to respect the conditions and circumstances of member states and to afford them space to adapt to ILO norms and standards is demonstrated.

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<sup>174</sup> ILO Declaration of 1944 para I.

<sup>175</sup> ILO Declaration of 1998 at 27.

<sup>176</sup> ILO Declaration of 2008 at 8.

<sup>177</sup> ILO Declaration of 2008 at 3.



### 3. Relevant Labour Standards

#### 3.1. Introduction

The ILO recognises that countries have their own cultural and historical background with different legal systems and levels of economic development.<sup>178</sup> It is for that reason that ILO standards are characterised by the two features of “universality” and “flexibility.”<sup>179</sup> According to the ILO, the fact that ILO standards are adopted by two thirds of the member states is a reflection of the universality of these standards.<sup>180</sup> According to Humblet and Zarka-Martres,<sup>181</sup> if standards have to be universal and thus applicable to all states irrespective of their level of development and different legal systems, the proper approach would be to have standards that have sufficient flexibility in order to ensure adaptability to the most diverse of countries.

The ILO explains that standards are flexible in that they are formulated in a manner that makes them easy to adapt to the national law and practice of member states.<sup>182</sup> There is merit in Trebilcock’s view that in standard-setting there are built-in “flexibility devices that provide considerable latitude to accommodate specific contexts” for member states.<sup>183</sup> This view countenances the accepted opinion that labour standards should not be too prescriptive on member states. The norms establish principles in the form of minimum standards rather than introducing rigid

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<sup>178</sup> ILO Rules of the Game (2005) 16 available at [www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---normes/documents/publication/wcms\\_108393.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_108393.pdf) (accessed June 2014). These rules are referred to by Advocate Trebilcock in his defence of the nature of the ILO standards as possessing the character of flexibility and universality.

<sup>179</sup> See Trebilcock *CLLPJ* (2010) 553. Trebilcock in her paper is responding to the view expressed by Langille in his paper, *CLLPJ* (2010) 535. Trebilcock argues that the standards are flexible because they are universal and have considerable latitude to accommodate specific contexts. See also *Standards: A Global Approach* (2001) 3.

<sup>180</sup> See ILO Rules of the Game (2009) 18 available at [http://www.ilo.org/wcmsp5/groups/public/---ed\\_norm/---normes/documents/publication/wcms\\_318141.pdf](http://www.ilo.org/wcmsp5/groups/public/---ed_norm/---normes/documents/publication/wcms_318141.pdf)

<sup>181</sup> Humblet and Zarka-Martres at 3 in *International Labour Standards: A Global Approach* (2001)

<sup>182</sup> See Langille *CLLPJ* (2010) 546. The point made by Langille is that the standards are rigid and prefers that they be more like ILO Declarations which are general principles rather than rules. See also Bockman at 11 available at <ftp://ftp.zew.de/pub/zew-docs/docus/dokumentation/0003.pdf> (accessed December 2016). The ratification of a convention creates the obligation to apply the standard set out in the convention and to co-operate with the ILO’s supervisory bodies. Bockman identifies the complaints about inflexibility that come from developing countries, “that standards take too much account of the conditions in industrialised countries.”

<sup>183</sup> Trebilcock *CLLPJ* 556-7.

rules.<sup>184</sup> It is for that reason that inasmuch as the ILO may arguably be said to have an inclination towards favouring majoritarianism, as is manifest in its own operational structure, it does not prevent member states allowing the right of minority trade unions to exist and to enjoy the right to freedom of association.<sup>185</sup>

In the part that follows these relevant instruments will be discussed: Convention No 87 of 1948, Convention No 98 of 1949 and the Workers' Recommendation No 143 of 1971 (Recommendation No 143 of 1971). An exposition of the provisions and principles in these instruments relating to the protection of labour rights and the extent to which they may be limited will be provided. Importantly, and as a starting point, an exposition of South Africa's inclination towards the case law provided by the committees of the ILO is key.

### 3.2. Hard Law and Soft Law Debate

The debate on whether the case law occasioned by the committees of the ILO, namely, the CFA and the CEACR is "hard law" or "soft law" is ongoing.<sup>186</sup> According to Crawford "hard law" is defined as an "obligation of a state or states for the breach of which it or they are responsible, whatever form of sanction or penalty that responsibility may entail".<sup>187</sup> The debate is whether the cases decided by these two committees are binding as international law or whether they are soft law and thus not legally binding.<sup>188</sup>

According to Langille "a shift from hard law to soft law" is required in order effectively to rid the ILO of in his words "the disconnect between the legal

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<sup>184</sup> See Van Niekerk *et al* (2015) 25. It is submitted that it is for that reason that Van Niekerk *et al* are able to conclude that due to their nature international standards establish "minimum standards in relation to the rights of trade unions."

<sup>185</sup> See also *Digest of Decisions* (2006) para 359. The ILO states in no uncertain terms that "minority trade unions that have been denied the right to negotiate collectively should be permitted to perform their activities and at least to speak on behalf of their members and represent them in the case of an individual claim." As indicated the ILO is inclined towards the majoritarian model of representation, however all that it does is to provide guidelines that are to be followed by states that have similar systems.

<sup>186</sup> See Langille *CLLPJ* (2010) and Trebilcock *CLLPJ* (2010). In Crawford *IL* (2001) at 1433 the author explains soft law as expressing "a preference and not an obligation that states should act, or should refrain from acting, in a specified manner." According to the author the contrast to this is hard law, which is defined as an obligation by a state or states for the breach of which it or they are responsible, whatever form of sanction or penalty that responsibility may entail.

<sup>187</sup> Crawford *IL* (2001) 1433. See also Schaffer and Pollack *Boston CLR* (2011) 1160 on his definition of hard law as precise and legally binding obligations for interpreting and applying a rule.

<sup>188</sup> Crawford *IL* (2001) 1433-1344.

machinery of the ILO and the real world”.<sup>189</sup> Trebilcock correctly summarises Langille’s view as one that suggests a normative system of the ILO as hard law.<sup>190</sup> This, according to Trebilcock, is a misunderstanding on the part of Langille from where the ILO standards originate and the way they are developed. The confirmation that international standards are hard law can be based on the power of the Governing Body to take “such action as it may deem wise and expedient to secure compliance”, regular reporting in terms of the ILO Constitution and the comments of the CEACR focusing mainly on the law.

South Africa’s stance on international standards is bolstered by the Constitution, 1996 which provides that international law must be considered when interpreting the law.<sup>191</sup> The cases of the ILO committees are referred to as authority on international law by the Constitutional Court in the interpretation of rights and thus provide binding legal principles that are to be observed.<sup>192</sup>

### 3.3. Freedom of Association and Protection of the Right to Organise Convention No 87 of 1948 (Convention No 87 of 1948)

The Preamble to Convention No 87 of 1948 declares that the recognition of freedom of association is a means to improve the conditions of workers and to ensure labour peace.<sup>193</sup> The mandate and function of the CFA, which is “to contribute to the effectiveness of the general principles of freedom of association, as one of the primary safeguards of peace and social justice” is consistent with the Preamble.<sup>194</sup>

Importantly, Article 2 of ILO Convention No 87 of 1948 provides content to the meaning of the term freedom of association in so far as it provides that:

“Workers and employers, without distinction whatsoever, shall have the right to establish and, subject only to the rules of the organisation

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<sup>189</sup> Langille *CLLPJ* (2010) 540, 541 and 545.

<sup>190</sup> Trebilcock *CLLPJ* (2010) 554.

<sup>191</sup> See s 39(1) of the Constitution, 1996 and Chapter 2 at 7 on the discussion of the position of international law in the South African context.

<sup>192</sup> See *NUMSA v Bader Bop* [2003] 2 BCLR (CC) discussed in Chapter 6 at para 3.4.

<sup>193</sup> It is to be noted that s 1 of the LRA of 1995 also provides that “the purpose of the Act is to advance economic development, social justice, labour peace and the democratisation of the workplace.”

<sup>194</sup> The Preamble of Convention No 87 of 1948.

concerned, to join organisations of their own choosing without previous authorisation.”

The terms “without distinction whatsoever” endorse the universal scope of the principle of freedom of association and emphasise that the right must be guaranteed without distinction or discrimination of any kind.<sup>195</sup> The CEACR considers the right to freedom of association to be linked to freedom of assembly, which constitutes “a fundamental aspect of trade union rights.”<sup>196</sup> The CEACR makes it clear that the authorities in member states are to refrain from interfering with the right unless it is threatening to public order.<sup>197</sup> Where there is a dispute as to the interference with said right the member country’s national courts shall be the appropriate institution to determine such disputes relating to a clash between the right to freedom of association and public order.<sup>198</sup>

The CFA deems Article 2 to be designed to protect trade unions from employers or their organisations.<sup>199</sup> It is for that reason that inter-union rivalry falls outside the scope of Article 2 and whenever this rivalry manifests itself the trade unions are unable to refer to this provision and rather have to subject themselves to the option of a vote to determine representivity before an independent mediation or the judicial process.<sup>200</sup>

When the International Labour Conference adopted Convention No 87 of 1948, it recognised the right of both private and public sector workers to be organised. It is for that reason that the words “without distinction whatsoever” feature in the article.<sup>201</sup> The ILO, however, made an exception in relation to public workers in the police, armed forces and those involved in the administration of the state.<sup>202</sup> In this regard, Article 9 of the Constitution of the ILO provides that:

“1. The extent to which the guarantees provided for in this Convention shall apply to the armed forces and the police shall be determined by national laws or regulations.

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<sup>195</sup> *General Survey* (1994) 23 para 45.

<sup>196</sup> As above.

<sup>197</sup> As above.

<sup>198</sup> As above.

<sup>199</sup> *Digest of Decisions* (2006) para 1118.

<sup>200</sup> *Digest of Decisions* (2006) para 1122. The CFA does not entertain inter-union rivalry disputes and refers them to the national authority.

<sup>201</sup> *General Survey* (2000) para 36.

<sup>202</sup> As above.

2. The ratification of this Convention by any Member shall not be deemed to affect any existing law, award, custom or agreement in virtue of which members of the armed forces or the police enjoy any right guaranteed by this Convention.”

Under Convention No 87 of 1948 notably there is no articulation that the right to freedom of association and to organise are to be subject to a particular threshold for them to be acquired and enjoyed by trade unions. The issue of thresholds does not feature at all when the ILO deals with promotion of the rights to freedom of association and the right to organise.

Article 3 of Convention No 87 of 1948 provides further content to the right to freedom of association in so far as it provides that:

“Workers’ 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. The public authorities shall refrain from any interference which would restrict this right or impede the lawful exercise thereof.”<sup>203</sup>

It is submitted that the emphasis on “full freedom” to elect representatives should entail that the right is to be exercised without limitation by either a law or collective agreement. The provision does not mention that the enjoyment of the right to elect representativeness is subject to a particular level of representivity being attained. It is significant to note that the ILO considers the election of representatives who carry out various tasks of the trade union to be an aspect that also falls under the right to freedom of association and to organise.<sup>204</sup> This right to elect representatives does not fall only within the right to engage in collective bargaining.

The supervisory bodies of the ILO have identified several unjustifiable restrictions regarding the election of trade union representatives. These include, *inter alia*, elections of representatives based on racial discrimination, membership of an occupation for election into union office, a trade union election requiring that a member be active in the said trade for more than a year, disqualification of trade

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<sup>203</sup> See also *Digest of Decisions* (2006) para 405. The CFA is consistent in this regard and states that “the determination of conditions of eligibility for union membership or union office is a matter that should be left to the discretion of union by-laws and the public authorities should refrain from any intervention which might impair the exercise of this right by trade union organisations.”

<sup>204</sup> As discussed in Chapter 2 at 5 below, it is the argument of this thesis that the right to freedom of association is significant in its own right and thus the premise on which the restrictions placed on the right of minority trade unions right to freedom of association is justifiable within the context of South Africa’s conditions and circumstances.

unions because of political beliefs.<sup>205</sup> The applicability of the threshold such that a minority trade union is unable to represent members in disciplinary and grievance proceedings is one such identifiable unjustified restriction.

Notwithstanding the restriction on the members of national security services in the exercise of the right to freedom of association, the minority trade union election of representatives is not listed or mentioned as a specified restricted activity by Convention No 87 of 1987. The argument that minority trade unions are not to be limited in the election of their trade union representatives as long as they meet a reasonable and justifiable requirement is consistent with the premise laid out by the ILO that they are to be allowed to exist and to represent their members in individual grievances even within a majoritarian system of collective bargaining where thresholds are set.<sup>206</sup>

Articles 2 and 3 of Convention No 87 of 1948 are supplemented by Article 8(2) which provides that “the law of the land shall not be such as to impair, nor shall it be so applied as to impair, the guarantees provided for in this convention”. This provision is not adequately canvassed or sufficiently detailed to indicate what these guarantees entail. However, it is clear that whatever law any member state elects to promulgate it may not limit the guarantees of the right to freedom of association more than it is necessary. Further where the socio-economic and political circumstances of the member state permit, the right to freedom of association may also be considered for extension to the granting of a voice in conditions of employment rather than just recognition in individual cases such as disciplinary and grievance proceedings.<sup>207</sup>

#### 3.4. Right to Organise and Collective Bargaining Convention No 98 of 1949 (Convention No 98 of 1949)

The Preamble to Convention No 98 of 1949 affirms the onus on the ILO to advance world programmes which will achieve the effective recognition of collective bargaining among member states.<sup>208</sup> Although the focus of Convention No 98 of

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<sup>205</sup> See *Digest of Decisions* (2006) paras 405-426. See also *General Survey* (1994) para 116.

<sup>206</sup> *Digest of Decisions* (2006) para 974. See also discussion in Chapter 2 at 3.

<sup>207</sup> See Chapter 3 at 4 and 5 on the participation of minority political parties within government, including the protection and promotion of the interests of the minority.

<sup>208</sup> ILO Declaration of 1944 para III(e).

1949 is the promotion of the machinery of voluntary collective bargaining, Article 3 clearly provides that the “machinery appropriate to national conditions shall be established, where necessary, for the purposes of ensuring respect for the right to organise”. This provision clearly demonstrates the need for the creation of a legal framework to ensure that the right of workers to organise themselves is respected.

The CFA cautions against imposing collective bargaining on trade unions on aspects determined by the “labour authority and stipulates that the period of negotiation shall not exceed a specified time, and failing agreement between the parties, the points at issue shall be submitted to arbitration by the said authority.”<sup>209</sup> In addition, a provision in a member state’s labour legislation that allows employers to, *inter alia*, unilaterally modify signed collective agreements is contrary to collective bargaining principles.<sup>210</sup> The setting of stipulations for the period of negotiations in collective bargaining which should not to be exceeded and failing agreement the next step is arbitration are seen as examples of conduct that is contrary to Article 4 of Convention No 98 of 1949.<sup>211</sup>

Convention No 98 of 1949 does not provide a definition for collective agreement. However, Recommendation No 91 of 1951<sup>212</sup> defines collective agreements as agreements that meet the criterion of being in writing with reference to working conditions and terms of employment, between employers and employees or their respective organisations in accordance with national laws and regulations. Entering the collective agreement is the main goal of collective bargaining for recognised trade unions and where there is no intention to enter into a collective agreement such a process cannot be regarded as collective bargaining.<sup>213</sup>

For the purpose of this thesis two pertinent questions relating to Convention No 98 of 1949 need to be addressed. First, does the ILO encourage member states to introduce an enforceable duty to engage in collective bargaining in their labour

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<sup>209</sup> *Digest of Decisions* (2006) para 997.

<sup>210</sup> *Digest of Decisions* (1996) para 848.

<sup>211</sup> As above. Article 4 of the Convention No 98 of 1949 provides: “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’ organisations and workers’ organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.

<sup>212</sup> Article 2(1) of Collective Agreements Recommendation No 91 of 1951.

<sup>213</sup> Gernigon *et al* (2000) 9.

relations? Second, does the ILO support the principle that employers should only negotiate with trade unions representing the majority of employees?

With reference to the first question, Article 4 of Convention No 98 of 1949 establishes the premise on which negotiations are to take place and provides that collective bargaining is a mechanism for voluntary negotiations between parties in order to enter a collective agreement that will regulate their conditions of employment.<sup>214</sup> There can be no doubt that the CFA values the free and voluntary nature of collective bargaining and it has often reiterated the principle that nothing in Article 4 of Convention No 98 of 1949 places a duty on states to compel social partners to engage in collective bargaining.<sup>215</sup>

In respect of the second question the CFA has made it clear that Article 4 of Convention No 98 of 1949 does not support stipulations that provide for collective agreements to be negotiated only with a trade union representing an absolute majority of the workers in an enterprise. Where there is no such majority trade union, the CFA indicates that:

“the organisations may jointly negotiate a collective agreement applicable to the enterprise or the bargaining unit, or at least conclude a collective agreement on behalf of their members.”<sup>216</sup>

This point is where minority trade unions may have an opportunity to enter into collective agreements with employers on behalf of their members. The employer also will not be in a position to impose terms on the workers due to the fact that there may be no trade union with an absolute majority with which to bargain.

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<sup>214</sup> Article 4 of Convention No 98 of 1949. See also *Digest of Decisions* (2006) paras 925–931 and *Gernigon et al* (2000) 8 and 27. Article 1(d) of the Declaration of 1944 provides that besides the parties themselves, the state plays an active role in such engagement. See also Case No 1391 (1986) para 82 which involved the United Kingdom. Here, the CFA emphasised its call to states “to encourage and promote the full development and utilisation of machinery for voluntary negotiation between employers or employers’ organisations and workers’ organisations, with a view to the regulation of terms and conditions of employment by means of collective agreements.” Case No 1771 (1994) para 494. In this case of Pakistan, the CFA held that annulling collective agreements that have been entered into unilaterally would have a seriously negative effect on bargaining relationship and that parties are to strive to bargain genuinely, constructively and in good faith.”

<sup>215</sup> *Gernigon et al* (2000) 27.

<sup>216</sup> *Digest of Decisions* (2006) para 978.



It is accepted that numerical strength which determines who the trade union represents is important in measuring a trade union's strength and therefore is an instrument that can be utilised in collective bargaining. However, it is strongly argued in this thesis that the issue of numerical strength should not cover all areas of trade union activity, but rather is relevant in the context of the exercise of the right to engage in collective bargaining.<sup>217</sup> In that case the exercise of the right to freedom of association is not easily infringed upon and made a casualty in the collective bargaining process.

### 3.5. The Workers' Representatives Recommendation No 143 of 1971 (Recommendation No 143 of 1971)

The granting of organisational rights to trade unions and their representatives forms a central theme of this thesis.<sup>218</sup> A number of protective measures included in Workers' Recommendation No 143 of 1971 (Recommendation No 143 of 1971) overlap with the organisational rights prevalent in South Africa.<sup>219</sup> The Recommendation provides that the provisions of the instrument may be given effect "through national laws or regulations or collective agreements, or any other manner consistent with national practice".<sup>220</sup>

From this provision, it is clear that the collective agreements between an employer and a majority trade union are seen as one mechanism that can be used to establish the trade union that qualifies for organisational rights, which includes the right to elect trade union representatives. The provision does not suggest that only majority trade unions may conclude such agreements. As indicated the trade union representatives of a minority trade union will not be in a position to discharge their responsibility to represent their members in grievance proceedings if they are unable to elect trade union representatives.<sup>221</sup>

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<sup>217</sup> See Chapter 2 at 3 and chapter 3 at 6.

<sup>218</sup> See Chapters 5 and 6.

<sup>219</sup> See Chapter 5 at 5.

<sup>220</sup> See Article 1 of Recommendation No 143 of 1971.

<sup>221</sup> See Chapter 2 at 2.1 above. This is in line with the premise of the ILO that minority trade unions are to be permitted even within a majoritarian collective bargaining system to represent their members in grievance processes.

As stated the instrument may be given effect “through national legislation, collective agreement or any manner consistent with national practice.”<sup>222</sup> Article 2 of Recommendation No 143 of 1971 provides that worker’s representatives:

“means persons who are recognised as such under national law or practice, whether they are-

- (a) trade union representatives, namely representatives designated or elected by trade unions or by the members of such unions; or
- (b) elected representatives, namely representatives who are freely elected by the workers of the undertaking in accordance with provisions of national laws or regulations or of collective agreements and whose functions do not include activities which are recognised as the exclusive prerogative of trade unions in the country concerned.”

Under the heading “Facilities to be afforded to Workers’ Representatives,” Recommendation No 143 of 1971 includes the following suggested rights.

- Workers’ representatives are to be protected through measures such as giving them priority of retention in cases of retrenchment;<sup>223</sup>
- The ILO recognises that they require to be afforded time-off without losing wages or benefits.<sup>224</sup>
- Facilities are to be provided to the trade union representatives as may be appropriate on condition they do not impair the premises or business of the employer.<sup>225</sup>
- Access to the premises is to be granted in order to hold meetings with members or management.<sup>226</sup>

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<sup>222</sup> Article 1 of Recommendation No 143 of 1971.

<sup>223</sup> Article 9 of Recommendation No 143 of 1971.

<sup>224</sup> Article 10 of Recommendation No 143 of 1971. For the representatives to be able to perform their functions effectively they need to be away from work or work stations. Permission from the employer is still required and the ILO states that it may not be withheld unreasonably. It is emphasised by this recommendation that permission is still required from the employer and may not be withheld unreasonably. See also Case No 2192 (2002) para 1067 and 1075. In the case of Togo, newly-elected staff members as trade union representatives were met with a refusal by the employer company for them to have leave to attend training by the trade union. The CFA held in this instance that such leave is not to be refused unreasonably, and was to be informed of the developments in this regard.

<sup>225</sup> Article 9(3) of Recommendation No 143 of 1971. See also Case No 1897 (1997) para 480 where a national health facility may refuse to provide facilities if within reason. See also *Digest of Decisions* (2006) para 1098 where the facilities referred to include being able to travel abroad to attend meetings.

<sup>226</sup> Article 17 of Recommendation No 143 of 1971 provides that the facilities are to be open to representatives that are not necessarily employed at the workplace where the facilities are sought. See also *Digest of Decisions* (2006) para 1101.

- Where no other arrangements exist, trade union representatives are to be allowed access to the premises in order to collect dues regularly from members.<sup>227</sup>
- The trade union representatives are to be allowed to distribute notices, pamphlets and information to the employees.<sup>228</sup>

Under a majoritarian system of collective bargaining the recognition of trade union representatives may be made dependent on the numerical strength of the trade union. In the case of a minority trade union in existence, the right to elect trade representatives or to gain access by officials may be excluded under this system, whereas the CFA recognises that workers require the assistance of their trade union to represent them at least in grievance proceedings.<sup>229</sup>

#### 4. The ILO on Models of Collective Bargaining

##### 4.1. Introduction

The ILO recognises that some member states have collective bargaining systems that favour majoritarianism, and others that follow a pluralist approach. As discussed later in the thesis, South Africa has adopted the pluralist system with a strong inclination towards majoritarianism.<sup>230</sup> In the context of labour law, majoritarianism is regarded by Du Toit *et al*<sup>231</sup> as a principle that offers “considerable inducements to majority trade unions as well as minority unions willing to join forces with others in order to achieve majority status”.

Langille regards majoritarianism as a situation where:

“a majority in a constituency selects a representative, that representative represents everyone in the constituency, not just those that voted for him or her. You may not have voted for the current Member of Parliament (MP)

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<sup>227</sup> Article 10(14) of Recommendation No 143 of 1971.

<sup>228</sup> In terms of Article 15(3) of Recommendation No 143 of 1971, the distribution of such is not prejudicing the operation of the business or tidiness.

<sup>229</sup> See Chapter 2 at 3.5.

<sup>230</sup> See Chapter 5 and 6.

<sup>231</sup> Du Toit *et al* (2015) 283.

for your constituency, but that person is still your MP. ...this is inherent in the very idea of majoritarianism.”<sup>232</sup>

Notwithstanding the fact that the definition by Langille refers to a political setting, it significantly describes the principle of representation as being also for those who did not vote for the representative. In contrast to this model the pluralist collective bargaining framework entails a system that “grants recognition to more than one trade union provided they are sufficiently representative of a defined bargaining unit”.<sup>233</sup> According to Laurijssen, trade union pluralism is “part of the principle of freedom of association, which is a universal basic right”.<sup>234</sup>

This part of the study therefore offers guidance on the part of the ILO in respect of majoritarianism and pluralism in collective bargaining systems, including trade union monopolies and trade union security agreements embedded in the majoritarian collective bargaining system. These guidelines will be analysed within the context of the regard that the ILO has for minority trade union labour rights and the extent of their protection within the two main collective bargaining systems.

#### 4.2. The ILO and Majoritarianism

The ILO regards the freedom of employers and trade unions to enter collective agreements in order to regulate their relationship as a guarantee of freedom of association.<sup>235</sup> The principle echoed by the ILO consistently is that:

“The fact of establishing in the legislation a percentage in order to determine the threshold for the representativeness of organisations and grant certain privileges to the most representative organisations (in particular for collective bargaining purposes) does not raise any difficulty provided that the criteria are objective, precise and pre-established, in order to avoid any possibility of bias or abuse.”<sup>236</sup>

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<sup>232</sup> Langille and Mandryk *CLELJ* (2013) 480. See also Grant *ILJ* (1993) fn 1 where the author refers to majoritarianism as “a system whereby the plant is divided into bargaining units, and a single union is recognised as representing all the employees (including non-members) in that unit. The union must obtain the support of more than half the employees in a unit before it can be recognised”.

<sup>233</sup> Du Toit *et al* (2015) 283 fn 57.

<sup>234</sup> TU Pluralism (2010) 11.

<sup>235</sup> *Digest of Decisions* (2006) para 178.

<sup>236</sup> *Digest of Decisions* (2006) para 356. According to Esitang and Van Eck *ILJ* (2016) 776 the position of the CFA on this is clear and where thresholds set in legislation meet these criteria, such would be easily acceptable.

The ILO is cautious not to prefer one model of collective bargaining over another.<sup>237</sup> In the ILO Digest of Decisions, the CFA confirms that “systems of collective bargaining” with exclusive rights for the most representative trade union are compatible with the right to freedom of association.<sup>238</sup> The ILO correctly recognises the relative nature of collective bargaining as an institution and points out that “combined with strong freedom of association, sound collective bargaining practices ensure that employers and workers have an equal voice in negotiations and that the outcome will be fair and equitable”.<sup>239</sup> The ILO therefore regards “systems of collective bargaining” where exclusive rights are negotiated for the most representative trade union as compatible with the right to freedom of association.<sup>240</sup>

It is submitted that the ILO’s view on the issue of the distinction between representative and unrepresentative trade unions is that this should not have the effect of denying unrepresentative trade unions the means “for defending the occupational interests of their members, for organising their administration and activities and formulating their programmes, as provided for in Convention No. 87.”<sup>241</sup> In this regard the CFA held that members of the unrepresentative trade unions are not be denied representation in the grievance processes of members.<sup>242</sup>

It is argued that the election of representatives and all organisational rights have a bearing on the collective bargaining rights of a majority trade union. However, organisational rights also have a significant bearing on the exercise of the right to freedom of association for minority trade unions. There is no glaring and appropriate example than where the minority trade union is required to represent

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<sup>237</sup> *Digest of Decisions* (2006) para 318.

<sup>238</sup> *General Survey* (2013) para 284.

<sup>239</sup> Rules of the Game (2005) 26 available at [www.ilo.org](http://www.ilo.org) (accessed June 2014) and Rules of the Game (2009) 28.

<sup>240</sup> *Digest of Decisions* (2006) para 950.

<sup>241</sup> *Digest of Decisions* (2006) para 347.

<sup>242</sup> Case No 1968 (1998) para 500. See also CEACR Report (2013) 59 where it noted that in a case where the national legislation provided that “if any contesting trade union receives less than 10 per cent of the votes for the election of the collective bargaining agent, the registration of that union should be cancelled.” In this regard, it reiterated the principle that trade unions which do not gather the required 10 per cent of workers should not necessarily be deregistered but should be allowed to continue to provide representation to their members, that is, making representations on behalf of their members and representing their members in individual matters such as grievances and disciplinary hearings.

members in individual cases. This therefore denotes an allowance to elect trade union representatives in this instance. This is the point where the limitation of the right to freedom of association cannot extend. For as long as minority trade union can represent their members in grievance proceedings. Surely, where the national conditions permit this can be taken to extend the right to freedom of association to include the right to be consulted rather than the right to negotiate prior to entering a collective agreement in the workplace.

In Fiji, legislative amendments “removed the excessively high representation thresholds required for recognition for collective bargaining purposes, establishing an obligation to negotiate regardless of whether or not the union represents the absolute majority of workers in a given unit”.<sup>243</sup> The ILO frowns upon creating a legal framework that enables a majority union and an employer to raise thresholds to excessive levels. Therefore, the ILO clearly sets out conditions that are to be met where the majoritarian model of collective bargaining is the preferred model of collective bargaining of a member state.<sup>244</sup>

The ILO regards the freedom of employers and trade unions to enter collective agreements in order to regulate their relationship as a guarantee of freedom of association.<sup>245</sup> This clearly is an empowering provision from an international law perspective, in that parties to collective bargaining can enter into collective agreements that set thresholds of representivity. The principle echoed consistently by the ILO is that:

“The fact of establishing in the legislation a percentage in order to determine the threshold for the representativeness of organisations and grant certain privileges to the most representative organisations (in particular for collective bargaining purposes) does not raise any difficulty provided that the criteria are objective, precise and pre-established, in order to avoid any possibility of bias or abuse.”<sup>246</sup>

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<sup>243</sup> See DG Report (2008) 14. The Director General of the ILO commended Fiji and regarded as progress the removal of high representation thresholds in the country.

<sup>244</sup> See also DG Report (2008) 11 para 40.

<sup>245</sup> *Digest of decisions* (2006) para 882.

<sup>246</sup> *Digest of Decisions* (2006) para 356. See also Esitang and Van Eck *ILJ* (2016) 776. The position of the CFA on this is clear and where thresholds set in legislation meet these criteria they are easily acceptable.

In the case of Mexico, which allowed for a dual system, it was held that the majority trade union can enter into a valid collective agreement covering all occupations where the law equally allows for the existence of occupational trade unions and enters into collective agreements with them.<sup>247</sup> This is based on the fact that the ILO recognises that individuals based on occupational, denominational or political reasons may choose between several trade union formations.<sup>248</sup> The CFA concluded that if the two contrasting systems of collective bargaining are allowed by domestic national law, they are compatible with freedom of association.<sup>249</sup>

The CFA said that in countries where the majoritarian system of exclusive representation is followed the essentials of the procedure for certifying these trade unions as such are that there should be the following safeguards:

“(a) certification to be made by an independent body; (b) the representative organisations to be chosen by a majority vote of the employees in the unit concerned; (c) the right of an organisation which fails to secure a sufficiently large number of votes to ask for a new election after a stipulated period; (d) the right of an organisation other than the certified organisations to demand a new election after a fixed period, often 12 months, has elapsed since the previous election.”<sup>250</sup>

Where there is a distinction between a representative and a non-representative trade union within a system, generally it should be limited to the recognition of certain preferential rights, for example, for purposes such as collective bargaining, consultation by the authorities or the designation of delegations to international organisations.<sup>251</sup> From this it is possible to deduce that the thresholds of representivity apply in the three identified areas and where these are exceeded that may constitute that which is contrary to international principles. It is argued that, based on the context of South Africa’s constitutional dispensation and its spirit of reconciliation to protect minority interests and the interests of the vulnerable, it cannot be that the collective bargaining institution can ignore or exclude these

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<sup>247</sup> *Digest of Decisions* (2006) para 520. The applicable law in Mexico stipulated that where there are two competing trade unions, one being an occupational union and the other an enterprise or industrial trade union, the occupational trade union can conclude an agreement for their specific occupational class if their membership number exceeds those in the same occupational class in the enterprise trade union.

<sup>248</sup> *Digest of Decisions* (2006) para 322.

<sup>249</sup> *General Survey* (2013) para 284.

<sup>250</sup> *Digest of Decisions* (2006) para 969.

<sup>251</sup> *Digest of Decisions* (2006) paras 346 and 356. See also Case No 2153 (2005) para 166.

principles of the Constitution, 1996 pertaining to minority interests wherever they manifest themselves.<sup>252</sup>

#### 4.3. The ILO and Pluralism

As already stated the ILO is reluctant to prescribe to member states whether a majoritarian or pluralist model of collective bargaining is to be preferred.<sup>253</sup> However, should a member state elect to have a pluralist model of collective bargaining the ILO sets out a number of conditions in order for it to comply with international standards.

There is no specific provision in Convention No 87 of 1948 that deals with trade union pluralism. All that it required at the very least is that diversity of trade unions remain in all areas.<sup>254</sup> The ILO takes this further to provide that:

“The Committee has requested a Government to take the necessary steps to amend the legislation so that workers can opt for deductions from their wages under the check-off system to be paid to trade union organisations of their choice, even if they are not the most representative.”<sup>255</sup>

The ILO holds the view that where a state adopts a pluralist system of collective bargaining, such a system should not allow excessive representational fragmentation of the collective effort.<sup>256</sup> The ILO has referred to Japan as an example where this fragmentation is possible due to the fact that equal recognition to a majority trade union and to a union that may have a single member for the collective bargaining purpose.<sup>257</sup> The ILO cautions that although the freedom of association recognises the plurality of trade unions, it does not require that

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<sup>252</sup> See Chapter 3 at 6.3 on the discussion of the constitutional right to organise and how the constitutional framework provides space for freedom of association to be a constitutional right worthy of protection and promotion.

<sup>253</sup> See Chapter 2 at 4.2

<sup>254</sup> TU Pluralism (2010) 11. In this study Eddy Laurijssen intimates that pluralism as a principle of freedom of association has to be exercised with great caution, and is to be motivated by nothing else but “loyalty and devotion” to the cause of workers.

<sup>255</sup> *Digest of Decisions* (2006) para 477.

<sup>256</sup> *Digest of Decisions* (2006) para 1097. The CFA states that the principles of freedom of association do not necessarily require “that there be an absolute proportional representation due to the risks of excessive fragmentation of workers representation”.

<sup>257</sup> See Chapter 7 at 10.2 for the discussion of the Japanese system.



necessarily there should be “absolute proportional representation” which might prove impossible.<sup>258</sup>

Budeli agrees with the ILO in so far as the rights to freedom of association and to organise do not exist in a vacuum, and workers organise for the purpose of giving a unified voice in their quest for favourable conditions of employment.<sup>259</sup> Budeli makes a cogent argument that “there is little point in workers belonging to a union, unless the union has the power to negotiate on behalf of the workers”.<sup>260</sup>

However, this thesis argues that collective bargaining is not the immediate goal of unrecognised and unrepresentative trade unions. The purpose of every trade union at inception is to be able to exercise its right to freedom of association and to be able to organise itself progressively into a representative trade union. Only after developing into a relatively strong trade union insofar as representivity is concerned, is it justified in demanding representation on behalf of its members, even in collective bargaining. The ability of a minority trade union to exercise the right to freedom of association and the right to organise puts it in a position of gaining the opportunity to acquire such strength gradually and enables it to be a major collective bargaining player.<sup>261</sup>

The study conducted by Laurijssen of French-speaking African countries on behalf of the ILO confirms that unity and solidarity are universal truths in the trade union movement.<sup>262</sup> The capacity of workers to negotiate and defend their right to negotiate and their rights as workers to a large extent depends on their opportunity and ability to act as a collective.<sup>263</sup> The division and fragmenting of

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<sup>258</sup> *Digest of Decisions* (2006) para 1097.

<sup>259</sup> Budeli (2007) 54.

<sup>260</sup> Budeli (2007) 57. The point made by Budeli above is not to be seen as giving greater importance to collective bargaining than to the exercise of the right to freedom of association or to organise, because, seen in this context, both rights as recognised by the ILO are equally important to trade unions.

<sup>261</sup> See the discussion *infra* below at 5.3.4 “Trade Union Monopoly and Favouritism by Government” where pluralism and diversity are seen as countervailing the effect of monopoly.

<sup>262</sup> TU Pluralism (2010) 1. This was a study prepared for the ILO by Eddy Laurijssen, when he was Assistant General Secretary of the International Confederation of Free Trade Unions (ICFTU). In its assessment of trade union pluralism and proliferation in French-speaking Africa, the ILO reported that lack of trade union unity is a major weakness in the African trade union movement. This has undermined the efficiency, representativeness and the credibility of these trade unions, as they compete with each other to the benefit of the employers and those who are anti-worker welfare.

<sup>263</sup> TU Pluralism (2010) 2.

their collective strength compromises their position in relation to employers.<sup>264</sup> This is the reason the proliferation of trade unions<sup>265</sup> is not encouraged by the ILO, because of the negative effect it has on collective bargaining.

The same study observed that trade union pluralism emerged concurrently with political pluralism.<sup>266</sup> The study found that the principle of trade union pluralism does not result in proliferation, but rather it is the “incorrect interpretation” and abuse of pluralism that causes proliferation.<sup>267</sup> The major causes of proliferation identified and listed in the study, *inter alia*, are irresponsible and unscrupulous leadership, lack of rules for internal trade union democracy and transparency, interference by governments and employers in the affairs of trade unions, alliances between trade unions and political parties.<sup>268</sup>

Despite the concerns that the ILO raises in relation to the risks of representational fragmentation that may result from proportional representation of trade unions, it recognises that:

“there be an absolute proportional representation (which might prove impossible, and indeed is not advisable due to the risks of excessive representational fragmentation) the authorities should at the very least make some allowance to recognise the plurality of trade unions, reflect the choice of workers, and demonstrate...that fair and reasonable efforts are made to treat all representative workers’ organisations on an equal footing.”<sup>269</sup>

If minority trade unions are excluded from exercising organisational rights solely because they do not satisfy a set threshold and organisational rights are not recognised as serving the collective bargaining purpose, their right to freedom of association and to organise is merely an ideal. The right to freedom of association and the right to organise are rights that serve as a precursor to collective bargaining rights, especially within a majoritarian system of collective bargaining.

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<sup>264</sup> As above.

<sup>265</sup> See *Digest of Decisions* (2006) para 320.

<sup>266</sup> TU Pluralism (2010) 13.

<sup>267</sup> As above. Laurijssen in the study lists the major causes of proliferation as, *inter alia*, irresponsible and unscrupulous leadership, lack of rules for internal trade union democracy and transparency, interference by governments and employers in the affairs of trade unions, alliances between trade unions and political parties.

<sup>268</sup> As above.

<sup>269</sup> Case No 2139 (2001) para 444.

Members and their trade unions therefore need to be able to freely associate with each other and to organise themselves as a viable establishment before they can be in a position to challenge for the right to exercise collective bargaining. Under the majoritarian system there are thresholds of representivity set for a party to participate in collective bargaining.<sup>270</sup> The membership numbers therefore are crucial in determining participation in the structures of collective bargaining. The need to allow at least the exercise by a minority trade union of rights related to freedom of association provides an environment conducive for diversity and the prevention of monopoly.<sup>271</sup>

It is submitted that the ILO principle of granting minority trade unions the right to represent members in grievance proceedings should be an established phenomenon of the legislation of member states and should include all cases of an individual member. However, it is far from being enough. In order to make some allowance to recognise the plurality of trade unions as the ILO professes, it is required that minority trade unions be allowed to exercise organisational rights.<sup>272</sup> Some member states, such as South Africa, have deliberately gone further to provide constitutionally for the recognition of minority interests and to grant minorities a voice to be considered in recognition and in conformity with the constitutional democracy model entrenched by the Constitution, 1996.

The ability to enter workplace premises to recruit and to organise generally is a way for a minority trade union to grow and be in a position to challenge and compete with majority trade unions either for recognition or majority status in the workplace. They will be in a position to do this if they are granted a voice and if they represent members in individual cases.

#### 4.4. The ILO and Trade Union Monopolies

The ILO holds the view that workers and employers generally find it in their best interest to avoid a multiplication of competing unions. However, the ILO says this

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<sup>270</sup> S 18 of the LRA of 1995 provides for the setting of thresholds of representivity for the acquisition of organisational rights. See Chapter 6 for the discussion in detail of the impact of these on the acquisition of organisational rights.

<sup>271</sup> See Chapter 2 at para 4.4.

<sup>272</sup> *Digest of Decisions* (2006) para 1097. See Chapter 5 at 5 for the discussion of organisational rights.

does not justify direct or indirect intervention by the State by means of legislation.<sup>273</sup> The ILO discourages governments from creating an environment that will bring about a single unified trade union instead of multiple trade unions.<sup>274</sup> The independence of the trade union and its ability to organise its activities without interference by the public authorities is critical for the fulfilment of their collective bargaining obligation.<sup>275</sup>

Budeli<sup>276</sup> warns that collective bargaining cannot be effective if the bargaining union is an “in house union” under the control and direction of the employer. These worker organisations therefore are not to sacrifice the control of their trade union to employers or employer organisations as the collective bargaining machinery will be compromised.

The ILO’s encouragement of unity in the form of the workers’ collective voice is to be distinguished from trade union monopoly. The CFA held that:

“While fully appreciating the desire of any government to promote a strong trade union movement by avoiding...undue multiplicity...it is more desirable in such cases for a government to seek to encourage trade unions to join together voluntarily...than to impose...a compulsory unification which ...runs counter to the principles which are embodied in the international labour Conventions relating to freedom of association.”<sup>277</sup>

Iraq is an example of a country where legislation provided for the establishment of a single trade-union system for all the employees in the enterprise.<sup>278</sup> The ILO noted that Iraq during a time when the country was undergoing a process of reconstruction and the rebuilding of national institutions passed Decree No 16 on 28 January 2004, which instituted the Iraqi Federation of Workers Trade Unions as the only legitimate and legal federation in Iraq. Although the country was undergoing a reconstruction phase, the CFA insisted on the principle of workers

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<sup>273</sup> *Digest of Decisions* (2006) para 322.

<sup>274</sup> As above.

<sup>275</sup> Articles 3 and 10 of Convention No 87 of 1948.

<sup>276</sup> Budeli (2007) 57.

<sup>277</sup> *Digest of Decisions* (2006) para 319. See also *General Survey* (1994) 42 para 91. The CFA and the CEACR consistently state that the imposition of the unity of trade unions by law either directly or indirectly is contrary to Convention No 87 of 1948.

<sup>278</sup> *Digest of Decisions* (2006) para 320.

having a right “to form and join organisations of their own choosing in full freedom”.<sup>279</sup>

According to the ILO, in the post-colonial phase of a number of African states a deplorable pattern of favouritism developed which establishes a subtle form of monopoly. On this aspect, the CEACR stated that:

“Such favouritism or discrimination may take various forms and relate to different aspects of labour relations: pressure exerted on organisations in public statements by the authorities; unequally distributed aid; premises provided for holding meetings or activities to one organisation but not to another; refusal to recognise the officers of some organisations in the exercise of their legitimate activities, etc.”<sup>280</sup>

The ILO feels strongly that authorities should not practice favouritism towards persons or labour organisations which share their political views.<sup>281</sup> Emanating from this practice, it is clear that trade union monopoly is a disconcerting factor for minority trade unions as well as sufficiently representative trade unions as they may be the victims in this state of affairs. It is submitted that under such circumstances of trade union monopoly there is a highly undesirable effect upon an open and democratic dispensation.

#### 4.5. The ILO and Trade Union Security

The CFA recognises that trade union security arrangements, such as closed shop agreements, are compatible with Convention No 87 provided they are not imposed by legislation.<sup>282</sup> The ILO clearly maintains that they are to be the result of free negotiations between the employer and the majority trade union. In addition, the ILO mentions that the fact that these security arrangements increasingly are contested in national supreme courts conforms to the Convention.<sup>283</sup> From a minority trade union point of view the stance of the ILO is a positive step as it allows for a challenge to this tenet of majoritarianism.

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<sup>279</sup> Case No 2348 (2005) paras 994 and 995. The CFA noted that Iraq had ratified Convention No 9 of 1949, but had not ratified Convention No 87 of 1948.

<sup>280</sup> *General Survey* (1994) 47 para 104.

<sup>281</sup> *General Survey* (1994) 47 para 65.

<sup>282</sup> *General Survey* (2000) para 121.

<sup>283</sup> As above.

The ILO suggests that where there may be disputes that arise out of security arrangements, those disputes are to be dealt with by the member states themselves through their labour relations systems.<sup>284</sup> The CFA encourages a party in a dispute which revolves around security arrangements to use its national legal system to deny or confirm the lawfulness and legitimacy of the system.<sup>285</sup>

In Guyana, the state wished to introduce a pluralist system of labour relations in the public sector where there was a closed-shop agreement in place.<sup>286</sup> The ILO directed that the responsible state authority should engage interested parties in consultations before any changes are made to a member state's labour relations system.<sup>287</sup> It is submitted that it is problematic to allow trade union security arrangements in a pluralist system. It is further argued that it is disappointing of the ILO not adopting a stronger view which at least prescribes that when a system is changed from a majoritarian to a pluralist model there should be consultations between interested parties, although no such directive exists when the change is from a pluralist to a majoritarian model. However, this thesis does not discuss the security arrangements albeit they also have the potential to limit the right to freedom of association of trade unions unable to meet the set threshold.

## 5. Conclusion

The ILO as an international body and through its supervisory committees provides guidance to member states and disputes referred to it. These decisions serve as tools of interpretation and application for the ILO Conventions and Recommendations. Convention No 48 of 1948 and Convention No 98 of 1949 and Recommendation No 143 of 1971 are the main instruments that provide an exposition of the content and nature of three significant labour rights, namely the rights to freedom of association, to organise and to collective bargaining.

The voluntary nature of collective bargaining provides a mechanism that enables the employer to recognise the right to freedom of association and to organise for all trade unions irrespective of their status. The ILO recognises that member states

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<sup>284</sup> *Digest of Decisions* (2006) para 365.

<sup>285</sup> Case No 2136 (2002) para 102.

<sup>286</sup> Case No 2187 (2003) para 721.

<sup>287</sup> Case No 2187 (2003) para 721.

have different pieces of legislation that resonate to local conditions and circumstances. Therefore, where these member states opt for one system over the other the ILO is able to provide clear guidance without interfering in local conditions and circumstances.

As a matter of principle, the ILO has not opted to prefer one system of collective bargaining over another. This neutral position however is compromised and complicated by its own system of operation, in which it sets a precondition of an organisation being most representative in the member state to participate in its structures.<sup>288</sup> This requirement clearly is an inclination or a preference for majoritarianism and sets the tone for the rest of the ILO's collective labour law policies. Despite this practice, the ILO does not pressure member states to adopt the most representative organisation recognition in its structures as a point of reference to justify a majoritarian model.

There is no expressed indication that the ILO endorses the approach that the rights to freedom of association and to organise are to be accorded subject to a threshold of representivity. As indicated by the ILO, thresholds mainly are relevant in the case of collective bargaining or representation in the structures of the ILO.<sup>289</sup> It is here that numbers are of the essence as there needs to be a proven relationship to the interests of those represented. Where the system establishes thresholds for the enjoyment of labour rights, they should meet the criteria set by the ILO of being "objective and precise pre-established" in the said legislation in order to prevent bias and the abuse of the system.<sup>290</sup>

The ILO has set out cautionary guidelines for both the majoritarian system and the pluralist systems of collective bargaining. The ILO recognises the diversity of local circumstances and conditions in member states and thus there would be leeway for a member state to opt for a collective bargaining system that resonates with the conditions and circumstances of that member state. Where the member state opts to have a majoritarian system of collective bargaining, the ILO still requires that diversity be possible.<sup>291</sup> Significantly, the ILO also mentions that minority trade

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<sup>288</sup> See Chapter 2 at 2.2.

<sup>289</sup> See Chapter 2 at 2.2.

<sup>290</sup> *Digest of Decisions* (2006) paras 356 and 357.

<sup>291</sup> See Chapter 2 at 4.3.

unions should always be allowed to represent their members in respect of individual grievances. It is submitted that disciplinary proceedings should also be included for allowance within a majoritarian system.<sup>292</sup>

This thesis argues that the denial of organisational rights to unrepresentative trade unions limits their rights to freedom of association and to organise and disables the constitutional framework. It is submitted that the ILO has adopted an unambiguous approach towards minority trade unions. The ILO allows collective agreements that set thresholds of representivity having the effect of excluding unrepresentative trade unions from acquiring organisational rights as long as particular conditions are met. These conditions are that there must be pre-established criteria for setting thresholds, minority trade unions must be permitted to represent their members in individual cases, and diversity must remain possible. It is submitted that without organisational rights it is not possible for an unrepresentative trade union to establish itself and to organise its activities such that it is in a position to satisfy that which the ILO signifies it ought to be able to carry out.

The ILO clearly is not opposed to trade union pluralism *per se*. However, it suggests that where pluralism leads to proliferation of trade unions in the workplace, this would not be in the best interest of collective bargaining. Although the ILO views trade union unity as significant diversity as alluded to still needs to be possible.<sup>293</sup> It is submitted that diversity will not be possible where thresholds are set high and collective agreements are able to prevent unrepresentative trade unions to represent their members in grievance or disciplinary proceedings. The ILO has not provided that the enjoyment by unrepresentative trade unions to represent their members in grievance proceedings is subjected to meeting some set threshold. This is where the challenge arises. How is it possible that collective bargaining parties are at liberty to set high thresholds for the acquisition of

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<sup>292</sup> See Chapter 6 at 2.3 where the Constitutional Court decision of *NUMSA v Bader Bop* (2003) 24 *ILJ* 305 (CC) is discussed and includes grievance and disciplinary proceedings as requiring to be allowed in recognition of the right to freedom of association even under majoritarian systems.

<sup>293</sup> See Chapter 2 at 4.3.



organisational rights to the extent that they unjustifiably limit the right to freedom of association of unrepresentative trade unions?<sup>294</sup>

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<sup>294</sup> *Digest of Decisions* (2006) para 347. See also Chapter 2 at 4.2 where the ILO mentions that the fact that there are thresholds of representivity should not deny unrepresentative trade unions right to represent members in certain individual instances.

## Chapter 3

### Constitutional Framework

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#### 1. Introduction

In South Africa the right of freedom of association, the right to organise and the right to engage in collective bargaining are separately enshrined constitutional labour rights.<sup>295</sup> As confirmed by Van Niekerk *et al*<sup>296</sup> constitutional rights affect labour legislation and they perform a test of the “the validity of the law seeking to

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<sup>295</sup> Ss 18, 23(4)(b) and 23(5) of Constitution, 1996.

<sup>296</sup> Van Niekerk *et al* (2015) 38.

give effect to fundamental labour rights; interpret legislation enacted and to develop common law". These labour rights guarantee that the voice of workers is heard in the workplace.

This chapter commences with a discussion of the concept of "democracy." The second part covers an analysis of the negotiation process that led to South Africa's new and constitutional democratic order. The third part provides an exposition of the concept of "democracy" in the Constitution, 1996. The fourth part examines the content of constitutional labour rights. The fifth part provides an exposition of the constitutional limitations clause before conclusions are drawn in the final instance in terms of section 36(1) of the Constitution, 1996.

The different parts of this chapter combine to offer an outline of the evolution of the democratic ethos as demonstrated through the constitutional dispensation and reflect the impact this democratic ethos has on all institutions of society - the workplace is no exception.

## 2. The Concept of "Democracy"

Section 1 of the Constitution, 1996 provides that South Africa is founded on the values of "human dignity, the achievement of equality and the advancement of human rights and freedom, supremacy of the Constitution, regular elections and a multiparty system of democratic government."<sup>297</sup> These values are of fundamental importance because they inform and give substance to all the provisions of the Constitution, 1996.<sup>298</sup> It is submitted that these values are worthy of incorporation in bolstering a democratic ethos for institutions that fall within the ambit of the Constitution, 1996.

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<sup>297</sup> S 7 of the Constitution, 1996 in the same vein as s 1 provides that the Bill of Rights is the cornerstone of democracy that enshrines rights of all people and affirms the values of human dignity, equality and freedom. The Constitution, 1996 does not provide a clear definition of democracy, but supplies adjectives to describe the type of democracy envisaged by the Constitution. It is from these adjectives that the content of democracy can be deciphered.

<sup>298</sup> In *Minister of Home Affairs v NICRO* 2005 (3) SA 280 (CC) para 21 the Constitutional Court held that values enunciated in section 1 of the Constitution, 1996 are of fundamental importance in that they inform and give substance to all other provisions. However, these do not give rise to distinct and enforceable rights in themselves.

For the purposes of this study this definition is utilised as the focal point in the discussion of the model of democracy that South Africa espouses as embedded in the Constitution and its electoral legislation. This constitutional model of democracy uniquely expresses principles that specifically seek to protect and guarantee the rights and interests of minority entities.<sup>299</sup>

According to Touraine “democracy” is a political system which enables individuals to live together under the same set of laws even though they hold different beliefs and have different interests.<sup>300</sup> This definition denotes that there is a plurality of interests and beliefs within a political system. Touraine suggests that although democracy as a concept can be described in various ways, all these descriptions agree on the “central principle of democracy as the ability of political institutions to articulate the diversity of interests or opinions with the unity of the law and of the government”.<sup>301</sup> The common theme in these definitions and perspectives is the recognition of differences in beliefs and interests and the need therefore to have a system that accommodates the plurality of beliefs and interests.

South Africa as part of the African continent plays a role in establishing general standards that resonate with the common history of its African counterparts.<sup>302</sup> The Inter-Parliamentary Council<sup>303</sup> at its 161st session in 1997 adopted the Declaration on Democracy. The Council saw democracy as an ideal to be “applied according to the modalities which reflect the diversity of experiences and cultural particularities without derogating from internationally recognised principles, norms and standards”.<sup>304</sup> What is key is the recognition of diversity in the content of democracy.

Paragraph 1 of the Declaration provides that:

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<sup>299</sup> See the discussion of democracy under the Constitution, 1996 at Chapter 3 at 4.

<sup>300</sup> Touraine in Bassiouni *et al* (1998) 87 available at [www.ipu.org/PDF/publications/DEMOCRACY\\_PR\\_E.pdf](http://www.ipu.org/PDF/publications/DEMOCRACY_PR_E.pdf) (accessed in April 2015).

<sup>301</sup> As above.

<sup>302</sup> See *S v Makwanyane and another* 1995 (3) 391 (CC) at paras 252 and 258. The Constitutional Court judges supported the idea that there is a need to bring traditional African jurisprudence to the determination of issues such as the present and research on issues should not be confined to South Africa only but should be extended to Africa in general.

<sup>303</sup> Bassiouni *et al* (1998) IV available at [www.ipu.org/PDF/publications/DEMOCRACY\\_PR\\_E.pdf](http://www.ipu.org/PDF/publications/DEMOCRACY_PR_E.pdf) (accessed in April 2015). The Inter-Parliamentary Union is an international organisation of parliaments and works in close co-operation with the United Nations. At their 161<sup>st</sup> session the IPU adopted the Universal Declaration of Democracy.

<sup>304</sup> See IPU Declaration (1997) para 2 available at [www.ipu.org](http://www.ipu.org) (accessed in April 2015).

“Democracy is a universally recognised ideal as well as a goal, which is based on common values shared by peoples throughout the world community irrespective of cultural, political, social and economic differences. It is thus a basic right of citizenship to be exercised under conditions of freedom, equality, transparency and responsibility, with due respect for the plurality of views, and in the interest of the polity.<sup>305</sup>

The Inter-Parliamentary Council confirms the sentiment that the democratic idea should take cognisance of the conditions and circumstances of particular countries and have these resonate with internationally recognised premises.

It is submitted that the Inter-Parliamentary Council perspective on paying due respect to a plurality of views is a recognition of the historical context during the colonial period when minority political parties were the only representation that was recognised. These views as expounded and demonstrated during the negotiations for a democratic and constitutional order for South Africa reflect the plurality of views referred to in the definition or perspective of the Inter-Parliamentary Council. The recognition of a plurality of views is not to be viewed as tantamount to the adoption of all views, but rather that when a determination is made they are considered fairly and equitably.

The perspective on democracy that recognises the colonial past and the historical injustice in South Africa’s provides the appropriate context for an analysis of democracy and its impact on institutions of society and society at large.<sup>306</sup> An analysis which aims to propagate the democratisation of society appropriately should be based in local conditions.<sup>307</sup> In this regard the local conditions pertinent to South Africa are that the apartheid policy ensured that a minority of the population is privileged and a majority made outcasts in this privilege leading to diversified approach to ridding South Africa of its past.

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<sup>305</sup> See Bassiouni *et al* (1998) iv available at [www.ipu.org/PDF/publications/DEMOCRACY\\_PR\\_E.pdf](http://www.ipu.org/PDF/publications/DEMOCRACY_PR_E.pdf) (accessed in April 2015).

<sup>306</sup> See Fayemi *JPAK* 1 (2009) 102 and 108. The author draws attention to the view that many African political scholars and politicians find it absurd to think of the possibility of an African theory of democracy without the need for the utilisation of Africa’s democratic heritage and values, rooted in her traditional past in resolving her peculiar problems.

<sup>307</sup> See Nwauwa’s paper presented at Fourth Annual Kent State University Symposium on Democracy available [www.upress.kent.edu/Nieman/Concepts\\_of\\_Democracy.htm](http://www.upress.kent.edu/Nieman/Concepts_of_Democracy.htm) (accessed in April 2015), where the author argues that the notions of democracy are not foreign to Africa as Western liberal democratic theorists have suggested.

Shivzi's perspective on democracy requires the concept to be seen in a broader context that goes further than a consideration of the interests of the masses of the people within the new democracies.<sup>308</sup> The author views the structure of the liberation movement and democratic discourse in Africa as being "disfigured" by the cold war, in which the new democratic states were made "pawns, and the continent into a chessboard, of proxy hot wars." Shivzi cautions that as a new democracy South Africa should be wary of developing into a "so-called democracy constructed on ahistorical and asocial paradigms of neo-liberalism", which he argues "is an expression of renewed imperial onslaught, which is profoundly anti-democratic".<sup>309</sup>

At the CODESA negotiations post-apartheid were represented groups with divergent interests and political philosophies. It is these divergent interests and political postures that find reflection in the Preamble to the Constitution, 1996 in which, despite the injustices of the past, citizens "believe that South Africa belongs to all who live in it, united in our diversity". In this context, the definition offered by the Inter-Parliamentary Council is reflective of the type of democracy that South Africa embraces. What follows is a discussion of the significant role trade unions played in the democratisation process.

### 3. Negotiating the New Constitution

The Constitution, 1996 and the Bill of Rights are the product of negotiations at which the African National Congress (ANC) and the Nationalist Party (NP) were the dominant role players. During the negotiation of a democratic dispensation<sup>310</sup> according to Woolman and Swanepoel, the ANC's electoral strength provided an environment within which there were few incentives for them to accommodate

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<sup>308</sup> Shivzi (2003) available at [www.marxists.org/subject/africa/shivji/struggle-democracy.htm](http://www.marxists.org/subject/africa/shivji/struggle-democracy.htm) (accessed in 14 April 2015), makes the cogent point that the concept of democracy is not a simple phenomenon at all. See also Nwauwa's paper on Democracy available [www.upress.kent.edu/Nieman/Concepts\\_of\\_Democracy.htm](http://www.upress.kent.edu/Nieman/Concepts_of_Democracy.htm) (accessed in April 2015), where the author cautions us not to look at democracy as a concept from a simplistic point of view, but rather to be aware that African pro-democracy and human rights movements were under pressure and their momentum hijacked by the West and its agencies in furthering their own interests.

<sup>309</sup> As above.

<sup>310</sup> Woolman and Swanepoel in *Woolman et al* (2014) 2:37.

concerns from relatively smaller parties in the process of finalising the constitutional dispensation.<sup>311</sup>

After the exit of the Inkatha Freedom Party (IFP)<sup>312</sup> from the Constitutional Assembly, the ANC and the NP proceeded drafting a constitution.<sup>313</sup> Politically, the major players could conclude negotiations without the participation of minority political parties. However, had one of the dominant parties, namely, the ANC or the NP government left the negotiations the multi-party talks would have collapsed. Fortunately, the negotiations succeeded.

The primary goal of the ANC was to negotiate a constitutional dispensation that would create a government based on majority rule.<sup>314</sup> The NP and the IFP, as minority parties, worked at ensuring that minority interests would be protected to some extent before the Constitution was finalised in 1996.<sup>315</sup> The IFP advocated a federal government which they saw as a bulwark against unfettered majority rule by the ANC.<sup>316</sup> The NP also argued against centralised power in a national government which inevitably would be led by the ANC due to its popularity amongst the black majority, and proposed that provinces and local government be given proportional powers.<sup>317</sup> In the furtherance of these views they argued for an equal voice for parties in the negotiations, but this position was rejected on the grounds of the sovereignty of the majority.<sup>318</sup>

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<sup>311</sup> As above.

<sup>312</sup> The IFP is the political party led by Chief Buthelezi and was not as popular as the ANC and therefore technically can be considered a minority political party. Further, reference to the IFP is only for purposes of demonstrating the point that minority views even amongst the oppressed majority were not a major factor in determining the process of building a truly democratic society. See Woolman and Swanepoel in Woolman *et al* (2014) 2:37. The authors state that the IFP having a stronghold in the Kwazulu Natal region of South Africa argued for a federal government that would provide some autonomy for the regions where their support lay and also ensure there are limits to the powers of a national government.

<sup>313</sup> Woolman and Swanepoel in Woolman *et al* (2014) 2:41. See also Murray *IJLI* (2004) 344-345.

<sup>314</sup> As above.

<sup>314</sup> As above at 2:37.

<sup>315</sup> As above.

<sup>316</sup> As above. See also Mbatha *Codicillus* (XLIV) 3 fn 7 where the author provides a fairly simple description of the counter-majoritarian dilemma, that basically it “revolves around the legitimacy of judicial review, whether unelected and allegedly unaccountable judges should be allowed to strike down legislation enacted by elected and legitimate people’s representatives in Parliament and whether judicial review may be compatible with popular sovereignty and democracy.

<sup>317</sup> Woolman and Swanepoel in Woolman *et al* (2014) 2:37.

<sup>318</sup> As above. See also Mbatha *Codicillus* (XLIV) 3 fn 7 to compare these expressed by the IFP and the NP in contrast to the description of the counter-majoritarian dilemma by the author.

In addition to the demand made by minority political parties Klug<sup>319</sup> notes an argument on behalf of minority parties that “allowing a minority of the members of a legislature to send a Bill directly to the Court for constitutional review before it is enacted into law would enhance the democratic participation of legislative minorities.” This, it is submitted was taking accommodation of minority political parties in a democracy too far. Furthermore, it was argued it resolves the counter-majoritarian dilemma “by giving the legislature a chance to respond to judicial determinations of unconstitutionality prior to the enactment of a law”.<sup>320</sup>

Against the relative strength of majority parties, it is argued that the fact that the voices in question are unequal should not render minority views and contributions irrelevant. Such views assist the majority voice to take cognisance of minority interests. The ANC were suspicious of the submissions on behalf of minority interests and viewed them as a disguise to protect minority privileges and the *status quo*.<sup>321</sup> The ANC in the certainty of majority support in an election rejected these proposals as they would dilute their interests as the party with majority support.

As discussed below, compromises were reached which recognise minority party interests as demonstrated in the constitutional provisions. It is submitted these provisions should be taken into account when evaluating the role of minority trade unions in South Africa.

The Constitutional Court in *Ex Parte Chairperson of the Constitutional Assembly: In Re Certification of the Constitution of the Republic of South Africa*<sup>322</sup> recognised and commended the contribution of the political leadership and said:

“remarkably and in the course of but a few years, the country’s political leaders managed to avoid a cataclysm by negotiating a largely peaceful transition from the rigidly controlled minority regime to a wholly democratic constitutional dispensation. After a long history of ‘deep conflict between a minority which reserved for itself all control over the political instruments of

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<sup>319</sup> Klug ASSAL (1995) 5.

<sup>320</sup> As above.

<sup>321</sup> Ramaphosa SAJIL (1991) 29. Ramaphosa stated that the proposals of the NP were “designed to make it totally impossible for the party which wins the elections to govern the country. A minority party will be able to hold the majority party to ransom” and they “represent another unique white South African contribution to the theory of democracy which hopefully will find its way into the dust bins of history.”

<sup>322</sup> (1996) (4) SA 744 (CC) para 10.



the state and a majority who sought to resist that domination', the overwhelming majority of South Africans across the political divide... negotiated...a fundamentally new constitutional order..."

The negotiators agreed to accommodate the interests of minority political parties and this compromise was embedded in the Constitution, 1996. The protection of minority parties in this context was not tantamount to the prevention of effective government by the majority party. Rather it allows for diversity and lobbying by those diverse interests for the ultimate good.<sup>323</sup> Later in this thesis it is argued that this principle should also apply to minority trade unions.<sup>324</sup>

The position of the ANC was strengthened by the establishment of the Patriotic Front that included minority groups such as the Pan Africanist Congress (PAC).<sup>325</sup> According to Ramaphosa the PAC, which essentially was a minority political party, initially was not part of the multi-party negotiations between the former NP government and the ANC as major parties.<sup>326</sup> The umbrella of the Patriotic Front allowed them a voice in the multi-party negotiations. Organised labour, through their representatives in the dominant federations Congress of South African Trade Unions (COSATU) and the National Council of Trade Unions played a significant role during the negotiations.<sup>327</sup>

This is the context within which minority political party participation in the envisaged democratic model is founded. The purpose is to recognise the diverse nature of the politics and interests of the people of South Africa and to allow a broader forum for these different voices that ordinarily would have fallen away.<sup>328</sup>

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<sup>323</sup> This principle, emanating from the referred to compromise, arguably gave impetus to the choice of proportional representation as the electoral system for the country. See the discussion of the electoral system of proportional system as applicable to South Africa at 5.3 below.

<sup>324</sup> See Chapter 5 and 6.

<sup>325</sup> The Pan Africanist Congress is a minority political party that had a different philosophy and policy stance to the ANC. Together with the ANC and the South African Communist Party they were unbanned by government in order to provide for an environment in which negotiations for a new democratic and constitutional order could begin.

<sup>326</sup> Ramaphosa *SAJIL* (1991) 37. See also Carpenter and Bewkes *JAL* (1992) 168. The authors identify the organisations that initially refused to participate as being from the extreme right (listed as Conservative Party, Herstigte Nasionale Party and some of the right-wing groupings that sprung up), and the extreme left, (listed as Pan Africanist Congress, Azanian People's Organisation). Even though these are minority parties their role was not discounted because of the emphasis placed on the need for consensus.

<sup>327</sup> ILO Fact Finding Mission (1992) paras 34 and 153.

<sup>328</sup> Esitang and Van Eck *ILJ* (2016) 771 mention that the fact the ANC and the NP were major parties did not have them excluding parties with minority support during the multi-party negotiations at CODESA. 19 political parties in total participated in the writing of the Constitution. In contrast to the earlier position of the ANC to continue negotiations despite the IFP, a minority party, having left

According to Hopper<sup>329</sup> dialogue and the negotiations ultimately resulted in a compromise with minority political parties which gave them a voice in the Government of National Unity. This compromise was in stark contrast to popular slogans which emerged during the period before the first elections. These included chants like “long live the spirit of no compromise,” and “freedom or death,” and were common before the accord was reached.<sup>330</sup>

The protection of minority interests through party political affiliation was later incorporated into the Interim Constitution,<sup>331</sup> and became the foundation for South Africa’s political structure.<sup>332</sup> Principle XIV of the Interim Constitution declared that “provision shall be made for participation of minority political parties in the legislative process in a manner consistent with democracy”.<sup>333</sup> This provision forms the basis upon which the role and place of minority trade unions will also be evaluated in the chapters to follow.<sup>334</sup>

Political parties with diverse ideologies and interests, including those that were minority political parties, were accommodated by Principle VIII which embraced multiparty democracy and proportional representation.<sup>335</sup>

In *S v Makwanyane*<sup>336</sup> the Constitutional Court considered a matter that did not relate to political parties but was borne out of the constitutional spirit and purport.

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the negotiations, that the IFP, as a minority party, was wanting to hold the pre-constitutional negotiations to ransom. This was a major shift in position by the leader of the liberation movement to compromise for the benefit of a peaceful transition to a new democratic and constitutional state to have minority political parties participating in the process.

<sup>329</sup> Hopper (2008) 1.

<sup>330</sup> See International IDEA Report (2000) 21. This is a report on the workshops that were held in Chiangmai, Thailand and New Delhi, India in 2000 on the topic “Negotiating a Political Settlement in South Africa: Are there lessons for Burma.”

<sup>331</sup> See Principle XIV of the Interim Constitution Act 200 of 1993. See also Hopper (2008) 1 where the author states that the Interim Constitution established a multi-party system and enabled minority parties with 5% of the national vote a position in the cabinet and introduced proportional representation.

<sup>332</sup> The minority interests in question were not only white minority interests. It also concerned interests rooted in the ideological consciousness of dispossession or economic freedom and maintenance of the *status quo* as concepts embodied by organisations such as the Pan Africanist Movement, the Black Consciousness Movement and the Freedom Front respectively. These were and still are minority parties with views that are fundamentally different from those of the ANC and the Democratic Party which are major players in the present political setting.

<sup>333</sup> Constitution, 1996.

<sup>334</sup> See Chapters 4, 5 and 6.

<sup>335</sup> As above.

<sup>336</sup> 1995 (3) SA 391 (CC) para 7.

In this case the Constitutional Court recognised that the Interim Constitution provided that:

“a historic bridge between the past of a deeply divided society characterised by strife, conflict, untold suffering and injustice, and a future founded on the recognition of human rights, democracy and peaceful co-existence and development opportunities for all South Africans, irrespective of colour, race, class, belief or sex.”<sup>337</sup>

The co-existence referred to by the Constitutional Court easily can lead to the wrong conclusion that it refers exclusively to different race groups in political parties. However, this interpretation is not correct, as peaceful co-existence refers to the different manifestations of differentiation, such as political affiliation and convictions, sexual orientation or religious beliefs. This diversity is a reality that is manifest in workplaces too. Section 1 of the LRA of 1995 provides that it seeks to give effect to the Constitution, 1996, and has the purpose “to advance economic development, social justice, labour peace and the democratisation of the workplace”.

The willingness to compromise and to accommodate a minority and its interests is borne out of the Constitution, 1996. Even though the labour relations premise is not the same as the political setting, it is submitted that through analogy the labour relations framework cannot be immune to the principles of the Constitution, 1996 as applicable to minority interests within the context of political parties. The concept of “democratisation of the workplace” includes the notion that workers elect representatives who will represent them and pursue their interests in the workplace whether these interests are individual interests of employees or collective interests. Bendix<sup>338</sup> commendably provides a clearer exposition of the objective parallelism between political and workplace democracy and states that:

“[p]olitical democracy is interpreted to encompass, ... the principles of ... government for the people by the people. If this concept of democracy is transferred to the labour relations sphere, then democracy would encompass ... the government of the organisation by all concerned or by their elected representatives.”

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<sup>337</sup> As above.

<sup>338</sup> Bendix (2015) 576. Bendix concedes that the analogy between political democracy and workplace democracy is complicated and inhibited by the principle of private property ownership even though this principle is diluted by corporate share-holding.

The thesis is not about employee participation, but rather employee representation and the realisation thereof through collective bargaining. In the context of South Africa,<sup>339</sup> the argument by Bendix<sup>340</sup> that workplace democracy is best practised by the institutionalisation of free collective bargaining as it limits the authority and prerogative of management is supported.

In South Africa all facets of society and activity are a mirror of the values and principles of an existent political system. Therefore, it is justifiable to argue that the workplace democratic ethos should be a consequential manifestation of the existent form of political democracy. This premise justifies juxtaposing the model of democracy as espoused by the Constitution, 1996 to workplace democracy. Consequently, political democracy becomes a prerequisite and provides an appropriate context for workplace democracy. Pateman<sup>341</sup> correctly argues that “a society where all political systems are democratised ... and socialisation through participation can take place in all areas” including the workplace.

The greater the number of members belonging to a trade union in a workplace, the greater the chances that the said trade union will enjoy greater influence through representation of workers in the workplace. This is made possible through the exercise of organisational rights. These organisational rights not only entail recognition for purposes of representing members in disciplinary hearings and grievance proceedings whilst having minority status, but bolsters the representation of workers in collective bargaining as well when set thresholds for collective bargaining rights are met.<sup>342</sup>

#### 4. Democracy under the Constitution, 1996

##### 4.1. Introduction

Section 1 of the Constitution, 1996 provides that South Africa is founded on the values of “human dignity, the achievement of equality and the advancement of

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<sup>339</sup> See Chapter 1 at 2.2 and 2.3 on the discussion of workplace forums and the route taken by trade unions towards realising workplace democracy.

<sup>340</sup> Bendix (2015) 577.

<sup>341</sup> Pateman (1970) 43.

<sup>342</sup> See Chapter 2 paras 4.3 and 4.4 and Chapter 5 at 4.3.

human rights and freedom, supremacy of the Constitution, regular elections and a multiparty system of democratic government.”<sup>343</sup> The values enunciated in section 1 of the Constitution, 1996 are of fundamental importance, because they inform and give substance to all the provisions of the Constitution.<sup>344</sup>

The Constitution, 1996 provides for the participation of political parties within the context of a representative, multi-party democracy and proportional representation system.<sup>345</sup> These values and provisions explicitly endorse the protection of minority political parties and importantly provide the conditions and circumstances that are to be taken into account when considering international law in the interpretation of the Bill of Rights.

The content given to democracy in the Constitution, 1996 expresses the dimension of “a multi-party system of democratic government” as espoused in section 1. The concept of “democracy” in the Constitution, 1996 is qualified by four adjectives that seek to capture its essence. Section 57(1)(b) makes provision for national assembly procedures that are “representative,” “participatory,” “constitutional” and “multi-party.”<sup>346</sup> This part offers an exposition of the different models of democracy espoused in the Constitution, and explores the interrelatedness of these forms of democracy and their significance. These forms of democracy provide the full context and the underlying constitutional values in which employee participation in the workplace is discussed. It also significantly provides the full context to the discussion of the impact of thresholds of representivity on trade union activity in representing the interests of members.

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<sup>343</sup> S 7 of the Constitution, 1996 in the same vein as s 1 provides that the Bill of Rights is the cornerstone of democracy that enshrines the rights of all people and affirms the values of human dignity, equality and freedom. The Constitution, 1996 does not provide a clear definition of democracy, but employs adjectives to describe the type of democracy envisaged by the Constitution. It is from these adjectives that the content of democracy can be deciphered.

<sup>344</sup> In *Minister of Home Affairs v NICRO* 2005 (3) SA 280 (CC) at para 21 the Constitutional Court held that values enunciated in section 1 of the Constitution, 1996 are of fundamental importance in that they inform and give substance to all other provisions. However, they do not give rise to distinct and enforceable rights in themselves.

<sup>345</sup> Ss 57(b), 70(b), 116(b) of the Constitution, 1996 refer to representative, participatory, multi-party and constitutional democracy as the way in which the business of government is carried out. Ss 1, 199(8) and 236 also specifically provide for a democracy that is multi-party in nature in the business of government or political activity, whilst ss 105(d), 46(d) and 157(2)(a) promote elections that result in proportional representation.

<sup>346</sup> See also Roux in Woolman *et al* (2014) 10:2.

## 4.2. Representative Democracy

The Constitution, 1996 does not offer a definition of representative democracy. However, this notion is the basis for the rules and orders concerning the business of the National Assembly, the National Council of Provinces, National and Provincial Legislatures.<sup>347</sup> According to Boye, the classical tradition of representative democracy is that the elected representatives of the nation adopt laws and scrutinise the execution of public policies.<sup>348</sup>

In his somewhat cynical view of representative democracy, Rousseau views representative democracy as an illusion in which citizens pretend to themselves that they have control over their elected representatives, whereas in reality they have handed over control of the decision-making powers to those who do not have the public interest at heart.<sup>349</sup> This is a serious indictment of this form of democracy. However, in reality this form of democracy is characterised by the actuality that elected representatives are always at the mercy of the electorate and if they do not deliver the goods or are unresponsive to the interests of the electorate they can be voted out.<sup>350</sup> In *Doctors for Life International v Speaker of the National Assembly and Others*, the minority judgement as per Yacoob J with Van der Westhuizen concurring held that:

“South Africa’s democracy can be described neither as participatory nor representative. It has, like most democracies, both participatory and representative elements. It would also be a mistake, in my view, to conclude that a democracy has participatory elements only if it permits a level of direct public involvement in the legislative process. In other words, democracies that permit a measure of direct public involvement are not the only democracies with participatory elements in them. The place of public involvement in our democracy can be ascertained by looking at the relationship between representative and participatory elements in our constitutional democracy. The meaning of public involvement must be determined in that context.”<sup>351</sup>

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<sup>347</sup> See ss 57, 67, 70, 78, 116 of Constitution, 1996.

<sup>348</sup> Boye in Bassiouni *et al* (1987) 41 available at [www.ipu.org/PDF/publications/DEMOCRACY\\_PR\\_E.pdf](http://www.ipu.org/PDF/publications/DEMOCRACY_PR_E.pdf) (accessed in April 2015).

<sup>349</sup> Roux in Woolman *et al* (2014) 10:6.

<sup>350</sup> In *Richter v Minister for Home Affairs and Others* 2009 (5) BCLR 448 (CC) para 53 the Constitutional Court emphasised the significance of the right to vote and held, even though the issue is raised within the context of political parties, it should be equally applicable in the workplace. The power of those who vote lies in their ability to replace their representatives as and when they wish.

<sup>351</sup> *Doctors for Life International* at para 272.

Therefore, it is not in all instances that it is true that those elected do not have the interests of the public at heart. The above minority judgement reflects a response to the call for direct representation and any assertion based on Rousseau's view that representative democracy remains an illusion. The Constitutional Court confirmed that representative democracy entailed taking steps to ensure that the public participates in the legislative process and does not simply leave it to their representatives.<sup>352</sup>

In the context of labour relations representatives of trade unions are accountable to workers, in the same way that public representatives are dependent on the voting citizenry. If the trade union representatives are found not to be representative of the interests of the workers, similarly, they can be voted out. The choice of the collective bargaining model, whether majoritarian or pluralist, undoubtedly impacts on the content of democracy in the workplace.

#### 4.3. Participatory Democracy

In the case of *Doctors for Life International*, the Constitutional Court emphasised the participatory element in democracy in terms of the Constitution, saying that:

“[c]ommitment to principles of accountability, responsiveness and openness shows that our constitutional democracy is not only representative, but also contains participatory elements...It is apparent from the Preamble to the Constitution that one of the basic objectives of our constitutional enterprise is the establishment of a democratic and open government in which the people shall participate to some degree in the law-making process.”<sup>353</sup>

Aragonès's definition describes a process of collective decision-making that combines elements from both direct and representative democracy, in which citizens have the power to decide on policy proposals and politicians assume the role of policy implementation.<sup>354</sup> His definition of participatory democracy is close to the view expressed by the Constitutional Court, but does not limit participation to a role in making the law. Roux confirms a relationship between direct and

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<sup>352</sup> As above at para 120.

<sup>353</sup> At para 111.

<sup>354</sup> Aragonès *EER* (2008) 1.

participatory democracy in so far as both types emphasise the value of public participation in the making of collective decisions.<sup>355</sup>

The majoritarian system which entails that the “winner takes all” within the context of industrial democracy places the majority trade union at an advantage over all other trade unions. The majority trade union enjoys all organisational rights and is able to negotiate with the employer to the exclusion of unrepresentative trade unions.

A strictly majoritarian model of democracy does not accommodate the participation of the broader public wherein elements of minority interests are embedded. Participation under this model would be only exclusive to the majority political party to the exclusion of non-majority political parties. By analogy in the context of labour relations participatory democracy restricts participation in decision making only to members of the majority trade union and the participation of minority parties is excluded solely because of their minority status. The pluralist model of democracy on the other hand recognises the participation of a plurality of political parties and their participation in public affairs. The pluralist model of democracy wherein citizens through their parties are able to have a voice in the affairs of government more closely resembles a participatory democracy than does the majoritarian model.

#### 4.4. Multi-party Democracy

Section 19(2) of the Constitution, 1996 gives every citizen the freedom to make political choices.<sup>356</sup> In *United Democratic Movement v The President of the Republic of South Africa and others (No 2)*,<sup>357</sup> the Constitutional Court held that:

“A multi-party democracy contemplates a political order in which it is permissible for different political groups to organise, promote their views through public debate and participate in free and fair elections. These

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<sup>355</sup> Roux in Woolman *et al* (2014) 10:14.

<sup>356</sup> S 19 of the Constitution, 1996 provides:

“(1) Every citizen is free to make political choices, which includes the right-

(a) to form a political party’

(b) to participate in the activities of, or recruit members for, a political party; and

(c) to campaign for a political party or cause.”

<sup>357</sup> 2003 (1) SA 495 (CC) at para 26.



activities may be subjected to reasonable regulation compatible with an open and democratic society. Laws which go beyond that, and which undermine multi-party democracy, will be invalid.”

Multi-party democracy is similar to a pluralist democracy because central to the theory is the existence of diverse political parties in competition for the votes of the citizenry. According to Ramaphosa, the ANC wanted a parliamentary system which operates on the basis of accepted principles of democracy and recognises that all parties have the right to exist, to meet, to promote their policies, to canvass support and to participate freely in elections.<sup>358</sup> The author is of the opinion that pluralist democracy is in contrast to the principle of majoritarianism and does not regard the principle as being reconcilable with pluralist democracy.<sup>359</sup> Malan draws a clear distinction between governing and domination. He argues that the majority has the right to govern, but not to dominate or suppress minorities.<sup>360</sup> These concerns are met through the provisions in the Constitution, 1996 that guarantee minority rights.

Sections 61(3) and 70(1)(c) of the Constitution, 1996 promote the participation of minority parties in the legislature (national and provincial). Haysom convincingly argues that what is true for political parties in the context of exercising the right to freedom of association in contemporary democracies equally is true for trade unions.<sup>361</sup> The ILO Fact Finding Mission in 1992 expressed the view that trade unions like political parties have different histories and associational bases. Like political parties the outlook of any trade union is informed and based on a theory of class consciousness, political philosophy or affiliation.<sup>362</sup> It is submitted that these outlooks and their diversity provide an occasion for robust exchange and

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<sup>358</sup> Ramaphosa *JIL* (1991) 29.

<sup>359</sup> Malan *TSAR* 3 (2010) 436.

<sup>360</sup> As above.

<sup>361</sup> See Haysom in Cheadle *et al* (2016) 13:2.

<sup>362</sup> ILO Fact Finding Mission (1992) 40 paras 159 and 162. So, for example the United Workers Union of South Africa (UWUSA) was an offspring of the Inkatha Freedom Party. However, the National African Congress of Trade Unions (NACTU), the second largest in the country had no alliance with a political party. It represented the black-consciousness tradition and differs with other unions on that basis. In News 24 available at [www.news24.com/elections/.../nactu-backs-eff-pac-in-2014-elections-20...](http://www.news24.com/elections/.../nactu-backs-eff-pac-in-2014-elections-20...) (accessed on 12 April 2016), NACTU was reported as backing the Pan Africanist Congress and the Economic Freedom Front in the 2014 elections. In the COSATU discussion paper “The Alliance at a Crossroads - the battle against a predatory elite and political paralysis,” COSATU confirms the alliance between itself, the African National Congress and the South African Communist Party. There are other federations besides the above-mentioned and these are the Federation of Unions of South Africa (FEDUSA) and the Confederation of South African Workers Unions (CONSAWU). This multiplicity reflects the diverse political parties in South Africa.

debates in the relevant *fora*, including providing workers with a sense of identity which informs the choice of trade union membership.<sup>363</sup>

It is argued that multi-party democracy is accommodating to minority political parties. Similarly, a diversity of trade unions in the workplace is an assertion of multiparty democracy and enables the vibrancy of trade union activity in the workplace for the common advancement of worker interests. It is submitted that the fact that a minority trade union has minority status should not disqualify it from participation in a multi-union workplace democracy.

#### 4.5. Constitutional Democracy

The curtailment of “majority rule” in a particular democratic model is the subject of debate in constitutional law circles. In a constitutional democracy, the courts often are called upon to review legislative and executive decisions and in so doing are seen as acting against the will of the people exercised through their democratically-elected representatives.<sup>364</sup>

Bekink supports the view that there are no irreconcilable differences between the roles of the elected representatives in parliament and that of the unelected judiciary in advancing democracy, as long as pre-determined rules, procedures and fundamental rights are followed.<sup>365</sup> This view suggests that the judiciary may not usurp the role of the legislature, as that would violate the principle of separation of powers.<sup>366</sup>

Where the protection and promotion of minority interests as part of a model of constitutional democracy like South Africa, the function of the courts would be to ensure that these rights are guaranteed and protected.<sup>367</sup> This model

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<sup>363</sup> See Davis in Cheadle *et al* (2016) 12:2.

<sup>364</sup> See Bekink (2012) 59 wherein the author states that the importance of judicial review is often clouded by the concept referred to as the “counter-majoritarian dilemma.”

<sup>365</sup> Bekink (2012) 60.

<sup>366</sup> As above at 61. See also *Democratic Alliance v President of the RSA and others* 2013 (1) SA 248 (CC) para 41. The Constitutional Court held that if the decisions of the executive can be set aside too easily, there would be a danger of the judiciary entering this sphere too easily. On the appointment of the National Director of Public Prosecutions (NDPP), the Constitutional Court held that the failure of the president in taking account of the negative findings of the commission of enquiry relating to the appointed NDPP were irrational and therefore fatal to his appointment.

<sup>367</sup> Bekink (2012) 61.

encompasses a conciliatory principle recognising the injustices of the past and its divisions and seeks to reconcile them.<sup>368</sup>

A pluralist model of democracy that provides for the protection and promotion of minority political parties epitomises the model of democracy as espoused by the Constitution, 1996. It is submitted that minority interests catered for in the Constitution, 1996 are not related solely to political ideology and defined on racial grounds as the diversity of South African society does not reflect only a racial divide, there are other grounds, *inter alia*, class, gender, consciousness and political philosophy.

Constitutional democracy in seeking expressly to guarantee and protect the interests of minority political parties in the identified provisions of the Constitution, 1996 attempts to balance the interests of the majority and those who hold minority interests. The interests of a minority and those of a majority are not only manifest and are sometimes at loggerheads within a political party setting, but other spheres of society including the workplace. These two contrasting interests were the focal point in the Constitutional Court case of *S v Makwanyane*.<sup>369</sup> The Constitutional Court dealt with the question whether the death sentence in terms of s 277(1)(a) of the Criminal Procedure Act 51 of 1977 was constitutional in light of the fact that the Constitution, 1996 provides for the right to life.<sup>370</sup> On the argument that the majority in South African society is not opposed to the death sentence being imposed in extreme cases of murder the Constitutional Court held that:

“The question...is not what the majority of South Africans believe a proper sentence for murder should be. It is whether the Constitution allows the sentence. Public opinion may have some relevance to the enquiry, but, in itself, it is no substitute for the duty vested in the Courts to interpret the Constitution and to uphold its provisions without fear or favour. If public

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<sup>368</sup> Preamble of the Constitution, 1996.

<sup>369</sup> *S v Makwanyane* 1995 (3) 391 (CC) para 88. See also Klug *SAJHR* (1997) 199. The author discusses the cases of *S v Makwanyane* 1995 (3) 391 (CC) and *Executive Council, Western Cape Legislature v President of the Republic of South Africa* 1995 (4) SA 877 (CC), and how judicial review as a judicious style of intervention impacted on the Constitutional Court being prepared to strike down intensely politicised legislation passed by a democratically elected Parliament and an extremely popular president. Clearly, the judiciary will interfere with legislation passed by a popular government with majority support in pursuit of its constitutional responsibility.

<sup>370</sup> As above. The issues were dealt with by the Constitutional Court under the Interim Constitution Act 200 of 1993 and as a matter of fact the right to life had already been made a constitutional right. The death sentence as a criminal sanction was abolished in terms of s 35 of the Criminal Law Amendment Act 105 of 1997 and by way of contrast s 9 of the Interim Constitution provided for the “right to life.”

opinion were to be decisive, there would be no need for constitutional adjudication. The protection of rights could then be left to Parliament... answerable to the public for the way its mandate is exercised, but this would be a return to parliamentary sovereignty.”<sup>371</sup>

The attitude of the Constitutional Court towards popular views and sentiments is that these should not distract it from “its duty as an independent arbiter of the Constitution” by making determinations based on what makes the public or a majority content.<sup>372</sup> It sees as its duty, within its ability and powers, that when required to do so on necessity to disregard majority opinion where the interests of a minority are unjustifiably threatened or prejudiced.<sup>373</sup> These sentiments of the Constitutional Court are highly relevant in the workplace, where the concept of democracy is arguably defined somewhat contrary and inconsistently to the spirit and purport of the Constitution, 1996.

The Constitutional Court has been vocal in the protection of minority rights or interests and held that:

“Those who are entitled to claim this protection include the social outcasts and marginalised people of our society. It is only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected.”<sup>374</sup>

The reason provided by the Constitutional Court in this case for the establishment of the new legal order, and for granting the courts the power to review all legislation, “was to also protect the rights of minorities and others who cannot protect their rights adequately through the democratic process.”<sup>375</sup> It is submitted that this confirms that the principles and values, especially those that relate to minority rights protection as reflected by the Constitution, 1996 pervade all levels of activity of South Africa. Whether these activities are within political institutions

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<sup>371</sup> As above at para 87.

<sup>372</sup> As above at para 88.

<sup>373</sup> As above. The Constitutional Court cited the sentiments echoed by the European Court on Human Rights in the case of *Young, James and Webster v UK* that “the hallmarks of a democratic society are pluralism, tolerance and broad-mindedness. Although individual interests must on occasion be subordinated to those of a group, democracy does not mean that the views of a majority must always prevail: a balance must be achieved which ensures the fair and proper treatment of minorities and avoids any abuse of a dominant position.’ The principle that cognisance must be taken of minority opinions should apply with at least equal force to majority opinions; if one of the functions of the Constitution, 1996 is to protect unpopular minorities from abuse, another must surely be to rescue the majority from marginalisation.”

<sup>374</sup> As above.

<sup>375</sup> As above.

or within the workplace and its institutions, these principles and values should apply.

The content of constitutional democracy has been amplified in *Democratic Alliance v Masondo NO and another*<sup>376</sup> where Justice Sachs stated that:

“the Constitution does not envisage a mathematical form of democracy, where the winner takes all until the next voting-counting exercise occurs. Rather, it contemplates a pluralistic democracy where continuous respect is given to the rights of all to be heard and have their views considered.”

Justice Sachs further elaborated that the responsibility for taking care of the interests of the citizenry does not lie with the majority alone taking unilateral decisions, but rather includes the views of minorities.<sup>377</sup> The role of the minority parties is described as not simply the pursuit of selfish ends or to block the exercise of majority power, but rather to provide an instrument usable for the balance between “deliberations and the decision.”<sup>378</sup>

The above-mentioned cases demonstrate that the Constitutional Court is prepared to limit the power and interests of majority entities in instances where they are unjustifiably exercised or where they are unjustified against the interests of minority entities. Significantly, these cases demonstrate the content of democracy envisaged by the Constitution, 1996. In the context of labour relations, where the powers and interests of a majority trade union unjustifiably limit the rights of a minority trade union, it is submitted that the logic displayed in the Constitutional Court’s intervention is appropriate here too.

On this basis, it is argued that the right of the majority trade union to enjoy the right to engage in collective bargaining is not to extend to the right to unjustifiably exclude the enjoyment by an unrepresentative trade union’s right to freedom of association and specifically the right to represent members in individual cases such as disciplinary and grievance proceedings. This allowance should not be seen as a free for all, but rather could be a right that is afforded to trade unions

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<sup>376</sup> 2003 (2) SA 413 (CC) para 42.

<sup>377</sup> As above at para 43. The Constitutional Court was very careful to outline that to be heard during the referred to deliberations does not mean endless debates until consensus is reached, but rather to debate how best to improve the lives of the people.

<sup>378</sup> As above.

that are already active in the workplace or the sector. This makes the lower threshold the more relevant instrument to measure which trade union is to acquire organisational rights.

## 5. Electoral Systems

### 5.1. Introduction

There are two main electoral systems practiced by states in electing a parliament, namely, the majoritarian and the proportional representation systems.<sup>379</sup> An exposition of these two electoral systems is provided. The fact that only these two systems will be discussed does not mean that they are the only electoral systems. Hybrid systems that include elements of both majoritarianism and proportional representation also exist<sup>380</sup> This part seeks to provide meaning and content to these electoral systems and to show how the electoral system enhances the model of multi-party democracy and proportional representation espoused by the Constitution, 1996.

The electoral system and the model of democracy that the Constitution espouses provide the context and content to inform and guide institutions of democracy in the political arena. It is the principles that emanate from the system that resonates with the Constitution, 1996 that will inform the content that may be provided as the content to workplace democracy. It is this context that can serve to provide by analogy the content and principles that workplace democracy can emulate.

### 5.2. The Majoritarian Electoral System

According to Norris<sup>381</sup> the majoritarian electoral system is encapsulated by the well-known tenet of “winner takes all”. Under the majority representation system, political parties seek to become a parliamentary majority as this enables them to

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<sup>379</sup> Hopper (2008) 3.

<sup>380</sup> See Reynolds *et al* (2008) 43.

<sup>381</sup> Norris *IPSR* 18 (1997) 301. See also De Ville and Steytler (1996) 8-10. Among others, a majoritarian system is practised in Great Britain, Canada, United States and former British colonies, Botswana, Malawi and Zambia. See also Reynolds *et al* (2008) where the authors analyse the main electoral systems of the world.

exercise political power.<sup>382</sup> In this system the leading party exercises its legislative programme and the losers get little or no reward. According to Bormann and Golder majoritarian systems differ in so far as that some require that a winning candidate (or party) secures an absolute majority of votes, others require that the candidate (or party) gets more votes than everybody else.<sup>383</sup>

In the majoritarian electoral system, the focus is on “effective governance, not representation of minority views.”<sup>384</sup> This model suggests that minority views and the protection of minority interests bring about instability. Carey and Hix argue that there is no ideal electoral system,<sup>385</sup> the choice depends on what a country seeks to achieve or the ultimate goal.<sup>386</sup> If they wish for a stable single party government then they select a majoritarian system.<sup>387</sup> On the other hand, if they seek “a highly representative parliament, where the assembly is a microcosm of the pluralism of opinions in society, a proportional representation system is best”.<sup>388</sup> The latter is the system chosen by South Africa through the adoption of a constitutional democracy inclusive of minority political parties and an electoral system which accommodates small political parties.

This thesis agrees with Norris who alludes to the fact that majority electoral systems over-reward the winner.<sup>389</sup> Wolf’s view is that this system establishes a different type of rule by “an elected dictatorship” that does not need to consult broadly on issues affecting the electorate.<sup>390</sup> Norris confirms that the majoritarian electoral system ensures that the winning party is able to implement its policies and there would be no need for the support of minority political parties.

The effect that a majoritarian electoral system has on the setting up of government is that the majority political party exclusively establishes the government. The

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<sup>382</sup> De Ville and Steytler (1996) 7. The study is not going to discuss all forms of majority representation electoral systems. The discussion entails only the main features of majority representation.

<sup>383</sup> Bormann and Golder (2013) 361 available at <http://dx.doi.org/10.1016/j.electstud.2013.01.005>. (accessed on July 2015)

<sup>384</sup> Norris *ISPR* (1997) 301.

<sup>385</sup> Carey and Hix *AJPS* (2011) 383.

<sup>386</sup> As above.

<sup>387</sup> As above.

<sup>388</sup> As above.

<sup>389</sup> See Norris *IPSR* 18 (1997) 311.

<sup>390</sup> Wolf *SALJ* (2015) 800.

minority political parties are excluded from taking part in any law or policy-making decisions. Voting for a minority party becomes effectively unproductive.

### 5.3. The Proportional Representation System

According to Wolf<sup>391</sup> proportional representation systems which are implicit in multi-party democratic systems are “better suited to secure both direct election of political representatives” by the voting public and “proportional representation of political parties.” Two types of proportional representation are discernable. Under the constituency based proportional representation system, seat allocation is “based on a quota which is aimed at ensuring that seats are allocated to the party with the largest average number of votes per vacancy, and that, once all the seats have been allocated, the average number of votes which is required to win seats will be the same for each member.”<sup>392</sup> The second type is the open and closed list system, in terms of which the voters accept the candidate list decided upon by the party or where they are allowed to establish a list of preferences for candidates respectively.<sup>393</sup>

The Constitution, 1996<sup>394</sup> provides that the National and Provincial Legislatures, and includes Municipal Councils are to be constituted by members elected through proportional representation. Carey and Hix state that if a country desires a highly representative parliament in a society where there are diverse political opinions and interests, proportional representation is the most suitable system to achieve this.<sup>395</sup> The effect of this system is that a party that wins 40% of the vote will get 40% of seats whilst a party that wins 10% of the vote will secure 10% of the seats.<sup>396</sup> Maduna surmises that South Africa opted for this model:

“largely because it best ensures that all votes are equal, that no votes are wasted, and that the equitable representation of minority interests in the organs of government is part of the result of an election.”<sup>397</sup>

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<sup>391</sup> As above at 801.

<sup>392</sup> As above.

<sup>393</sup> As above at 803.

<sup>394</sup> Ss 46, 105 and 157 of the Constitution, 1996.

<sup>395</sup> Carey and Hix (2009) 383 available at <http://onlinelibrary.wiley.com/doi/10.1111/j.1540-5907.2010.00495.x/epdf> (accessed on July 2015).

<sup>396</sup> Reynolds (1999) 90.

<sup>397</sup> Maduna in Cheadle *et al* (2015) 14:13.



The principle of ensuring that minority political parties are accommodated in the democratic processes of the legislature simply through garnering a small number of votes is consonant with the express provision for minority rights protection in the Constitution, 1996. This is not to say that the proportional system caters for all minority political parties and interests, but rather that the threshold for representation in parliament is not set too high. The threshold represents the minimum standard which must be met by a political party to be recognised within the context of a democratic dispensation.

According to Maduna, South Africa's choice of electoral system ensures the equitable distribution of minority interests in all government structures.<sup>398</sup> However, there should be no illusion that there is only one form of proportional representation.<sup>399</sup> Reynolds states that the proportional representation electoral system is based on the rationale that disparity between a party's share of the national votes and the number of seats in the legislature is reduced.<sup>400</sup> The greatest advantages of this system are that it enables minority parties to gain parliamentary representation and acts to give minority parties the assurance that they will not be dominated by a majority party.<sup>401</sup>

The structure of the South Africa Parliament with a total of 400 seats has the ANC as the majority political party with 62% of the vote qualifying it for 249 seats. The two minority political parties at the bottom with 0.2% of the vote still qualifying for 1 seat.<sup>402</sup> This system of representation clearly embodies the guarantees that dominated the multi-party negotiations before the new democratic and constitutional order. Furthermore, this system ensures that the minority political parties that are not necessarily a majority also have a voice in matters of government. This voice can be acquired through the invocation of the principles of the constitutional model of democracy framed as participatory and representative,

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<sup>398</sup> As above at 14:14.

<sup>399</sup> See Bogdanor (1984) 46. The author identifies varieties of proportional representation and defines proportional representation as a single and specific electoral system. Hart (1992) 282 stated that where politics had become "adversarial" and "inimical to the conduct of the nation's affairs", as was the case in Britain in the mid-1970s, the remedy was proportional representation.

<sup>400</sup> Reynolds (1999) 90.

<sup>401</sup> As above 97.

<sup>402</sup> See Structure of Parliament available at <https://www.parliament.gov.za/how-parliament-is-structured> (accessed on 20 May 2018).

with the Constitutional Court playing a role in ensuring minority interests where they manifest themselves and are justified.

It can be argued that based on the same principle the allowance for low thresholds of representivity in the workplace in relation to organisational rights would ensure that there is opportunity for the protection of a diversity of interests through active unrepresentative trade unions, at least within the confines of the right to freedom of association. There are no compelling reasons why the workplace experience should not reflect the model of democracy as per the Constitution, 1996. If it did so it would establish a space in which minority trade unions can enter the arena of workplace democracy and would have the effect of keeping majority trade unions on their toes as well as protecting the interests of minority trade unions where these are justified.

In the context of labour relations and as indicated analogous to the workplace, the denial of the opportunity to a minority trade union to participate in the decision-making processes of the workplace may have the effect of denying unrepresentative trade unions a voice where the constitutional framework can arguably be interpreted as providing for that space.<sup>403</sup> This is where the issue of “diversity” of the workplace from the international law perspective<sup>404</sup> comes to bear, as proportionality is a possible enhancement of workplace democracy as long as it is not extreme.<sup>405</sup> It is on this basis that it is submitted that instruments that provide for the dominance of the majority trade union in the workplace to the detriment of the right to freedom of association for unrepresentative trade unions is possibly contrary to the constitutional framework of South Africa which is accommodating to interests of minority entities and even international law which provides for diversity and to at least permit minority trade unions to represent their members in individual cases.

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<sup>403</sup> See Chapter 3 at 3, 4 and 5 on the principles that are echoed in the constitutional model of democracy and the encouragement and provision of instruments for the protection and promotion of minority interests, whatever they are based on.

<sup>404</sup> See Chapter 2 at 4.3 on what the ILO seeks within a majoritarian model of collective bargaining that diversity be possible.

<sup>405</sup> See Chapter at 4 at 3.6 on the discussion of the all comers approach in labour relations during the Industrial Court era. Also see Chapter 2 at 4.3 on the ILO's position in relation to fragmentation of the collective effort. See also Chapter 7 at 4.4 on the Japanese model of collective bargaining which resembles the all comers approach. In *Digest of Decisions* (2006) para 1097 the CFA has pronounced on the avoidance of fragmenting the collective effort of workers.

## 6. Labour Rights in the Constitution

### 6.1 Introduction

In the preceding parts, the focus has been on the model of democracy and how together with the provisions that ensure the participation of minority political parties reflect upon the spirit and purport of the Constitution, 1996.<sup>406</sup> In the part that follows the emphasis falls on particular fundamental labour rights and their content, including the existence or non-existence of requirements to be met before their enjoyment.

The right to freedom of association is covered in two separate sections of the Constitution, 1996. Section 18 provides for freedom of association in a general sense, whereas section 23 provides for a set of rights specifically focussing on workers' and employers' rights. Section 18 of the Constitution, 1996 provides that "everyone has the right to freedom of association" and there is no indication that this provision does not apply to workers, employers and for that matter also to minority trade unions. Among other provisions section 23 of the Constitution, 1996 provides that:

- "(2) Every worker has the right to-
  - (a) to form and join a trade union;
  - (b) to participate in the activities and programmes of an employers' organisation.
  - (c) to strike.
- (3) ...
- (4) Every trade union and every employers' organisation has the right –
  - (a) to determine its own administration, programmes and activities;
  - (b) to organise; and
  - (c) to form and join a federation.
- (5) Every trade union, employers' organisation and employer has the right to engage in collective bargaining. To the extent that the legislation may limit a right in this Chapter, the limitation must comply with section 36(1)."

This section provides for the rights to freedom of association, to organise and to engage in collective bargaining. Even though these rights are inter-related each of these rights has its own significance. Each of these rights will be explored in the part that follows.

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<sup>406</sup> See Chapter 3 at 3 and 4.

## 6.2 The Right to Freedom of Association

According to Haysom<sup>407</sup> a person alone is an atomised, powerless, lonely being without a foundation for developing an identity or the capacity to influence or change his or her physical environment. One of the ways in which humans express their humanity is through their relations with others.<sup>408</sup> This view is consonant with the traditional value of “ubuntu” loosely equated with the maxim “a human is a human because of others.”<sup>409</sup> This value brings humans together as they are nothing without each other. *Ubuntu* is seen more as a “metaphor that describes group solidarity where such group solidarity is central to the survival of communities with a scarcity of resources”. However, Mokgoro has cautioned that defining *ubuntu* “with precision is an unattainable” exercise”.<sup>410</sup>

Woolman *et al*<sup>411</sup> regard the constitutional right to freedom of association as constituting a “bedrock of the related right to organise, bargain collectively and in the case of workers to strike.” Grogan<sup>412</sup> makes the sound point that freedom of association underpins the rights to assemble, demonstrate and picket. Cheadle<sup>413</sup> concurs with Grogan in so far as the right to organise and the right to collective bargaining being incidents of the right to freedom of association. On this aspect, it is submitted that drawn from the point made by Cheadle, the right to engage in collective bargaining, cannot then be the source of the right to freedom of association, if it is an incident of the right to freedom of association.

According to Woolman<sup>414</sup> associational freedom is that which:

“makes participatory politics meaningful and genuinely representative politics possible. An individual is unlikely to have either the ability or the

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<sup>407</sup> Haysom in Cheadle *et al* (2016) 13:1.

<sup>408</sup> As above

<sup>409</sup> As above. See also Mokgoro (1997) 2 where Mokgoro J states that *ubuntu* which means “motho ke motho ka batho ba bang” is “described as a philosophy of life, which in its most fundamental sense represents personhood, humanity, humaneness and morality; a metaphor that describes group solidarity where such group solidarity is central to the survival of communities with a scarcity of resources. This metaphor simply means “that a person can only be a person through others.”

<sup>410</sup> Mokgoro (1997) 2.

<sup>411</sup> Woolman *et al* (2015) 53:21.

<sup>412</sup> Grogan (2010) 21.

<sup>413</sup> Cheadle in Cheadle *et al* (2016) 18:20.

<sup>414</sup> Woolman in Woolman *et al* (2016) 44-6. See also Haysom in Cheadle (2016) 13-2. This extract is also cited by Haysom to demonstrate the significance of association.

resources necessary to mount an effective campaign to convince large numbers of his peers that his position on a particular subject is correct ... Associations thereby provide the bridge from individual efforts to collective political action.”

The reasons for the association amongst peoples may vary and may be motivated, *inter alia*, by personal, collective, political or economic interests.<sup>415</sup> There is a greater sense of purpose for an individual with a minority view to associate with those who share a common minority view on that issue, lest he be nothing without this association.<sup>416</sup> In the context of the minority trade union possessing a common minority outlook, there would be greater benefit in coming together rather than staging the outlook as individuals.

In *South African National Defence Union v Minister of Defence and another*<sup>417</sup>, the Constitutional Court was faced with the question whether the prohibition of members of the defence force from protesting and joining trade unions was constitutional. Added to this, members of the South African National Defence Force (SANDF), and State Security Agency are excluded from the application of the LRA of 1995.<sup>418</sup> At the time, section 126(B) of the Defence Force Act<sup>419</sup> provided that:

“(1) a member of the Permanent Force shall not be or become a member of any trade union as defined...of the Labour Relations Act ...provided that this provision shall not preclude any member of...from being or becoming a member of any professional or vocational institute, society, association or like body approved by the Minister.”

The question arose whether soldiers can rely on workers’ rights in terms of the Constitution, 1996 even though they are excluded from the scope of application of the LRA of 1995. According to the majority opinion of the Court “everyone” in section 18 of the Constitution, 1996 is indicative of the fact that members of the defence force do have the right to lay claim to the right to freedom of association.<sup>420</sup>

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<sup>415</sup> Haysom in Cheadle *et al* (2015) 13:2.

<sup>416</sup> In *S v Makwanyane* 1995 (3) 391 (CC) at para 224 the Constitutional Court held that “ubuntu gives value to each person in the community and *visé versa*. See also Barrie JSAL (2000) 271. According to the author *ubuntu* broadly means that an individual’s humanity is expressed through the humanity of others and theirs in return for recognition of his humanity.

<sup>417</sup> (1999) 20 ILJ 2265 (CC) at para 1.

<sup>418</sup> S 2 of the LRA of 1995.

<sup>419</sup> Defence Force Act 44 of 1957.

<sup>420</sup> *South African National Defence Union* at 2285 para 48.

O'Regan J for the majority went on to determine whether section 126B (1) and (2) of the Defence Act<sup>421</sup> met the test of section 36(1) of the Constitution, 1996 in limiting the right to freedom of association for members of SANDF. *South African National Defence Union* held that:

“the total ban on trade unions in the defence force clearly goes beyond what is reasonable and justifiable to achieve the legitimate state objective of a disciplined military force. Such a ban can accordingly not be justified under s 36 and s 126B (1) is accordingly inconsistent with the Constitution and invalid.”<sup>422</sup>

The majority opinion of the Constitutional Court also concluded that soldiers are regarded as workers and that they are entitled to claim employee rights in terms of the Constitution, 1996.<sup>423</sup> *South African National Defence Union*<sup>424</sup> also referred the interrelatedness of rights and stated that:

“These 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.”

According to Woolman *et al*<sup>425</sup> the significance of the associational form of political association is that it acts as a brake on “majoritarian tyranny” which entails domination of the majority, by enabling minorities to challenge majorities. In the context of labour relations such a framework enables workers to choose to switch membership in a union and thus allow them the opportunity to turn an unrepresentative trade union into first a sufficiently representative trade union and even possibly a majority if it succeeds in gaining increased support.<sup>426</sup> The freedom of choice exercised by a worker in associating with an unrepresentative trade union should thus be respected for what it is rather than just what it is in relation to some other right.

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<sup>421</sup> S 126(B) 1 of the Defence Act 44 of 1957.

<sup>422</sup> At para 36.

<sup>423</sup> As above at para 30.

<sup>424</sup> As above at para 8. According to Steytler and De Visser in Woolman *et al* (2014) 22-4 “associational rights are often buttressed by reference to other rights.”

<sup>425</sup> Steytler and De Visser in Woolman *et al* (2016) 22-4.

<sup>426</sup> As above.

All of the above may apply to a minority trade union that has just started out, and allows it to exercise its rights to freedom of association and to organise its members. For a trade union to demand the right to collective bargaining at the start up stage may be premature, as the trade union needs to establish itself first and gradually acquire organisational rights. Ordinarily, it is only when it has grown sufficiently that it justifiably can demand the right to collective bargaining because it is at that point that it may be meeting the requisite threshold of representivity.<sup>427</sup>

It is in this context that the workplace as an institution where there might be associations that have a common associative element will have a context that will justify the appropriateness to have them acquire organisational rights. Where a voice is ousted by the invocation of majoritarian principles in collective bargaining, at least based on international law it would be appropriate to consider permitting them to represent their members in individual cases. As argued the context of South Africa's constitutional democracy does provide sufficient space for this.

Sections 23(2) and (4) of the Constitution, 1996 do not make specific reference to the right to freedom of association *per se*. The words used in the two sections are similar to the words used under Chapter II of the LRA, which provides the content to the right to freedom of association. The right to freedom of association in section 23 of the Constitution, 1996 unlike section 18,<sup>428</sup> does not refer to "everyone," but to "workers" and "employers."

The constitutional right to freedom of association does not provide circumstances under which the right may be limited. Therefore, no provision regarding the right to freedom of association per the Constitution, 1996 indicates that the enjoyment of this right is subject to the numerical strength of a trade union. However, the LRA of 1995 establishes limitations in so far as it has a provision which sets thresholds of representivity. It is this provision that is the focus of the thesis, and raises the question whether it complies with section 36(1) of the Constitution, 1996.

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<sup>427</sup> See Chapter 2 at 2.1 and 2.2 on the discussion of the ILO principles related to the relevance of thresholds of representivity in labour relations.

<sup>428</sup> s 18 of the Constitution, 1996 on the one hand provides that "[e]veryone has the right to freedom of association, s 23 on the other hand makes specific mention of the parties to a contract of employment, namely, workers and employers. Both parties to this relationship have the right to freedom of association catered for under s 18 in a general way and under s 23 with specific reference to them.

### 6.3 The Right to Organise

The right to organise is regarded as an incident of the right to freedom of association.<sup>429</sup> The Constitution, 1996 does not set requirements, such as numerical goals, before the right to organise may be relied upon by trade unions. The setting of a threshold as a requirement for the enjoyment of organisational rights emanates from the LRA of 1995 under the heading “collective bargaining.”<sup>430</sup>

According to Woolman *et al* the right to organise refers:

“to the right of an organisation to build its structures to enable it to represent its members and engage effectively in collective bargaining. As far as trade unions are concerned, this right embraces the recruiting of members, the granting of stop-order facilities, the right of union representatives to fulfil their duties, and access to necessary information to ensure that bargaining is meaningful.”<sup>431</sup>

These rights pertain to the establishment of an organisation and enable it to fulfil its obligations to itself and its members in terms of its constitution, and to build the organisation. As discussed in Chapter 5 the South African labour relations framework provides for organisational rights located within the collective bargaining dispensation. Placing organisational rights under the collective bargaining dispensation arguably creates the impression that the collective bargaining parties have the freedom to agree to exclude unrepresentative trade unions from acquiring organisational rights. This is what is regarded as a complete disconnect between the spirit and purport of the Constitution, 1996 and the application of majoritarian principles where these principles are abused and thresholds set too high. The relevance of the thresholds has already been pronounced on by the ILO, in terms of what purpose they serve, namely, in collective bargaining, in consultation with governments and when nominating delegates for international bodies.<sup>432</sup> As has already been alluded to, this thesis argues that the collective bargaining purpose referred to is in relation to

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<sup>429</sup> See Cheadle in Cheadle *et al* (2016) 18:20.

<sup>430</sup> See Chapter 6 at 2.

<sup>431</sup> Cooper in Woolman *et al* (2014) 53-28. These rights in the South African labour relations system are made statutory rights whose acquisition and withdrawal are stipulated by and in the LRA.

<sup>432</sup> See Chapter 2 at 2.2.



substantive issues regarding improvement of conditions of employment rather than organisational rights.<sup>433</sup>

Budeli points out that the main reason workers join a trade union is for them to be represented in the process of collective bargaining.<sup>434</sup> This statement does not negate the need to attach equitable importance to different constitutional labour rights, with the right to engage in collective bargaining being the ultimate prize for any trade union. The enjoyment of the rights to freedom of association and to organise is significant for a trade union that is not representative yet, whereas the status of being a party to collective bargaining is the ultimate goal for any established trade union.<sup>435</sup> Added to this, Cooper appreciates that constitutional labour rights are significant in themselves rather than merely co-relative.<sup>436</sup> In this regard Cooper states that:

“[c]ollective bargaining is inextricably linked to the right to join and form representative organisations, to organise and to strike. These rights jointly and severally promote democracy in the workplace and the achievement of worker dignity. While freedom of association rights more narrowly construed, have a value in and of themselves, their full value may only be achieved through the right to collective bargaining.”<sup>437</sup>

Cooper’s view confirms the fact that the rights to freedom of association, to organise and to engage in collective bargaining are inter-related. It is accepted that the full value of the right to freedom of association for an unrepresentative trade union is realised by the eventual ability to bargain collectively. Budeli’s reasoning that there is effectively little point for existence if the trade union cannot bargain, therefore is to be considered carefully not to create the perception that minority trade unions unable to bargain have no purpose to exist.<sup>438</sup>

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<sup>433</sup> See Chapter 2 at 4.3 on the crux of the argument in recognition of what the ILO regards as the purpose of thresholds and their relevance in labour relations. context of the See also Chapter 5 at 3 on the discussion of the impact that the definition of “workplace” has on the impact of thresholds of representivity in relation to the acquisition of organisational rights on the right to freedom of association.

<sup>434</sup> Budeli (2007) 57.

<sup>435</sup> See Chapter 6.

<sup>436</sup> See Cooper in Woolman *et al* (2014) 53:32.

<sup>437</sup> As above.

<sup>438</sup> See Budeli (2007) 57. Woolman in Woolman *et al* (2014) 44:02 correctly warns that presenting freedom of association as a derivative of other constitutional rights “seriously underestimates the importance of individual or group identity of the constitutive attachments.”

Therefore, it is important to draw a distinction between the acquisition of organisational rights in pursuit of the right to freedom of association and the acquisition of organisational rights for purposes of collective bargaining. This distinction may be the basis for a minority trade union to seek to acquire organisational rights for example for purposes of individual cases rather than to engage in collective bargaining.

#### 6.4 The Right to Engage in Collective Bargaining

Section 23(5) of the Constitution, 1996 provides that:

“[e]very 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).”

As mentioned above, the right to engage in collective bargaining and the rights to freedom of association and to organise are interlinked. These rights hold the potential individually and in relation to each other, to impact on workplace relations. According to Woolman *et al*, these rights singly or together, promote industrial democracy and the achievement of dignity for workers.<sup>439</sup> The point that constitutional labour rights are important in themselves (and in relation to each other) bolsters the argument that the right to freedom of association and the right to organise are critically important to minority trade unions even necessarily being granted the right to engage in collective bargaining.

There are no identifiable limitations set by the Constitution, 1996 for the enjoyment of the constitutional labour rights except to provide that the LRA of 1995 may be enacted to regulate collective bargaining. For example, the constitutional right to engage in collective bargaining does not refer to requirements that need to be met before the right can be enjoyed by the trade union except for the general limitation in terms of section 36 of the Constitution, 1996. The limitations to constitutional labour rights are identified in the proposed national legislation envisaged in section 23(5) of the Constitution.

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<sup>439</sup> Cooper in Woolman *et al* (2015) 53:33.

As previously discussed South Africa's Constitution, 1996 and its electoral model recognise and promote minority interests.<sup>440</sup> It is argued that South Africa's model of workplace democracy should take this context, spirit and purport of the Constitution, 1996. Limiting the labour rights of minority trade and creating a conducive environment for a "winner take all" system without taking cognisance of this constitutional framework is a disconnect for workplace democracy. The Constitutional Court has given clear direction that it recognises minority interests and where it is justifiable will protect and promote them even if means going against majority interest.

The significance of these rights is to be appreciated effectively within the context of the post-1994 constitutional negotiations which resulted in the recognition and the protection of minority political parties and ensuring that they have a voice and are able to participate in government despite their status. To divorce the employment arena from this constitutional premise of democracy does injustice to the full appreciation of the true content of these constitutional rights which are not just related to political parties but to minority interests in general. It is for that reason that the rights to freedom of association and to organise, including the right to collective bargaining, have to be juxtaposed to the model of democracy espoused by the Constitution, 1996 and the context it provides to labour rights in the workplace.

## 7. Interpretation of the Bill of Rights

Section 39 of the Constitution, 1996 provides that:

"(1)(a) When interpreting the Bill of Rights, a court or tribunal must promote the values that underlie an open and democratic society based on human dignity, equality and freedom.  
(b) must consider international law; and  
(c) may consider foreign law."

The multi-party negotiations to create a democratic order in South Africa resulted in the introduction into the Constitution, 1996 section 39 which makes provision for "international law" to be considered when interpreting the law. It does not mean

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<sup>440</sup> See Chapter 2 at 5.

that international law necessarily must be followed in each instance.<sup>441</sup> The consistent link in dealing with comparative law is that each court, tribunal or forum is required to give effect to the Constitution, 1996 and not to the international instrument and with due regard for the legal system, the history and the circumstances of the country.<sup>442</sup> It is argued that the ultimate conclusion in the consideration of international law in the course of interpreting the Bill of Rights, is to ensure that the country's unique circumstances prevail in a context in which international law applies. O'Shea raises an additional dimension that where the provisions of the Constitution, 1996 are clear on a matter, it is unnecessary to consider the implications of international law.<sup>443</sup>

The ILO declares its non-interference in the system of collective bargaining that countries opt for. The ILO establishes overarching norms that need to be complied with in order to ensure that states do not contravene international standards.<sup>444</sup> The stance of the ILO is that within a majoritarian system diversity needs remain a possibility in the workplace and minority trade unions are to be allowed to represent their members in disciplinary and grievance processes.<sup>445</sup>

It is argued that this stance by the ILO is a minimum standard and should feature prominently in the interpretation and application of constitutional labour rights within the South African context. Encompassing this ILO dimension in a constitutional model of democracy arguably translates into recognising the existence and participation in institutions of democracy such as collective bargaining of minority trade unions. Further, the ILO states that thresholds should be relevant only in the context of collective bargaining and member countries must be clear in their requirements.<sup>446</sup> These positions are the context for the interpretation and application of labour rights.

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<sup>441</sup> As above. See also O'Shea in Rautenbach *et al* (2012) 7A2 fn 87 where O'Shea dealt with the possible conflict between the provisions of international law and those of the Constitution, 1996.

<sup>442</sup> *S v Makwanyane* 1995 (3) SA 391 (CC) 415 para 39.

<sup>443</sup> O'Shea "International Law and the Bill of Rights" in Rautenbach *et al* (2012) 7A2.

<sup>444</sup> See Chapter 2 paras 4.1 and 4.2 *supra*.

<sup>445</sup> See *General Survey* (1994) para 91 and 98.

<sup>446</sup> See also *Digest of Decisions* (2006) para 356 where the ILO provides the criteria for thresholds.

## 8. The Limitation of Constitutional Labour Rights

The Constitution, 1996 is the supreme law and confirms that “law or conduct that is inconsistent with it” will be invalid.<sup>447</sup> Section 23(5) of the Constitution, 1996 provides that national legislation may be enacted to regulate collective bargaining. The LRA of 1995 establishes the collective bargaining framework. Should the provisions of the LRA of 1995 place limitations on constitutional principles, these restrictions must comply with the limitations clause.

Section 36 of the Constitution, 1996 provides that:

“(1) The rights in the Bill of Rights may be limited only in terms of the law of general application to the extent that the limitation is reasonable and justified in an open and democratic society based on human dignity, equality and freedom taking into account all relevant factors, including

- (a) the nature of the right;
- (b) the importance of the purpose of the limitation;
- (c) the nature and extent of the limitation;
- (d) the relation between the limitation and its purpose; and
- (e) less restrictive means to achieve the purpose.

(2) Except as provided in subsection (1) or in any other provision of the Constitution, no law may limit any right entrenched in the Bill of Rights.”

This section confirms that labour rights protected by the Constitution, 1996 are not absolute<sup>448</sup> however any limitation of these rights must be justifiable, reasonable and must be necessary without negating the essence of the constitutional right.<sup>449</sup>

In *S v Makwanyane*<sup>450</sup> the Constitutional Court explained the principle of proportionality as follows:

“the limitation of constitutional rights for a purpose that is reasonable and necessary in a democratic society involves the weighing up of competing values, .... Different rights have different implications for democracy, and in the case of our Constitution, for an open and democratic society based on freedom and equality, means that there is no absolute standard which can be laid down for determining reasonableness and necessity. Principles can

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<sup>447</sup> S 2 of the Constitution, 1996.

<sup>448</sup> *Esitang and Van Eck ILJ* (2016) 774 and 775.

<sup>449</sup> S 33 of the Constitution of South Africa Act 200 of 1993. These are the three conditions set by the Interim Constitution for the limitation of constitutional rights. This three-fold criteria in section 33 of the Interim Constitution was included in the limitations clause of Constitution, 1996.

<sup>450</sup> 1995 (3) SA 391 (CC) at para 104. Cheadle in *Cheadle et al* (2016) 30:09 mentions that the context of an open and democratic society based on dignity, equality and freedom, including all relevant factors are imperative in determining reasonableness and justifiability.

be established, but the application of those principles to particular circumstances can only be done on a case by case basis. This is inherent in the requirement of proportionality, which calls for the balancing of different interests.”

The requirement is that the limitation must be “reasonable and justifiable in an open and democratic society based on human dignity, equality and freedom.” Currie and De Waal, in explaining this provision, state that the law 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.<sup>451</sup>

For example, the harm done by the law that sets up thresholds for the enjoyment of organisational rights and the benefits achieved can be identified by examining the impact thresholds of representivity have on minority trade unions, and by determining whether the collective bargaining dispensation is able to achieve the type of democracy espoused by the Constitution. It is argued that in confirming proportionality should involve deciding whether the ILO principles have been complied with.

Currie and De Waal<sup>452</sup> contend that there needs to be a good reason for the infringement. It remains to be seen whether the provisions of the LRA of 1995 that empower parties to collective agreements to set thresholds for the enjoyment of organisational rights endow a good reason for the exclusion of minority trade unions from organisational rights. The limitation to the right to freedom of association, to organise and the right to engage in collective bargaining are severe limitations bearing in mind the possible impact they have on minority trade unions. According to Rautenbach the nature of the limitation includes the method used to limit the right.<sup>453</sup> In *S v Manamela*<sup>454</sup> it was held that the more invasive an infringement or limitation on the constitutional right the stronger the justification must be for the infringement.

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<sup>451</sup> See Currie and De Waal (2013) 162. See also Woolman and Botha in Woolman *et al* (2016) 34:67-68. The authors state that the phrase “reasonable and justifiable in an open, democratic society based on human dignity, equality and freedom” is fraught with interpretive difficulties in that not only is it couched in the broadest possible terms, but it replicates all of the tensions between democracy and rights which it is supposed to resolve. The guidance on how to resolve these conflicts is to be found in other constitutional democracies.

<sup>452</sup> Currie and De Waal (2013) 169.

<sup>453</sup> Rautenbach (2012) 311.

<sup>454</sup> 2000 (5) BCLR 491 (CC) para 32.

What is reasonable and justifiable in one instance is not necessarily reasonable and justifiable in another. It is submitted that any factor in the non-exhaustive list in section 36(1) of the Constitution, 1996 will still need to be viewed in the context of the circumstances of the society the Constitution envisages. South African society displays a history of inequality based on apartheid policies, whereas the Constitution, 1996 models the protection of all forms of minority interests and imperatively does not indicate which minority interests are to be protected and which are not

The Constitutional Court in *S v Makwanyane*<sup>455</sup> held that in the balancing process requires various considerations, including determining whether the desired ends can reasonably be achieved through other means less damaging to the right in question. In order to be legitimate, the limitation of a constitutional right must achieve benefits that are proportionate to the costs of the limitation.

## 9. Conclusion

The Constitution, 1996 is supreme law of South Africa and in a particular model of democracy was adopted. The type of democracy it envisages is one founded on the principles of participation of minority political parties within a representative and multi-party system. In order to bolster and protect this form of democracy, which recognises minority political parties' participation in the constitutional democratic dispensation, the judiciary plays an important role in ensuring that the power and authority of the majority political party does not infringe the rights of those in the minority.

The principle of *ubuntu* is part of the project of national unity and reconciliation in the Interim Constitution<sup>456</sup> of South Africa. Inasmuch as *ubuntu* is not specific to

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<sup>455</sup> 1995 (3) SA 391 (CC) 436 para 104. See also *Johncom Media Investments Ltd v M* 2009 (8) BCLR 751 (CC) para 25. The Constitutional Court held that prohibiting any information coming to light during a divorce action or related proceedings regardless of whether it infringed the rights of parties (or their children's interests) to the action is a limitation of the constitutional right to freedom of expression. There were less restrictive means available that could be utilised in order to protect the rights of parties and the interests of children.

<sup>456</sup> Constitution of the Republic of South Africa Act 200 of 1993. Under National Unity and Reconciliation, it provided that the conflicts in South African society caused by apartheid policies could "now be addressed on the basis that there is a need for understanding but not for vengeance, a need for reparation but not for retaliation, a need for Ubuntu but not for victimisation."

the Constitution, 1996<sup>457</sup> nevertheless, it is part of South African society. In this context *ubuntu* is the antithesis of vengeance and retaliation. The Constitutional Court in *Makwanyane*<sup>458</sup> held that it is “only if there is a willingness to protect the worst and the weakest amongst us, that all of us can be secure that our own rights will be protected”. To discourage and disallow the domination of one group by another constitutes an integral part of the essence of *ubuntu*. It is not surprising therefore that the Constitution, 1996 establishes a system that endorses a democratic model that promotes and protects minority rights.

The constitutional right to freedom of association in terms of section 18 confirms that it applies to “everyone”. Everyone includes minority trade unions. The labour rights in section 23 of the Constitution, 1996 do not stipulate a limitation on the enjoyment of these rights on the basis of size or numerical strength. The provisions of the LRA of 1995 which provide for the limitations on labour rights, therefore need comply with section 36(1) of the Constitution, 1996.

The workplace is part of the socio-political milieu of South Africa. The policies that regulate this sector cannot be divorced from South Africa’s history. The negotiation process that led to the Constitution elevated the element of compromise and gave impetus to the recognition of minority political parties and proportional representation. The South African constitutional framework clearly does not endorse majoritarianism to the full extent. Rather it reflects a multi-party, proportional system and recognises minority interests. Minority parties have the right to voice their opinion. It is submitted that in essence, this is the model of constitutional democracy that the workplace needs to pursue.

The chapter that follows debates whether the LRA of 1995 gives effect to minority trade union rights in the workplace in a manner similar to the way the Constitution, 1996 respects minority political parties. In other words, it is argued that a workplace democracy should conform to the model that the Constitution, 1996 promotes. The establishment of thresholds of representivity for trade unions must be seen within this content and due regard to the principles of the Constitution, 1996 and with international standards.

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<sup>457</sup> Referring to the Constitution, 1996.

<sup>458</sup> At para 88.



**Chapter 4**  
**Early Developments Regarding Collective Bargaining and the Rights of**  
**Minority Trade Unions**

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1. Introduction

As referenced in chapter one this thesis appraises the impact of threshold agreements on the organisational rights of unrepresentative minority trade unions. This chapter analyses the early developments in collective bargaining and the

rights of minority trade unions in South Africa. According to Godfrey *et al*<sup>459</sup> the Industrial Disputes Act,<sup>460</sup> which was applicable exclusively to employers and white workers in the Transvaal colony, was promulgated as a result of the white mine-workers strike of 1907.<sup>461</sup> Subsequently, various pieces of legislation and a number of commissions of enquiry were established to deal with the challenges in collective labour relations.<sup>462</sup>

O' Regan advances the strong argument that labour law developments are closely linked to social relations and its context is provided by "society's labour relations structure and its political and economic system."<sup>463</sup> This sentiment fully justifies the analogy that this thesis argues should be drawn between the model of constitutional democracy espoused by the Constitution, 1996 and its protection and promotion of minority interests and how these impact on the developments within the labour relations sphere. The author correctly submits that the underlying causes of the changes in labour law can be found in major developments in the sphere of labour relations and politics.<sup>464</sup> Budeli<sup>465</sup> adds that the South African system of labour relations has to be considered within the context of the "industrial revolution, economic history and traditional attitudes to work" of the country.

The chapter opens with a discussion of the Industrial Conciliation Act<sup>466</sup> and the work of two commissions of enquiry that were established by government to review labour relations law as part of the first phase of this development.<sup>467</sup> This era was characterised by racial segregation and a dual system of labour relations for white and black workers.

The second phase offers an analysis of the Industrial Court's approach in respect of the content given to the concept of "unfair labour practice" and the impact it had on representivity and the enjoyment of organisational rights in the workplace.<sup>468</sup>

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<sup>459</sup> Godfrey *et al* (2010) 42.

<sup>460</sup> S 1 and Chapter II of Act 20 of 1909 demonstrate its focus as being the prevention of strikes and for the settlement of disputes by other means such as conciliation after investigation.

<sup>461</sup> Godfrey *et al* (2010) 42.

<sup>462</sup> De Kock *ILJ* (1980) 26.

<sup>463</sup> O' Regan *ILJ* (1997) 890.

<sup>464</sup> As above.

<sup>465</sup> Budeli in *Fundamina* (2009) 57. See also Godfrey *et al* (2010) 41 who claim that our current collective labour law is critically informed by the developments of the last century.

<sup>466</sup> Act 11 of 1924.

<sup>467</sup> See Chapter 4 at 2.2.

<sup>468</sup> See Chapter 4 at 3.2.

Central to this analysis is the attitude of the Industrial Court to the different models of collective bargaining, namely, majoritarianism, pluralism and the all-comers approach.<sup>469</sup>

The next part covers the work of the Ministerial Task Team which was appointed to overhaul the laws regulating labour relations at the time.<sup>470</sup> The failure of legislation in the 1980s and early 1990s to bring about the desired peace and stability in labour relations and the inconsistencies in the decisions of the Industrial Court reached a point where there was a need to set up a new labour relations framework. This part of the study examines the work of the Ministerial Task Team and the challenges identified in the labour relations system as experienced under “apartheid” policies. A number of conclusions will be drawn in the final part of the chapter.<sup>471</sup>

## 2. The First Phase: A Dual System

### 2.1. Introduction

According to Bendix<sup>472</sup> before industrialisation South African economics was largely agrarian and the only labour relations law was the Master and Servants Act which essentially set rules for black workers in the workplace. South Africa’s industrial revolution commenced with the discovery of diamonds in 1867 and of gold in 1886.<sup>473</sup> Due to this there was an influx of workers into the Witwatersrand area, today called Gauteng. South Africa in these early years relied on European immigrants for skilled labour and both unskilled and semi-skilled labour was performed mostly by black workers.<sup>474</sup> According to Jones *et al*<sup>475</sup> Afrikaners displaced from farming joined the black workers in the mines as unskilled or semi-skilled workers.

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<sup>469</sup> See Chapter 4 at 3.3-3.5.

<sup>470</sup> See Chapter 4 at 4.1-4.2. See also Explanatory Memorandum *ILJ* (1995) 278.

<sup>471</sup> See Chapter 4 at 5.

<sup>472</sup> Bendix (2015) at 45. See also Steenkamp *et al ILJ* (2005) 947.

<sup>473</sup> Bendix (2015) 47.

<sup>474</sup> As above at 46 Bendix notes that the white, skilled workforce was well-paid but the black workers were not.

<sup>475</sup> Jones *et al* (1980) 18.

With the increased mechanisation of work and the fall in the price of gold in the 1920s retrenchment was imminent with white skilled workers being replaced by black workers.<sup>476</sup> The collapse of the gold price threatened profit margins and the viability of the gold mining and drastic measures were needed in order to cover losses.<sup>477</sup> These included employing less skilled black workers at lower wages with white mineworkers being informed of their pending retrenchments.<sup>478</sup>

White mineworkers did not take this threat lightly and in 1922 approximately 25 000 white workers went on strike.<sup>479</sup> Bendix reports that the then government under General Smuts proclaimed martial law and the South African army was deployed. By the end of the strike, 153 miners had been killed and 500 wounded, 5 000 were arrested and 4 were hanged for treason.<sup>480</sup> This state of affairs led to a need to regulate conflict and quell labour unrest in the workplace.

The first part discusses the new legislation and the institutions established in order prevent conflict. The second part discusses the effect of the new legislation and the need for review that led to the establishment of the Van Reenen and Botha Commissions of Enquiry. The third part examines the presence of organisational rights in the LRA of 1956 and draws conclusions in relation to the notion of “representivity” as a consequence.

## 2.2. The Industrial Conciliation Act 11 of 1924

The main purpose of the Industrial Conciliation 11 of 1924 (ICA of 1924) was to regulate collective bargaining and to settle disputes through industrial councils and conciliation boards for white workers.<sup>481</sup> Section 24 of the ICA of 1924 provides that “employee” refers to:

“any person engaged by an employer to perform...work in any undertaking, industry, trade or occupation to which this Act applies, but shall not include

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<sup>476</sup> As above at 46 the trade unions of these white skilled workers began demanding job security against being replaced by cheap labour supplied by black workers.

<sup>477</sup> According to Key *ILR* (1922) 893 the fall in the currency medium threatened profit-making and the viability of the gold mining sector and drastic measures needed to be taken in order to recover losses.

<sup>478</sup> Steenkamp *ILJ* (2005) 947.

<sup>479</sup> Vettori *De Jure* (2005) 383 and Steenkamp *ILJ* (2005) 947.

<sup>480</sup> Bendix (2015) 47.

<sup>481</sup> Godfrey *et al* (2010) 42.

a person whose contract of service or labour is regulated by any Native Pass Laws and Regulations...”

Black workers were excluded from this definition of “employee” and the black trade unions were unable to register or participate in the machinery established by the ICA of 1924 and benefit from industry level collective bargaining.<sup>482</sup>

When the Industrial Conciliation Bill was published in 1923 it provided for the establishment of a standing conciliation board by the employer and the majority of employees in the enterprise.<sup>483</sup> The board was limited to settling disputes and the agreements reached were restricted to the parties to the agreement.<sup>484</sup> However, the ICA of 1924 provided for the voluntary establishment of industrial councils by employer organisations and registered trade unions.<sup>485</sup> The Minister of Labour was given the power to extend an agreement reached by the industrial council to all employers and employees that were within their jurisdiction, if satisfied that the parties were sufficiently representative of the industry and it was expedient to do so.<sup>486</sup>

It is significant to note that the setting up of an industrial council was subject to the parties having demonstrated that they were sufficiently representative within the area of the undertaking, trade or occupation of the industry.<sup>487</sup> This requirement establishes that where a trade union is not sufficiently representative in these areas, a council cannot be established. The other noted difficulty is the fact that the ICA of 1924 did not provide a definition of the phrase “sufficiently representative for the establishment of a council”. The collective agreements entered into by the industrial councils on being gazetted were legally enforceable and could be extended.<sup>488</sup>

Even though the trade unions argued for collective bargaining to be compulsory as part of their submissions prior to the promulgation of the ICA of 1924, the legislature did not budge and maintained the voluntary nature of collective

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<sup>482</sup> Steenkamp *et al ILJ* (2005) 947.

<sup>483</sup> Godfrey *et al* (2010) 42.

<sup>484</sup> As above.

<sup>485</sup> As above at 43.

<sup>486</sup> As above.

<sup>487</sup> S 4(1) of the ICA of 1924.

<sup>488</sup> In terms of s 2(4) of the ICA of 1924 the power to extend to the industry and area covered by the agreement lay with the Minister.

bargaining.<sup>489</sup> However, there was a positive development of institutionalising workplace conflict law through collective bargaining in this period.<sup>490</sup> Unfortunately these benefits were not distributed equitably amongst all workers as blacks were excluded from this statutory system of collective bargaining.

According to Vettori<sup>491</sup> the exclusion of blacks from participation resulted in a dual system of collective bargaining. The black trade unions negotiated with individual employers at plant or enterprise level whilst the white trade unions partook in statutory centralised collective bargaining.<sup>492</sup> Bendix<sup>493</sup> mentions the reservation of job categories for white miners in terms of the 1911 Mines and Works Act, whereas black workers and their trade unions were not recognised. This state of affairs was not sustainable and was a source of conflict between white and black workers and disrupted the political system that perpetrated that division.

Steenkamp *et al*<sup>494</sup> note that alongside the provision of the permanent conciliation boards, a notable contribution of the ICA of 1924 was the establishment of industrial councils. Strike action was preceded by negotiations and in cases of failure to negotiate a criminal penalty was imposed.<sup>495</sup> The agreements that were reached between the parties in the industrial council and in the permanent conciliation boards were legally enforceable upon being gazetted.<sup>496</sup> Inasmuch as these are positive developments in relation to collective bargaining, they did not apply across the board, but were narrowly enjoyed by one sector of the working class.

### 2.3. The Van Reenen and Botha Commissions

The Van Reenen Commission was established in 1934 and mainly was concerned with the effect of the ICA of 1924 on employment.<sup>497</sup> It also dealt with wage

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<sup>489</sup> As above at 43. Where industrial councils did not exist, a centralised form of *ad hoc* collective bargaining was made possible through the conciliation board.

<sup>490</sup> Vettori *De Jure* (2005) 383. According to Godfrey *et al* (2010) 44 the significance of the ICA of 1924 was to lay a foundation for a collective bargaining framework for South Africa.

<sup>491</sup> As above.

<sup>492</sup> As above.

<sup>493</sup> Bendix (2015) 46 mentioned that black workers were prevented from being engine drivers.

<sup>494</sup> Steenkamp *et al ILJ* (2004) 947.

<sup>495</sup> As above.

<sup>496</sup> As above.

<sup>497</sup> De Kock *ILJ* (1980) 26.

disparity between men and women as well as skilled and unskilled workers.<sup>498</sup> This commission did not directly deal with the exclusion of black workers from the definition of employee and the non-registration of their trade unions.<sup>499</sup>

The Botha Commission followed the Van Reenen Commission in 1948 and its terms of reference were to determine the efficacy of labour legislation.<sup>500</sup> Steenkamp notes that 1948 is the year the Nationalist Party and their philosophy of apartheid gained power.<sup>501</sup> The Botha Commission recommended that under their own legislation black trade unions were to be recognised “subject to a reasonable degree of control and sympathetic guidance” by the officials of the Department of Labour and that registration was to be granted in stages.<sup>502</sup>

According to De Kock the recommendations of the Botha Commission were accepted by the Nationalist Party government only in so far as they introduced separate legislation to prevent and settle disputes amongst black workers.<sup>503</sup> As a consequence of the recommendation of the Botha Commission the Nationalist government passed the Native Labour (Settlement of Disputes) Act for black workers.<sup>504</sup> The dual nature of legislation already alluded to was to be embodied in the statutory framework.

It is evident that the Van Reenen and Botha Commissions did not have a significant impact on the current labour relations framework in respect of thresholds of representivity with regard to the acquisition and enjoyment of organisational rights. The work of the Botha Commission was strongly influenced by the policy of “apartheid” and the desire to align labour legislation to this policy. What was of interest to the Nationalist Party government was the extension of privileges to white workers.<sup>505</sup> This policy was met with antagonism and greater militancy on the part of the black trade unions and the reforms brought about to provide indirectly a

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<sup>498</sup> As above.

<sup>499</sup> As above. The legislation that followed the recommendations of the Van Reenen Commission included the Industrial Conciliation Act 36 of 1937, the Wage Act 44 of 1937 and the Shops and Offices Act 41 of 1939.

<sup>500</sup> As above.

<sup>501</sup> Steenkamp *et al ILJ* (2005) 948.

<sup>502</sup> De Kock *ILJ* (1980) 28.

<sup>503</sup> Act 48 of 1953. This Act was later renamed the Labour Relations Regulation Act 48 of 1953.

<sup>504</sup> As above. According to Godfrey *et al* (2010) 44 after the conclusion of the work of the Botha Commission, the coloured and indian workers later were co-opted into the white collective bargaining system, African workers remained excluded.

<sup>505</sup> Godfrey *et al* (2010) 50 and 51.

voice for the excluded black workers met with resistance and rejection in favour of direct representation.<sup>506</sup>

#### 2.4. The LRA of 1956 and the Right to Stop-order Facilities

After the work of the Botha Commission, the ICA of 1924 was renamed the Labour Relations Act of 1956 (LRA of 1956).<sup>507</sup> Notwithstanding the later significant amendment to the LRA of 1956 in the 1980s, this Act provided a glimpse to the notion of “representivity”.

The issue of representivity in section 4 of the LRA of 1956 relates to the registration requirement of trade unions and not to the enjoyment of organisational rights. In this regard section 4 of this Act provides that “in determining the representativeness of a trade union the registrar shall have regard to the facts that existed when the application was made and where numbers are relevant consider only the number of members that are in good standing”.<sup>508</sup>

The LRA of 1956 did not define “representative” and the factors listed in section 4(4) of the LRA of 1956 were prescribed to determine representativeness.<sup>509</sup> The registrar had a wide discretion to overrule the union objecting to registration on the basis it lacks “the representativeness requirement”. Ringrose<sup>510</sup> states that “good standing” in terms of s 4(4) refers to having paid the prescribed fees and not being in arrears in such payments.

The case of *Natal Liquor and Catering Union v Minister of Labour*<sup>511</sup> is a dispute where a trade union sought registration and an objection was raised. The High Court held that “a body which comprises less than half of the persons eligible is not very well representative of those persons”.<sup>512</sup> Ringrose understands the High

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<sup>506</sup> As above at 53.

<sup>507</sup> Act 28 of 1956.

<sup>508</sup> See Ringrose (1976) 174.

<sup>509</sup> As above.

<sup>510</sup> As above.

<sup>511</sup> (1953) (3) SA 819 (N) 821. The High Court held that if employees of a particular race group do not join a union even though they are eligible to join, it translates to the trade union not being sufficiently representative in terms of s 4(4) of the LRA of 1956. In this case the European trade union had objected to the registration of a society in the same industry. The society members did not want to join it. The court held that the objecting European trade union must be sufficiently representative for the objection to be carried through, which it was not, therefore the society was registered.

<sup>512</sup> *Natal Liquor and Catering Trade Union* at 822.



Court in this case to mean that the representativeness of the trade union refers not only to relative numbers, but rather to effective representation in the industry concerned.<sup>513</sup> This rationale was a factor to be borne in mind when determining the content of representativeness in the LRA of 1956 for the purposes of registration and for acquiring the right to stop order facilities.<sup>514</sup>

Section 78 of the LRA of 1956 made provision for a single organisational right as follows:

“(1A) (a) The Minister may...on application... by that trade union...declare that sub-section (1B) shall...apply with reference to the members of that trade union who are employed in that undertaking, industry, trade or occupation.

(b) No notice shall be issued under paragraph (a) unless the Minister is satisfied that...persons...have signed requests such as are contemplated in sub-section (1B).

(1B) (a) The employer...shall, if there is lodged with him a request in the prescribed form signed by the employee, from time to time deduct from the employee's remuneration...by way of membership fees, and shall within one month...pay that amount to that trade union: ... the employer may retain as a collection fee an amount not exceeding five per cent of the amount so deducted.”

Section 78 of the LRA of 1956 has no mention of a requirement of representivity for the acquisition of the right to stop-order facilities. The right to stop order facilities was the only organisational right provided for in the LRA of 1956 and was exercised subject to the Minister of Labour's approval and to an administrative fee.

The LRA of 1956 did not provide for the regulation of organisational rights *per se*, but focused only on trade union deductions subject to the referred to conditions. According to *Du Toit et al*, the conspicuous absence of organisational rights was due to the difficulties that were caused by the Trespass Act,<sup>515</sup> which criminalised the entering of premises by trade union organisers without the owner or occupier's permission.<sup>516</sup>

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<sup>513</sup> Ringrose (1976) 174.

<sup>514</sup> S 78(1A)(a) of the LRA of 1956 provides for the right to be acquired by a registered trade union.

<sup>515</sup> Trespass Act 6 of 1959.

<sup>516</sup> *Du Toit et al* (2015) 251. In *R v Mgunu* 1960 (4) SA 544 (N) 545 the operation of this piece of legislation was tested and it was held that the lawful occupier does not include the servant who occupies the servant's room. An official of a trade technically therefore could not enter the premises of an employer solely by reason of an invitation of the employee of that employer.

### 3. The Second Phase: The Wiehahn Commission and the Era of the Industrial Court

#### 3.1. Introduction

In the 1970s black workers showed greater zeal in rejecting the apartheid policies reflected in labour law which culminated in serious strikes between 1972 and 1973 in different places, including Cape Town and Durban.<sup>517</sup> This unstable climate caused by the emergence of militant black trade unions as demonstrated by the December 1973 strikes in Durban coupled with the 1976 student uprising and the threat of sanctions led to the establishment of the Wiehahn Commission in May 1977.<sup>518</sup> This Commission was tasked “to enquire, report and make recommendations in relation to labour legislation.”<sup>519</sup>

This part of the chapter first examines the impact of the Wiehahn Commission on labour legislation. Secondly, it offers a definition of “unfair labour practice” definition and examines the case law of the Industrial Court.

#### 3.2 The Wiehahn Commission

The 1970s marked a need for the government to revisit labour legislation. The Wiehahn Commission was the third major commission established to investigate labour legislation.<sup>520</sup> The turmoil in the country provided the context within which the Wiehahn Commission did its work. According to Thompson<sup>521</sup> the rationale for the establishment of the Wiehahn Commission was a search for social control by a besieged minority.

The original intent behind the establishment of the Wiehahn Commission was to provide a package of reforms that included the repeal of statutory job reservation and the establishment of work security and a guarantee against less favourable

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<sup>517</sup> Baskin (1991) 16-17.

<sup>518</sup> Godfrey *et al* (2010) 54.

<sup>519</sup> According to Kock *ILJ* (1980) 29 the Wiehahn Commission’s terms of reference initially were to investigate and make recommendations in relation to the Industrial Conciliation Act, the Wage Act, Shops and Offices and Factories, Machinery and Building Work and the Mines and Works Act 27 of 1956, including any Acts administered by the Department of Mines.

<sup>520</sup> See Thompson *ILJ* (2004) v.

<sup>521</sup> As above at iii.

conditions of work.<sup>522</sup> According to Thompson the “unfair labour practice” definition was devised to protect white minority interests.<sup>523</sup> The protection of white worker interests did not take place as was intended as the implementation of the recommendations of the Wiehahn Commission took a turn completely unanticipated.<sup>524</sup>

The Wiehahn Commission’s recommendations marked a turning point in the history of racial segregation and the division of the work force into white and black workers.<sup>525</sup> According to O’ Regan, barely one month after the first interim report of the Wiehahn Commission,<sup>526</sup> the legislature repealed the Black Labour Relations Regulation Act 48 of 1953 and amended the definition of “employee” in the LRA of 1956 to include black employees.<sup>527</sup>

In addition, the Industrial Court was established to adjudicate over labour matters.<sup>528</sup> The LRA of 1956 and its predecessor provided for collective bargaining through the industrial council system as its centerpiece. As already alluded to representivity was a precondition for registration and the acquisition of the right to stop-order facilities. It was also a precondition for admission to the industrial council.<sup>529</sup> The significant thrust of this commission whether intended or not, was

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<sup>522</sup> As above at v. According to Landman *ILJ* (2004) 805 the commission’s first interim report “addressed discrimination against black workers and the method of maintaining it through job reservation, particular types of work being reserved for whites only.”

<sup>523</sup> Thompson *ILJ* (2004) v.

<sup>524</sup> As above. Landman *ILJ* (2004) 806 justifiably finds it ironical that softening the encroachment on white jobs by black workers was the intention and yet the Industrial Court in the case *George v Liberty Life of Africa Ltd* (1996) 17 *ILJ* 571 (IC) held it to be permissible to discriminate against the white person in the interest of normalising South African society. In Steenkamp *et al ILJ* (2004) 949 the authors noted the view of Judge President Hlophe on the Wiehahn Commission as unfortunately not having been charged with reforming the old racist laws but rather to adjust the then existent system.

<sup>525</sup> O’ Regan *ILJ* (1997) 891. According to Lichstein (2013) 2 there were several views that did not see positive developments in both the establishment and recommendations of the Wiehahn Commission. The view from the left of the political spectrum was that the purpose of the commission proved to be “the extension of control over unregistered unions, in a unitary system which can be sold abroad.” Some from the right were of the view that the commission was the “greatest treachery against the white employees of South Africa,” alongside the killing of miners in the 1922 strike for opposing the Chamber of Mines who wanted them to share what is perceived as their work with black workers.

<sup>526</sup> As above.

<sup>527</sup> According to Godfrey report (2007) 22 the report states that this repeal resulted in black workers having access to rights that were previously enjoyed by white, coloured and Indian workers exclusively in terms of the LRA of 1956.

<sup>528</sup> Steenkamp *et al ILJ* (2004) 385. See also Fergus and Rycroft *Acta Juridica* (2012) 171.

<sup>529</sup> Thompson *ILJ* (1980) 808.

the successful recommendation to abolish the racist principle in labour legislation.<sup>530</sup>

The amendments brought about by the Wiehahn Commission's recommendations in the early 1980s provided positive returns for black workers and black trade unions as they were able to join collective bargaining structures directly with their white counterparts.<sup>531</sup> At first the black trade unions rejected registration and were faced with the choice of having to determine whether to engage in negotiations at plant level, which is what they had been doing during the era of racialised labour law, or at enterprise level through industrial councils.<sup>532</sup>

However, as black trade unions grew stronger they gradually joined centralised bargaining in the industrial councils, although maintaining the shop floor negotiations whence they derived benefits which were better than those secured through the centralised industrial council negotiations.<sup>533</sup> The rationale of the Wiehahn Commission for recommending the establishment of the Industrial Court was to create a structure that would limit industrial conflict as had been manifested in strikes.<sup>534</sup> However, this Industrial Court pronounced not only on the rights of white minority trade unions but also in favour of the principle of majoritarianism.

### 3.3. The Industrial Court and the Definition of "Unfair Labour Practice"

The Industrial Court worked within a labour relations framework at a time when it was in a process of development and refinement.<sup>535</sup> According to Van Jaarsveld *et al*, the Industrial Court seized this opportunity and laid down principles and

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<sup>530</sup> O'Regan (2007) 891. See also Steenkamp *et al ILJ* (2004) 943.

<sup>531</sup> Steenkamp *et al ILJ* (2004) 948 mention that the agreements entered into through collective bargaining were extended to black workers and indirect representation for black workers was done through the representatives of the department of labour in terms of the 1930 and 1937 amendments to the ICA of 1924.

<sup>532</sup> Godfrey Report (2007) 21.

<sup>533</sup> As above at 22 where the authors stated that the industrial council was to be utilised to secure minimum wages and benefits whilst the shop-floor was to be used to maximise the minimum wage and benefits.

<sup>534</sup> Godfrey *et al* (2010) 18-19.

<sup>535</sup> Van Jaarsveld *et al* (2007) para 331 state although the recommendations of the Wiehahn Commission were reflected in the legislation and the decisions of the Industrial Court, there was still room for the development of new statutory labour measures. The Industrial Court took the opportunity and laid down principles and provided guidance where legislation was deficient.

guidelines in areas where serious legislative deficiencies existed.<sup>536</sup> The Industrial Court played an important role in providing content to the concept of “unfair labour practice”.

The Industrial Court adopted different approaches and developed inconsistent positions when considering the question whether or not an employer had committed an unfair labour practice. The different approaches of the Industrial Court cannot be examined without first providing a definition of the term “unfair labour practice”. The first definition of unfair labour practice in terms of the LRA of 1956 was vague and merely defined it as “a labour practice that in the opinion of the Industrial Court, was unfair”.<sup>537</sup> The Industrial Court was given the authority to give content to this broad definition<sup>538</sup> and it entertained disputes of interest and of right, individual and collective disputes, as well as serving an advisory function and hearing various other types of disputes.<sup>539</sup>

Shortly after its inception the definition of unfair labour practice was changed for the first time through the Industrial Conciliation Amendment Act 95 of 1980. It defined the term as:

“(a) any labour practice or any change in any labour practice, other than a strike or lock-out...which has or may have the effect that—  
(i) any employee or class of employees is or may be unfairly affected or that his or their employment opportunities or work security is or may be prejudiced or jeopardized thereby;  
(ii)...;  
(iii) labour unrest is or may be created or promoted thereby;  
(iv) the relationship between employer and employee is or may be detrimentally affected thereby;  
(b) any other labour practice or any other in any labour practice which has or may have an effect which is similar or related to any effect mentioned in paragraph (a).”<sup>540</sup>

This definition was regarded as extremely open-textured and the Industrial Court retained its wide powers regarding the development of labour relations policy.<sup>541</sup>

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<sup>536</sup> As above. See also O’ Regan (1997) 895 the author states that inasmuch as the Wiehahn Commission had established the Industrial Court, it never contemplated that it would harbour the duty to bargain.

<sup>537</sup> S 1(1) of the LRA of 1956.

<sup>538</sup> Van Niekerk *et al* (2015) 386.

<sup>539</sup> Le Roux *ILJ* (1987) 196.

<sup>540</sup> S 66(1) of the Industrial Conciliation Act 95 of 1980.

<sup>541</sup> Anon *ILJ* (1980) 113.

According to Rycroft and Jordaan<sup>542</sup> this definition removed the legislative function of the Industrial Court and had it focus only on determining the dispute as per the definition.

Not long after the amendment to the definition of unfair labour practice, the Industrial Court had the first opportunity to consider an employer's refusal to bargain. In *Bleazard v Argus Printing Co Ltd*<sup>543</sup> the employer party gave notice to unilaterally withdraw its membership from the collective bargaining forum on the grounds that they were opposed to negotiating on the conditions set on behalf of the workers. An unfair labour practice dispute was instituted against the employer, and the Industrial Court directed that the employer party could not withdraw from such a negotiating forum.<sup>544</sup> The Industrial Court held that:

“[o]ur Act does not expressly place a statutory obligation on parties to negotiate, but failure to comply with an order made by this court in terms of s 43(4) is by s 53(1) declared an offence. Although it is conceivable that an order to negotiate in good faith might be difficult to enforce, that is not what has been ordered. The respondents are by the order required to remain parties to the Board in order to enable the achievement of the Board's object by way of negotiations.”<sup>545</sup>

In *Bleazard*<sup>546</sup> the Industrial Court referred to the duty to bargain in good faith as the notion is understood in the context of the United States of America. In that context, it is required that the parties must prove the existence of a serious attempt to adjust differences and to reach acceptable common ground.<sup>547</sup> Counterproposals have to be offered when those of the opposing party are rejected. Engagement occurred on a 'give and take' basis and contract terms were not to be constantly changed.<sup>548</sup> Evasive behaviour also had to be avoided.<sup>549</sup> The collective bargaining model and the duty to bargain as applicable in the United States was preceded by a determination having been made as to who the

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<sup>542</sup> Rycroft and Jordaan (1992) 158.

<sup>543</sup> (1983) 4 *ILJ* 60 (IC) 64.

<sup>544</sup> *Bleazard* at 79.

<sup>545</sup> As above at 78.

<sup>546</sup> As above at 77.

<sup>547</sup> As above at 76.

<sup>548</sup> As above.

<sup>549</sup> As above.

exclusive collective bargaining representative would be, that is, the majority trade union.<sup>550</sup>

Even though the Industrial Court did not introduce the notion of an enforceable duty to engage in good faith collective bargaining into South African law as early as 1983, it was an important development for the Industrial Court to hold that it would be unfair for the employer to withdraw from a negotiating forum. Following criticism about the open-ended definition of unfair labour practice attempts were made to codify the concept to provide more certainty. The Labour Relations Amendment Bill of 1986 was followed by the adoption in 1988 of a comprehensive definition of unfair labour practice which contained fourteen types of irregular practices.<sup>551</sup> The Congress of South African Trade Unions (COSATU) objected to this new definition resulting in the reintroduction of the definition of 1980.<sup>552</sup>

According to Rycroft<sup>553</sup> this draft Bill provided an opportunity to give recognition to the duty to bargain in good faith by including unreasonable failure or refusal to negotiate as part of the definition of an unfair labour practice. The Industrial Court however was pushed into acknowledging such a duty to bargain only later after its establishment.<sup>554</sup> In *National Union of Mineworkers v East Rand Gold and Uranium Co*<sup>555</sup> the Appellate Division confirmed that refusing to bargain or negotiating without an intention to enter into an agreement were subversive of the commitment

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<sup>550</sup> The duty to bargain as applicable in the United States was preceded by a determination having been made as to who the exclusive collective bargaining representative would be, that is, the majority trade union. The full discussion on the model of collective bargaining followed in the United States of America is in Chapter 6.

<sup>551</sup> See Le Roux *ILJ* (2002) 1670 and Le Roux and Van Niekerk (1994) 25. See also Rycroft and Jordaan (1992) 159-162 the authors mention that this list was not exhaustive as paragraph (o) of the definition "left ample scope for further development of the unfair labour practice concept." According to Coleman *CLLJ* (1991) 197 the 1988 amendments to the unfair labour practice definition created greater certainty on what constitutes unfair labour practices.

<sup>552</sup> According to Le Roux *ILJ* (2002) 1700 the LRA of 1995 definition included the unfair labour practices recognised by the Industrial Court since 1980 which include significantly, "unfair conduct relating to freedom of association," the "rights of access" and organisational rights"

<sup>553</sup> Rycroft *ILJ* (1988) 202. Rycroft states that there was no explanation why this duty to bargain was excluded in the 1987 Labour Relations Amendment Bill.

<sup>554</sup> Du Plessis *et al* (1994) 193.

<sup>555</sup> *East Rand Gold and Uranium Co Ltd* at 1237 E-F. See also *National Union of Mineworkers v East Rand Gold and Uranium Co Ltd* (1991) 12 *ILJ* 1221 (AD) 1224 B-D and 1237 E-F. The judgement of the LAC was taken to the AD by the trade union on appeal which was upheld. De Klerk, who was chairman of the LAC, was held to have been incorrect in his conclusion that the impasse was a direct result of bad faith bargaining by NUM, therefore there was no basis to interfere with the decision of the Industrial Court which found that the employer had committed an unfair labour practice. The AD did not tamper with the definition of good faith and even went as far as drawing on the United States of America's understanding of the concept confirming the content given in the *court a quo*. See also Louw *SAMLJ* (1989) 261 for further detail and discussion of the LAC judgement.

to collective bargaining.<sup>556</sup> The significance of this Appellate Division case on the unfair labour practice definition is its confirmation of the duty to bargain in good faith which includes negotiating with the recognised trade union and not the employees themselves.<sup>557</sup>

Steenkamp *et al*<sup>558</sup> mention that the effects of the decisions of the Industrial Court were twofold. First, employers in certain circumstances were under an obligation to negotiate with the trade union and to extend it organisational rights.<sup>559</sup> It is submitted that upcoming and new trade unions would be able to use this obligation in order to establish their position in the workplace. Secondly, the negotiating parties were compelled to negotiate in good faith and if the role of the trade union was undermined during the negotiations, the Industrial Court would regard such conduct as constituting bad-faith bargaining.<sup>560</sup>

As discussed below, a number of decisions of the Industrial Court give content to the rights of majority and minority bargaining agents.<sup>561</sup> The LRA of 1956 did not make specific reference to a body of organisational rights but covered aspects such as the duty to bargain, representation and retrenchment.

Broadly speaking, the Industrial Court recognised three approaches, namely the majoritarian, the pluralist and the all-comers models.<sup>562</sup> As pointed out by Grant whereas the court in some instances supported and accepted the principle of majoritarianism, there has generally been a rejection of the principle of majoritarianism.”<sup>563</sup>

### 3.4. Authority in Favour of Majoritarianism

In general, majoritarianism refers to the doctrine whereby representatives of a trade union are elected by the majority of employees in a particular bargaining unit

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<sup>556</sup> *East Rand Gold and Uranium Co Ltd* at 1237 E-F.

<sup>557</sup> As above. The Appellate Division at 1226 H-I also did not have an issue with 50% plus 1 as part of the collective agreement constituting sufficient representivity and the non-recognition of any other union for collective bargaining purposes.

<sup>558</sup> Steenkamp *et al ILJ* (2004) 951.

<sup>559</sup> As above.

<sup>560</sup> As above at 951-952.

<sup>561</sup> See Chapter 4 at 3.3. – 3.5.

<sup>562</sup> Van Jaarsveld and Van Eck (1992) 156.

<sup>563</sup> Grant *ILJ* (1993) 305.



for purposes of collective bargaining with the employer.<sup>564</sup> Grant<sup>565</sup> defines majoritarianism as “a system whereby the plant is divided into bargaining units, and a single union is recognised as representing all the employees (including non-members) in that unit.”

Several decisions of the Industrial Court supported the principle of majoritarianism. In *Luthuli and others v Flortime (Pty) Ltd and another*,<sup>566</sup> a matter dealing with retrenchment, the employer had a collective agreement with the majority trade union that included a retrenchment procedure. The employer consulted with the trade union and the employees who belonged to a minority trade union argued that they were not informed or were aware of the retrenchments in question.<sup>567</sup> The question before the Industrial Court revolved on whether in this situation there was a duty on the employer to consult with the affected employees or their minority trade union where there is an agreed procedure with the recognised trade union.<sup>568</sup>

The Industrial Court held that there was no duty on the employer to consult with minority trade unions, accepting the argument relied upon by the employer based on the principle of majoritarianism.<sup>569</sup> The additional decisive argument raised by the respondents was that there was an agreement that stipulated that where there is a majority trade union in place, the minority trade unions would not be entitled to claim any collective bargaining rights for as long as the majority trade union retains its status.<sup>570</sup> Similarly, in *Bokomo Mills*<sup>571</sup> where the employer had refused to negotiate with a minority trade union, the Industrial Court held that it “will not enforce an employee’ right to negotiate (or consult) with his employer either in his capacity as an individual or under the auspices of a minority trade union” where a majoritarian collective bargaining arrangement is in place.

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<sup>564</sup> *Food Workers Council of South Africa v Bokomo Mills* (1994) 15 ILJ 1371 (IC) 1374 paras F- I. The determination on what majoritarianism entails was already determined in *Radio Television Electronic & Allied Workers Union v Tedelex (Pty) Ltd & another* (1990) 11 ILJ 1272 (IC) 1280 at para D where majoritarianism was held to entail that the employer negotiates “only with the majority union and on the basis that any agreement arrived at would be binding on all employees within the bargaining unit.”

<sup>565</sup> Grant ILJ (1993) fn 1.

<sup>566</sup> (1988) 9 ILJ 287 (IC) 288 at paras A-E.

<sup>567</sup> *Luthuli* at 288 paras H-J.

<sup>568</sup> As above at 290 para C.

<sup>569</sup> As above at 290 para G.

<sup>570</sup> As above at 290 B-C.

<sup>571</sup> *Bokomo Mills* at 1377 B.

In the case of *BAISEMWU and others v Iscor*,<sup>572</sup> the dispute also involved retrenchment. The Industrial Court held that the recognition of a majority trade union is the “philosophy of collective bargaining” and it would be problematic for the employer to accord the same privileges associated with majority status to a minority trade union.<sup>573</sup> The Industrial Court further held that in the case of retrenchment the employer may consult with the minority, but if it does not wish to do so, that cannot be held to be an unfair labour practice.<sup>574</sup> It is submitted that this stance empowers the employer with an election to negotiate with a minority trade unions. This would be tantamount to promoting pluralism at the instance of the employer.

The Industrial Court in this case held that its position was informed by the recognition that there was no existing relationship between the employer and that minority union.<sup>575</sup> Where there was such existing relationship deduced from an existent pattern of consulting with a minority trade union, the employer’s decision unilaterally to bring this pattern to a halt could have been construed as an unfair labour practice.<sup>576</sup>

At a higher level, the Labour Appeal Court case of *Ramolesane & another v Andrew Mentis & another*<sup>577</sup> significantly reinforced the Industrial Court’s support of the principle of majoritarianism. This appeal case involved entering into an agreement which bound all employees by a majority trade union in settling a dispute.<sup>578</sup> The LAC agreed with the argument that the will of the majority had to prevail over the will of the minority when taking decisions and it confirmed this decision by defining a majority as oppressive of the minority in a benevolent sense.<sup>579</sup>

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<sup>572</sup> (1990) 11 ILJ 156 (IC) at 157 G.

<sup>573</sup> *BAISEMWU* at 160 A-B.

<sup>574</sup> As above at 160 C the Industrial Court held that granting recognition to the minority trade union would be tantamount to being involved in the conflict between the majority trade union and other trade unions.

<sup>575</sup> As above at 159 H-J.

<sup>576</sup> *BAISEMWU* at 160 D-E.

<sup>577</sup> (1991) 12 ILJ 329 (LAC).

<sup>578</sup> *Ramolesane* at 333 and 334. The court *a quo* held that the majority trade union was authorised to act on behalf of all employees even those that have not been individually consulted.

<sup>579</sup> As above at 336 J.

According to Grant<sup>580</sup> there are various reasons why majoritarianism was favoured in comparison with other systems. The first reason is that the LAC endorsed it.<sup>581</sup> Secondly, negotiating with a minority trade union becomes artificial as no agreement will be entered into with it.<sup>582</sup> Lastly, imposing the duty to bargain separately with every employee and minority trade union is going too far and will result in serial negotiations characterised by opportunism.<sup>583</sup>

In *Mynwerkersunie v African Products*,<sup>584</sup> a matter dealing with collective bargaining, the Industrial Court held that where there is a majority trade union in the workplace of an employer, it is not expected that the employer should negotiate with the minority trade union too. The reasoning of the Industrial Court in finding that the employer did not commit an unfair labour practice by not including them in negotiations, was the fact that the union had elected to recruit only white workers as its members.<sup>585</sup> Their minority trade union status was held to be a consequence of their own doing and they had no basis to demand the right to negotiate with the employer.<sup>586</sup>

On a matter of principle what could be argued on behalf of a minority trade union that wishes to recruit on racial lines as was the case in *Mynwerkersunie*<sup>587</sup> could be the ILO principle of freedom of association. Where recruitment on racial lines takes place based on the freedom of association principle, the possible argument that could be made is that there is a right to represent members. However, this right to represent pertains only to the right to represent members in disciplinary and grievance proceedings, not collective bargaining. The Industrial Court unfortunately did not distinguish between the acquisition of organisational rights and the collective bargaining right.<sup>588</sup>

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<sup>580</sup> Grant *ILJ* (1993) 312.

<sup>581</sup> As above.

<sup>582</sup> As above.

<sup>583</sup> As above.

<sup>584</sup> (1987) 8 *ILJ* 401 (IC) at 412 H-I.

<sup>585</sup> *Mynwerkersunie* at 412 J - 413 A.

<sup>586</sup> As above at 412.

<sup>587</sup> As above.

<sup>588</sup> See Chapters 5 and 6 on the discussion of the distinction and the considerations at play in the promotion and protection of the right to freedom of association.

However, this distinction was drawn in *UWUSA v SA Stevedores (Pty) Ltd*<sup>589</sup> where there was an existing recognition agreement between the employer and the majority trade union, the Transport and General Workers Union (TGWU). The Industrial Court held that even though TGWU was to be allowed to enjoy the benefits of its majority status, which included non-recognition of minority trade unions in collective bargaining, the granting of stop order facilities to a minority trade union had to be recognised as a “first step towards full recognition” and should be afforded to minority trade unions.<sup>590</sup> Albeit qualifiedly, this stance is supported as it makes it possible for minority trade union to establish itself.

### 3.5. Authority in Favour of Pluralism

The cases of the Industrial Court that supported majoritarianism by way of exception also recognised pluralism. Such an exception was highlighted in *Food Workers Council of SA v Bokomo Mills*<sup>591</sup> which involved a minority trade union that sought bargaining rights with the employer. The Industrial Court held that there are factors that dictate that the employer could negotiate and grant organisational rights to a minority trade union.<sup>592</sup> The factors listed by the Industrial Court are that:

“(i) there has been a long-standing relationship between the employer and the minority union... (ii) the fact that the employer has no objection... (iii) the fact that the minority union is a registered union and has enjoyed a stable presence in the employer's workplace for... years; (iv) the fact that the number of employees represented by the minority union ... is not minimal or insignificant, or that the minority union represents the interest of a special group within the bargaining unit; (v) the fact that the minority union has an intimate knowledge of the business... and is in a position to make a meaningful contribution to the negotiating process... (vi) the fact that, although it may cause the employer some difficulty or inconvenience, the exercise by the employee of his right to negotiate through a minority union does not occasion the employer insurmountable problems.”<sup>593</sup>

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<sup>589</sup> (1994) 15 *ILJ* 1090 (IC) 1091. See also the discussion of the case in Anon *CLL* (1994) 58-59.

<sup>590</sup> As above.

<sup>591</sup> (1994) 15 *ILJ* 1371 (IC) 1373 H-J.

<sup>592</sup> *Bokomo Mills* at 1376 F-J.

<sup>593</sup> As above. These were the only factors that were listed in *Radio Television Electronic and Allied Workers Union v Tedalex (Pty) Ltd* at 1278-9 which is discussed below. *Bokomo Mills* at 1377 J is a case that serves as authority for majoritarianism in the decisions of the Industrial Court and *Tedalex* at 1278-9 was referred to as reflecting on the exceptions to the majoritarianism principle, the latter case is pro-pluralism.

Thompson<sup>594</sup> mentions that the pluralist system supports the recognition by the employer of more than one trade union within a bargaining unit, provided the trade union to be recognised is sufficiently representative.

This case demonstrates that the Industrial Court did not exclude minority trade unions from enjoying bargaining rights. There was still room created for the minority trade union to be recognised for purposes of collective bargaining if the employer elects to recognise them. This possibility created confusion regarding the approach adopted by the Industrial Court pertaining to a system of collective bargaining in terms of the LRA of 1956. Nevertheless, it is argued that where room exists for the recognition of a minority trade union this denotes pluralism and not majoritarianism.

Although the Industrial Court in *Bokomo Mills*<sup>595</sup> was in favour of majoritarianism, the recognition of minority trade unions nevertheless was held to be possible. From this possibility, it is clear that even though the Industrial Court supported the majoritarian approach, it tolerated pluralism where it was appropriate to do so. As was mentioned in Chapter 3 the Committee of Freedom of Association accepts that both majoritarianism and pluralism are compatible with the principles of freedom of association.

However, the Industrial Court did not consider the actual position of the ILO which entails that within a pro-majoritarian system, minority trade unions at least should be entitled to represent their members in disciplinary and grievance proceedings.<sup>596</sup> It can be argued that it extended the ambit of the ILO by providing circumstances where the majoritarian principle would not be applicable.<sup>597</sup> The Industrial Court did not consider this aspect as the focus was on the significance of freedom of association for the benefit of minority trade unions, going into the collective bargaining arena.<sup>598</sup> It is submitted that this stance by the Industrial Court

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<sup>594</sup> Thompson *ILJ* (1989) 810.

<sup>595</sup> See *Bokomo Mills* at 1377 C-E where the judge clearly outlined that there might be those who would want to see the *Bokomo Mills* judgement as significantly pro-majoritarian this "is clearly not the interpretation which the learned judge could have intended should attach to his observations."

<sup>596</sup> See Chapter 2 at 3.3

<sup>597</sup> *Bokomo Mills* at 1375 A-F.

<sup>598</sup> See Chapter 2 at 4.3 on the discussion of the extent of pluralism that the ILO propagates as opposed to one that runs the risk of excessive organisational fragmentation.

was incorrect as it is not supported by the determinations of the supervisory bodies of the ILO where the collective bargaining choice is majoritarianism.

### 3.6. Authority in Favour of the All-Comers Approach

The Industrial Court in *Radio Television Electronic & Allied Workers Union v Tedelex*<sup>599</sup> opened the way for the somewhat extreme all-comers approach. In this case the minority trade union applied to the Industrial Court for the employer to negotiate with it despite the existence of a majority trade union and a collective agreement which confirmed its exclusive collective bargaining rights.<sup>600</sup> *Tedelex* held that:

“Each employee has the right to speak to his employer and negotiate his conditions of employment, including wages. The right to negotiate is not confined to collective negotiations. Where, however, an individual employee negotiates he does so for himself and not on behalf of others. The outcome of such negotiations would apply to him only and not to a body of employees. The factors which would indicate when, where and whether the individual may negotiate are not necessarily the same as the factors which would indicate when, where and whether the employer must bargain collectively. What is sauce for a gaggle of geese may not be sauce for the lonely gander.”

Grant<sup>601</sup> correctly argues that the rationale for rejecting majoritarianism in *Tedelex* was that majoritarianism infringed upon the individual’s right to freedom of association. However, the author also points out that this premise lacked authority both at common law and in terms of the LRA of 1956.<sup>602</sup> It is submitted that this position in *Tedelex* is difficult if not impossible to reconcile with the procedure in *Bokomo Mills*<sup>603</sup> where equity based factors were applied. It is argued that although the Industrial Court in *Bokomo Mills* considered equity factors in relation to the rights of a minority trade union it did not confirm the all-comers stance, but rather viewed pluralism as an exception to the majoritarian principle.<sup>604</sup>

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<sup>599</sup> (1990) 11 *ILJ* 1272 (IC).

<sup>600</sup> As above at 1273 D-E.

<sup>601</sup> Grant *ILJ* (1993) 306.

<sup>602</sup> As above. This is to be contrasted with the view of Cameron *et al* referred to in *Natal Baking and Allied Workers union v BB Cereals (Pty) Ltd* (1989) *ILJ* 870 H-J.

<sup>603</sup> *Bokomo Mills* at 1376 F-J. See also the discussion of the case at 3.5 above. Grant (1993) at 307 mentions that equity was introduced to correct and develop existing law and enables the court to create new rights.

<sup>604</sup> See the discussion at para 3.5 above.

In *SA Polymer Holdings (Pty) Ltd t/a Mega-Pipe v Llale and others*<sup>605</sup> the employer did not consult with employees who did not belong to the majority trade union during a retrenchment exercise. The LAC held that even though the employer had consulted with the majority trade union in relation to its members' interests, not consulting with the other employees who were not members of majority trade union and equally affected by the retrenchment constituted an unfair labour practice.<sup>606</sup>

The LAC held further that these employees were not owed any allegiance by the majority trade union, and the livelihood of the employees was at stake.<sup>607</sup> It was held that these employees or their trade unions should have been allowed to make representations before their retrenchments were effected.<sup>608</sup> This decision did not place the majority status of the recognised trade union in question, but rather allowed the workers who were affected to have a voice and make representations through their trade union.

It is argued that this LAC judgement is significant in that it placed an issue that affected an individual employee directly in contrast to the interest of the majority trade union. The issue at hand is not a collective matter, losing a job impacts directly on the individual employee.

In *Natal Baking and Allied Workers Union v BB Cereals (Pty) Ltd*<sup>609</sup> the Industrial Court contributed to the strengthening of the ILO's core principle of the right to freedom of association in South Africa's system of collective bargaining. The Industrial Court in this case concurred with Cameron *et al*, in so far as the definition of an unfair labour practice extends "the workers' guarantee of freedom of association to what is now a right of association".<sup>610</sup> This definition served as the

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<sup>605</sup> (1994) 15 ILJ 277 (LAC) 282.

<sup>606</sup> As above.

<sup>607</sup> As above at 281 the LAC held that there are two purposes for the notices in the retrenchment exercise. The first is to allow the employees opportunity to involve their union or for them to make representations where they do not belong to one and to allow them time to seek alternative employment. Notwithstanding its decision the Industrial Court would have ruled in favour of the employer had the issue not been retrenchment but negotiations on wages for example.

<sup>608</sup> As above.

<sup>609</sup> (1989) 10 ILJ 870 (IC).

<sup>610</sup> The Industrial Court referred to s 1(j) of LRA of 1956 as amended by Labour Relations Amendment Act 83 of 1988 which provides that "subject to the provisions of this Act, the direct or indirect interference with the right of employees to associate or not to associate, by any other employee, any trade union, employer, employers' organisation, federation or members, office-bearers or officials of that trade union, employer, employers' organisation or federation, including, but not limited to, the prevention of an employer by a trade union, a trade union federation, office-

basis for the opinion of the Industrial Court, that an individual employee had the right to deal directly with the employer in matters of redundancy.<sup>611</sup> The Court rejected the principle of majoritarianism in this instance.<sup>612</sup>

In *Natal Baking and Allied Workers Union*<sup>613</sup> the employer had entered into a collective agreement with the majority trade union, and the latter enjoyed sole bargaining rights. The union had the majority support of van drivers in a sub-unit which they argued constituted a bargaining unit. The Industrial Court held that the right to associate or not to associate included the right to “negotiate or liaise” and a majority trade union’s agreement with the employer could not justify forcing the collective agreement on the applicant union. Van Niekerk J held that:

“there is no room for the contention that the relevant paragraph of the Act is ambiguous or unclear. A general right to negotiate is clearly granted to the employee and by definition the whole concept of majoritarianism must be excluded as not being of any application. In my opinion there can be no question that the employee is entitled to insist on direct dealings with his employer. Representation cannot be forced upon him in the name of majoritarianism.”<sup>614</sup>

The Industrial Court held that enforcement of this collective agreement would be a contradiction of the right to freedom of association, because the right to associate included the right to negotiate.<sup>615</sup> This approach means that even a single employee can insist on the employer negotiating with him or her directly.<sup>616</sup>

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bearers or members of those bodies to liaise or negotiate with employees employed by that employer who are not represented by such trade union or federation;”

<sup>611</sup> As above.

<sup>612</sup> As above.

<sup>613</sup> (1989) 10 *ILJ* 870 (IC) 872. The Applicant union in this case had as the majority members van salesmen and wanted to be able collectively to bargain on their behalf and the majority trade union as sole negotiator for all employees in terms of a collective agreement.

<sup>614</sup> As above at 874 B-C. In Rycroft and Jordaan (1990) 104 at fn 101 the authors understand this case to demonstrate an “all comers approach” wherein the “right not to associate is given paramountcy over a majoritarian system” despite the fact that the employer and the majority trade union had entered into an agreement to be the exclusive bargaining parties.

<sup>615</sup> *Natal Baking and Allied Workers Union* at 874 G-H. S 1(j) of the LRA of 1956 also provides that “subject to the provisions of the Act, the direct or indirect interference with the right to associate or not to associate, by any other employer, any trade union, employer, employer’s organisation, federation or members, office bearers or officials or members of that trade union, employer, employer’s organisation or federation including, but not limited to, the prevention of an employer by a trade union, a trade union federation, office bearers or members of those bodies to liaise or negotiate with employees employed by that employer who are not represented by such trade union or federation.”

<sup>616</sup> This stance is not supported in the study as it resonates with the Japanese model of collective bargaining which leads to fragmentation of the collective effort as discussed in Chapter 7 hereunder.



Arguably, this is not a sustainable position as the right to collective bargaining, which is an exercise involving a collective of employees, here may be invoked by an individual employee. It is truly a fragmentation of the collective efforts of workers that the ILO does not desire.<sup>617</sup>

The Industrial Court adopted a more reasonable stance in *United Workers Union of SA v SA Stevedores*<sup>618</sup> where recognition was seen to be a process that begins with an “extension of certain minimal facilities by an employer to a trade union, such as the right of access to company premises for the purposes of recruiting or the processing of stop orders” which may gradually develop into a full bargaining relationship.

Inasmuch as the Industrial Court in this case held that there was no general duty on the part of the employer to supply trade union facilities to the trade union, it held that where the trade union had complied with the provisions of section 78(1A) it ought to grant these facilities.<sup>619</sup> The Industrial Court held that it would be unfair to grant stop order facilities to a majority trade union and not to a minority trade union.<sup>620</sup> It is submitted that the position of the Industrial Court in this case is acceptable only insofar as organisational rights are concerned and not in relation to collective bargaining rights where majoritarianism remains appropriate.

This thesis argues that there are two points of departure when dealing with organisational rights. The first one is looking at organisational within the context of the right to freedom of association, and the second is looking at organisational rights within the context of the right to engage in collective bargaining. In the first instance, minority trade unions should ideally be granted the right to obtain some of not all organisational rights. This does not extend to the right to engage in collective bargaining. In the second instance minority trade unions where they

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<sup>617</sup> See Chapter 2 at 4.3 and Chapter 7 on the discussion of the Japanese model.

<sup>618</sup> 1994 *ILJ* 1090 (IC) at 1092 G-J. See also Mischke *CLL* (2004) 54–55 whose rationale is similar to this case of *SA Stevedores* that nothing prevents a collective agreement between an employer and a small minority trade union that represents for example highly skilled artisans or pilots even within labour relations framework that is pro majoritarian. Doing that is allowing such a trade union to “put the foot in the door” and not necessarily refers to recognition of the trade union as a collective bargaining party *per se*. This issue and rationale by Mischke is ventilated in more detail in Chapter 6 at 2.2.

<sup>619</sup> *SA Stevedores (Pty) Ltd* at 1093 C-F.

<sup>620</sup> As above. The Industrial Court held that in the absence of satisfactory reasons why facilities to a majority trade union should be granted and not to a minority trade union is unjustifiable discrimination.

meet set conditions in avoidance of fragmentation of the collective effort should have the right to represent their members in respect of individual disputes even if the model of collective bargaining is majoritarianism. Extending the duty to bargain to minority trade unions or to an individual employee goes beyond international norms.

### 3.7. Significance of the Industrial Court Era

Du Toit *et al*<sup>621</sup> identify the following problems regarding the uncertainty created by the *ad hoc* determinations of the Industrial Court. There were uncertainties relating to “when, with whom and in respect of which topics the duty to bargain would be imposed in future; a proliferation of eligible agents with rights to bargain at plant level; a duality between centralised and plant-level bargaining; an unclear and often subjective concept of ‘good faith’ bargaining; an overall lack of consistency, undermining bargaining relationships and impacting unfavourably on the legitimacy of the system.”

The key inconsistency from an organisational rights point of view is equating the right to engage in collective bargaining with the right to acquire organisational rights. There was no distinction drawn by the Industrial Court between the right to engage in collective bargaining and the right to acquire organisational rights and these seemed interchangeable. In this way, based on the right to freedom of association, minority trade unions and individual employees were granted right to engage in collective bargaining.<sup>622</sup>

The Industrial Court concluded that the term “unfair labour practice” could encompass a refusal to bargain.<sup>623</sup> According to O’Regan the Wiehahn Commission never contemplated that the unfair labour practice jurisdiction would harbour a duty to bargain.<sup>624</sup>

Despite the challenges faced by the Industrial Court, there are a number of positive developments that arise. First, the LRA of 1956 established a specialist dispute

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<sup>621</sup> Du Toit *et al* (2015) 279-280.

<sup>622</sup> Steenkamp *et al ILJ* (2005) 952.

<sup>623</sup> Du Toit *et al* (2015) 252.

<sup>624</sup> O’Regan *ILJ* (1997) 895.

resolution institution before the advent of majoritarian democracy in South Africa. Secondly, the right to freedom of association became a prominent feature of the labour relations framework. The cases which opposed majoritarianism relied on the right to freedom of association.

This aspect is illustrated in *Natal Baking and Allied Workers Union BB Cereals (Pty) Ltd*<sup>625</sup> where the Industrial Court recognised the distinction between the right to freedom of association and the principle of majoritarianism. The Industrial Court held that representation cannot be forced upon somebody “in the name of majoritarianism”.<sup>626</sup> The point also came to the fore in *United Workers Union of SA v SA Stevedores (Pty) Ltd*.<sup>627</sup> In this instance the minority trade union sought facilities for the deduction of trade union dues. The employer had concluded a recognition agreement recognising the organisational rights and the right to engage in collective bargaining with two majority trade unions in two separate bargaining units.<sup>628</sup>

The employer submitted that the granting of stop order facilities to the minority trade union would constitute a breach of the recognition agreement.<sup>629</sup> In a positive development the Industrial Court drew a clear distinction between recognition for purposes of exercising the right to collective bargaining and the extension of organisational rights in pursuit of the right to freedom of association.

In this regard, it held that:

“the terms of the recognition agreement do not expressly prohibit the granting of stop-order facilities to minority unions. Even if it is accepted that the recognition agreement confers upon the majority union sole bargaining rights and that it prohibits the recognition of minority unions, it does not in my view prohibit the granting of stop-order facilities to minority unions.”<sup>630</sup>

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<sup>625</sup> (1989) 10 *ILJ* 870 (IC) 874. The Industrial Court recognises the incompatibility between the right to freedom of association and the principle of majoritarianism, although it does it to the extreme as the study beckons for the option of granting organisational rights to minority trade unions that meet a low threshold rather than go as far as granting collective bargaining rights. This is not to say that the granting of collective bargaining recognition or making of inputs is necessarily inimical to pluralism and the recognition of minority entities in institutions of democracy in the Constitution, 1996.

<sup>626</sup> As above at 874.

<sup>627</sup> (1994) 15 *ILJ* 1090 (IC).

<sup>628</sup> *Stevedores* at 1091 A-H.

<sup>629</sup> As above at 1092 D-F.

<sup>630</sup> As above at 1092 G-H.

The negative and positive sentiments with regard to the achievements of the Industrial Court serve as a prelude to the work that lay ahead in respect of a new collective labour law framework for a new democratic South Africa.

In *Natal Die Castings v President, Industrial Court and others*<sup>631</sup> Kriel J expressed his view regarding the former dispensation as follows:

“I have on previous occasions, in relation to a variety of problems arising from the interpretation of various provisions of the Act, 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 and give effect to 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.”<sup>632</sup>

The Industrial Court jurisprudence and the former LRA of 1956 were in need of an overhaul. This task was assigned to a Ministerial Task Team instituted to design a new labour law dispensation.

#### 4. The Ministerial Legal Task Team

##### 4.1. Introduction

The Ministerial Task Team was appointed in July 1994 as per the mandate of the cabinet with the sole aim of overhauling the laws regulating labour relations in South Africa and preparing a negotiating document in the form of a draft Bill, for discussion and negotiation by organised labour and business.<sup>633</sup> The decisions of the Industrial Court which endorsed a mixed bag of majoritarianism,<sup>634</sup> pluralism<sup>635</sup> and the all-comers approach<sup>636</sup> provided the background for the work of the Ministerial Task Team, offering a spectrum of choices for consideration and inclusion in the new labour legislation framework. The work of the Ministerial Task Team set the tone for the new LRA of 1995.

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<sup>631</sup> (1987) 8 *ILJ* 245 (IC).

<sup>632</sup> As above at 253 and 254.

<sup>633</sup> Explanatory Memorandum *ILJ* (1995) 279.

<sup>634</sup> See Chapter 4 at 3.4.

<sup>635</sup> See Chapter 4 at 3.5.

<sup>636</sup> See Chapter 4 at 3.6.

## 4.2. The Brief of the Ministerial Task Team

The Ministerial Task Team comprised experienced labour law practitioners and academics who were assisted by three international experts provided by the ILO.<sup>637</sup> According to the Ministerial Task Team's Explanatory Memorandum the challenges relating to the labour relations framework at the time included the multiplicity of laws and the contradictions in policy introduced by these amendments;<sup>638</sup> the wide discretionary powers given to the Industrial Court;<sup>639</sup> the criminalisation of labour law<sup>640</sup> and the haphazard collective bargaining institutions.<sup>641</sup>

The brief of the Ministerial Task Team was informed by the Reconstruction and Development Programme which was government policy at the time.<sup>642</sup> The brief also alluded to the government's public commitment, *inter alia*, to implement the norms of the ILO Conventions No 87 of 1948 and 89 of 1949.<sup>643</sup> The new labour law was to be written in a language that was simple to understand, especially for its users, which include employees and the employers, when they seek remedies through an institution that will conciliate, mediate and arbitrate disputes.<sup>644</sup>

The Ministerial Task Team had the task to spell out the rights and obligations of trade unions.<sup>645</sup> The Ministerial Task Team was critical of the role played by the Industrial Court in relation to collective bargaining matters,<sup>646</sup> they mentioned that:

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<sup>637</sup> According to the Explanatory Memorandum *ILJ* (1995) 280 these were Dr B Hepple, of Clare College, Professor A Adigun, University of Lagos and Professor Manfred Weiss of the University of Frankfurt.

<sup>638</sup> See Explanatory Memorandum *ILJ* (1995) 281 where reference is made amongst others to the LRA of 1956, Public Service Act 108 of 1994, the Education Labour Relations Act 146 of 1993 and the Agricultural Labour Act 147 of 1993.

<sup>639</sup> As above at 281, 285, 290 and 292.

<sup>640</sup> As above at 281 and 284.

<sup>641</sup> Explanatory Memorandum *ILJ* (1995) 281. Grogan (2015) 46-47 also adds that the Ministerial Task Team hoped to rid the system of adversarial attitudes in the relationship between employers and trade unions and to bring about a co-operative one, thus transforming attitudes and bargaining styles.

<sup>642</sup> See the White Paper on Reconstruction Development Programme available at <http://www.gov.za/sites/www.gov.za/files/governmentgazetteid16085.pdf> (accessed in February 2017) where the RDP is referred as a government policy to direct the transformation of South Africa after the establishment of a new democratic order.

<sup>643</sup> Explanatory Memorandum *ILJ* (1995) 279.

<sup>644</sup> As above.

<sup>645</sup> As above.

<sup>646</sup> As above at 284.

“the Industrial Court, under the banner of its unfair labour practice jurisdiction, has further fragmented the system by intervening in bargaining disputes.”<sup>647</sup>

Their purpose was setting out an organisational rights dispensation and the realisation of the constitutional labour rights to freedom of association, to organise and to engage in collective bargaining.<sup>648</sup>

#### 4.3. Models of Collective Bargaining

According to the Ministerial Task Team the approach of the Industrial Court to impose a duty to bargain on all employers encroached on the voluntary nature of collective bargaining. This duty compelled employers to recognise all trade unions and in some instances even individual employees.<sup>649</sup>

The Ministerial Task Team had to work within the framework of the Interim Constitution.<sup>650</sup> The Ministerial Task Team considered three collective bargaining models.<sup>651</sup> The first was “a system of statutory compulsion, in which a duty to bargain is underpinned by a statutory determination of the levels at which bargaining should take place and the issues over which parties are compelled to bargain.” The second was regarded by the Ministerial Task Team as similar, but more flexible.<sup>652</sup> This model was prevalent under the LRA of 1956 and involved the Industrial Court making determinations regarding levels that would be appropriate for bargaining and what the topics for bargaining were to be.<sup>653</sup> The third model was one that afforded the parties greater freedom to determine their own arrangements and the use of their collective bargaining power in the process.<sup>654</sup>

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<sup>647</sup> As above.

<sup>648</sup> As above.

<sup>649</sup> See Chapter 4 at 3.6.

<sup>650</sup> Constitution of the Republic of South Africa Act 200 of 1993.

<sup>651</sup> Explanatory Memorandum *ILJ* (1995) 292.

<sup>652</sup> As above.

<sup>653</sup> As above.

<sup>654</sup> As above. The power in relation to the trade union party is the ability to strike and in relation to the employer refers to the ability to lock out workers from the premises of the workplace. See also Chapter 6 at 2.4.

The third model was preferred by the Ministerial Task Team and it was envisaged that the law would play a lesser role in the collective bargaining process.<sup>655</sup> Voluntary collective bargaining was to be bolstered through a set of organisational rights and the protection of the right to strike. In respect of collective bargaining, Grogan says that:

“successful bargaining requires each party to treat the other as an equal, while attempting to reach an agreement that might not entirely satisfy either. It has been well said that, unless employers treat workers as equals in the bargaining arena, collective bargaining is nothing more than collective begging.”<sup>656</sup>

Grogan<sup>657</sup> mentions that the Ministerial Task Team’s stance on voluntary collective bargaining was realised in the LRA of 1995 in so far as trade unions and their officials or representatives were granted statutory organisational rights. The author also mentions that an unequal power dynamic between the employer and the trade union in collective bargaining can be corrected by the right to withdraw labour and for such withdrawal to be protected.<sup>658</sup> The Explanatory Memorandum suggests that the acquisition and enjoyment of these organisational rights and the right to strike should take place only within the context of collective bargaining.<sup>659</sup> How minority trade unions were to acquire organisational rights was not an issue that was considered in detail in the Explanatory Memorandum.

#### 4.4. Organisational Rights

The Ministerial Task Team suggested that the duty to bargain, which was a notable feature of the Industrial Court era, had to be replaced.<sup>660</sup> The Industrial Court’s establishment of the duty to bargain was in conflict with voluntary collective bargaining, which the ILO prefers.<sup>661</sup> In this regard, the Ministerial Task Team in the Explanatory Memorandum outlined that:

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<sup>655</sup> As above at 293.

<sup>656</sup> Grogan (2010) 9.

<sup>657</sup> As above.

<sup>658</sup> As above at 10.

<sup>659</sup> This is the issue taken up in Chapter 5 and 6 on the significance of organisational rights and the right to strike on trade unions even outside the collective bargaining process.

<sup>660</sup> Explanatory Memorandum *ILJ* (1995) 292.

<sup>661</sup> Van Niekerk *et al* (2015) 46-47 correctly observe that the ILO supervisory bodies do not promote the duty to bargain and rather allude to the endorsement of the view that collective bargaining to be effective must assume a voluntary character.

“While giving legislative expression to a system in which bargaining is not compelled by law, the draft Bill does not adopt a neutral stance. It unashamedly promotes collective bargaining. It does so by providing for a series of organisational rights for unions and by fully protecting the right to strike. These rights and the speedy and inexpensive remedies by which they are to be enforced extend significant powers to trade unions.”<sup>662</sup>

It is submitted that the Ministerial Task Team is commended for not giving too much room to the duty to bargain in the institution of collective bargaining and for providing parties with an environment within which they can dictate the content of their collective agreements.<sup>663</sup>

I agree with Grogan’s view that organisational rights and the right to strike provide the foundation to the constitutional right to engage in collective bargaining,<sup>664</sup> only in so far as majority trade unions do not get licence to trample on the minority trade union’s right to exist. It is recognised that this is very possible as a collective agreement may have this effect. Minority trade unions are entitled to organisational rights which make it possible for them to establish themselves. Minority trade unions have a need for these organisational rights.<sup>665</sup>

The argument is simply that the right to engage in collective bargaining is not without limitation. The majority trade union automatically acquires organisational rights, but it is beyond their authority to exclude a minority trade union from attempting to reach an agreement with the employer on organisational rights.<sup>666</sup> In that case the Ministerial Task Team could just as well have explored a single option, namely a strictly majoritarian system where only the majority trade union represents all employees. It is inappropriate to give majority trade unions the unlimited right to raise the threshold as to who should obtain organisational rights.<sup>667</sup>

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<sup>662</sup> Explanatory Memorandum *ILJ* (1995) 293.

<sup>663</sup> As above at 292 the Ministerial Task Team was in support of the curtailment of the Industrial Court’s unfair labour practice jurisdiction by providing that parties themselves determine the structure of negotiations.

<sup>664</sup> Grogan (2010) 43.

<sup>665</sup> See Chapter 5 at 6 and Chapter 6 at 3, 5 and 7.

<sup>666</sup> In the context of possible variation of a threshold by a majority trade union, the minority trade union includes even a sufficiently representative trade union because for example if the threshold is varied to become 49%, that effectively puts such a trade union within the ambit of the collective bargaining unit and subject to exclusion as determined by the variation. This is where the bias and abuse forewarned by the ILO comes into play as is discussed in chapter 6 at 4.

<sup>667</sup> See Chapter 6 at 3 and 4.



The Ministerial Task Team also had the task to address a pattern of violent strikes which commonly occurred under the LRA of 1956.<sup>668</sup> The Ministerial Task Team noted that during the 1980s many disputes arose, *inter alia*, because of the demand for collective bargaining rights, including organisational rights.<sup>669</sup> The Ministerial Task Team hoped to remove the causes of strikes by introducing a coherent collective bargaining structure coupled with organisational rights and the right to strike.<sup>670</sup>

As discussed in chapters 5 and 6, the LRA of 1995 did not allocate organisational rights to minority trade unions.<sup>671</sup> In addition, majority trade unions were given the right to conclude threshold agreements with their employers which had the effect of excluding minority trade unions. It is argued that this provision contravenes the protection of minority trade unions where the majority trade unions are provided this unlimited right.

It is submitted that the Ministerial Task Team failed to foresee that the collective labour law framework would prove fertile ground for conflict between the right to engage in collective bargaining and the minority trade unions' right to freedom of association. This aspect is discussed comprehensively in chapter 6.

#### 4.5. Thresholds

At the outset, the Ministerial Task Team determined that organisational rights should not be accorded to all trade unions but should be linked to the representative status of a trade union.<sup>672</sup> The Ministerial Task Team suggested that:

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<sup>668</sup> Explanatory Memorandum *ILJ* (1995) 282. On other notable feature of strikes was their violent character. The strikes were enmeshed in the political mood in the country and the campaign to rid the country of "apartheid", as well as the brutality with which that campaign was suppressed.

<sup>669</sup> As above at 284.

<sup>670</sup> In the Explanatory Memorandum *ILJ* (1995) 284 the Ministerial Task Team noted that there was an unacceptably high incidence of unprocedural strikes, and the absence of procedures for the independent and effective mediation of disputes meant that many disputes that could be resolved by consultation instead are resolved by industrial action. See also Du Toit *et al* (2015) 253 where the authors concur with this observation and state that the reason the new LRA opted to define organisational rights was "to deal with the cause of these "unnecessary strikes."

<sup>671</sup> See Chapter 5 at 5.

<sup>672</sup> Explanatory Memorandum *ILJ* (2005) 294.

“[s]ome rights might require a lower threshold than others before they accrued to a union. It is for the social partners to decide whether only those unions representing 50% of employees or whether any union should be entitled to the organisational rights contained in the draft Bill. Low thresholds will assist in the organisation of the unorganised, while the majoritarian criterion avoids a proliferation of unions and provides stability.”<sup>673</sup>

Even though the Ministerial Task Team’s point of view demonstrates a level of pragmatism towards the granting of organisational rights on the one hand, it leaves room for a majoritarian system that creates a system of exclusive representation by majority trade unions. The Ministerial Task Team feared the granting of organisational rights to minority trade unions would result in a proliferation of trade unions.<sup>674</sup> This position is not entirely correct. It is argued that pluralism of trade unions is not tantamount to proliferation and further the model of South Africa’s constitutional democracy promotes minority interests and their participation in institutions of democracy through their associations.<sup>675</sup>

In order to appease the objections to granting majority trade union status and to make room for upcoming trade unions identified as sufficiently representative, the Ministerial Task Team introduced the notion of a hierarchy of organisational rights.<sup>676</sup> A high threshold of representivity is required for some rights and a lower threshold is required for the enjoyment of other organisational rights.<sup>677</sup> It is argued that this framework is not conducive to the protection of a minority trade unions’ right to freedom of association. The Ministerial Task Team neglected to propose clear criteria regarding the identification of minority trade unions and it did not pre-determine what rights fall under which category.

The determination of the threshold of representivity was rather left to the National Economic Development and Labour Council (NEDLAC).<sup>678</sup> Ultimately, the architects of the LRA of 1995 passed on the determination of thresholds of

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<sup>673</sup> As above.

<sup>674</sup> See Chapter 2 at 4.3 where reservations are raised as to this being an automatic result of pluralism or proliferation and the need to draw a clear distinction between the two concepts.

<sup>675</sup> See Chapter 3 at 3 and 4.

<sup>676</sup> Explanatory Memorandum *ILJ* (1995) 294.

<sup>677</sup> As above.

<sup>678</sup> See NEDLAC Act and establishment of NEDLAC available at <http://new.nedlac.org.za/wp-content/uploads/2015/09/Founding-documents-and-protocols-20151.pdf> (accessed in February 2017) where it is mentioned that NEDLAC was established through the National Economic Development and Labour Council Act 35 of 1994. From the provisions of ss 18 and 21 of the LRA of 1995, discussed at chapter 6 at 4 NEDLAC never set this threshold as suggested by the Ministerial Task Team.

representivity in agreements to the collective bargaining parties. This failure has made the setting of thresholds uncertain, imprecise and easy to manipulate. The idea of setting a clear threshold for minority trade unions to be in a position to represent their members in individual disputes would satisfy ILO norms and the Constitution, 1996's preference for a multi-party democracy.<sup>679</sup>

It is argued that by locating organisational rights under the umbrella of collective bargaining subjects the issue of thresholds to the whim of collective bargaining parties. It allows them free reign to decide who enjoys organisational rights and who does not. South Africa, which is committed to the ILO conventions, has not given effect to the determinations of the ILO's supervisory bodies which require the setting of criteria which are "objective, precise and pre-established, in order to avoid any possibility of bias or abuse against minority trade unions".<sup>680</sup>

It is also submitted that locating the setting of thresholds under collective bargaining results in the infringement of minority trade unions' right to freedom of association. The right to engage in collective bargaining and organisational rights are incorrectly seen by the Ministerial Task Team as two sides of the same coin. It is argued that the scheme suggested by the Ministerial Task Team regarding the right to freedom of association and the right to organise was viewed only from the perspective of the majority trade union.

The Ministerial Task Team omitted to set out the requirements for the setting of thresholds by means of collective agreements. The hierarchy of organisational rights was not clarified by the Ministerial Task Team, which is difficult to reconcile with the constitutional provisions of protecting and promoting minority interests and international law to at least permit minority trade unions to represent members in individual cases. The only two types of trade unions that were recommended for the acquisition of organisational rights were majority trade unions and sufficiently

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<sup>679</sup> Compare Explanatory Memorandum *ILJ* (1995) 294 and ss 18 and 20 of the LRA of 1995 on the suggestion to have NEDLAC decide upon statutory thresholds for the acquisition of organisational rights and the powers of majority trade unions at their discretion to decide on these.

<sup>680</sup> *Digest of Decisions* (2006) para 356. See also Chapter 2 at para 4.2 and Chapter 6 at para 4.

representative trade unions.<sup>681</sup> The fact that majority trade unions were also afforded special privileges is discussed in chapters 5 and 6.

## 5. Conclusion

South Africa's current system of collective bargaining is traceable to the rapid industrialisation of the economy after the discovery of gold and diamonds.<sup>682</sup> The early 1920s conflict in the gold mines led to the ICA of 1924 which made provision for the establishment of industrial councils to ensure that labour conflict is institutionalised.<sup>683</sup> Even though it was not defined, the concept of sufficient representation was born out of the ICA of 1924.

The dual labour relations system was challenged by black worker trade unions as only benefitting white workers.<sup>684</sup> This conflict necessitated the establishment of the Van Reenen, Botha and Wiehahn Commissions which considered ways to make the system more representative.<sup>685</sup> From the Nationalist Party victory in 1948 the institutionalisation of the protection of white workers was strengthened which led to the intensification of the campaigns against the labour relations system.<sup>686</sup>

The Industrial Court was a product of the Wiehahn Commission and it developed a duty to bargain on the employer, minority trade unions and even on individual workers in some instances.<sup>687</sup> This development went against the grain of the principle of voluntary collective bargaining. It is clear that during the Industrial Court era the system of collective bargaining was fraught with inconsistency and uncertainty.<sup>688</sup>

The Ministerial Task Team grappled with these inconsistencies when it began work on establishing a new labour relations system for South Africa based on the Interim

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<sup>681</sup> Explanatory Memorandum *ILJ* (2005) 294. See also Godfrey *et al* (2010) 82-85. The ANC, COSATU, and business, identified as the social partners that made contributions through position papers for the CODESA negotiations, are discussed.

<sup>682</sup> See Chapter 4 at 2.1.

<sup>683</sup> See Chapter 4 at 2.1.

<sup>684</sup> See Chapter 4 at 2.2.

<sup>685</sup> See Chapter 4 at 2.3 and 3.

<sup>686</sup> As above.

<sup>687</sup> See Chapter 4 at 3.

<sup>688</sup> See Du Toit *et al* (2015) 252, Vettori *De Jure* (2005) 386 and Steenkamp *et al ILJ* (2004).

Constitution<sup>689</sup> and international law. The ILO principle of freedom of association was already well established through the work of the Industrial Court.<sup>690</sup> However, the principle incorrectly was extended to individuals and incorporated the right of minority trade unions to enter into negotiations with employers, rather than being focused on granting these entities organisational rights.<sup>691</sup>

The Ministerial Task Team brought South Africa's labour relations framework in line with the ILO by promoting a system of voluntary collective bargaining. However, it omitted to establish pre-conditions for the setting of thresholds in collective agreements which would supply a check and balance in voluntary collective bargaining.<sup>692</sup> However, the Ministerial Task Team did establish the basis for protecting the rights to freedom association, to organise and to engage in collective bargaining in terms of the LRA of 1995. The Ministerial Task Team failed to offer sufficient protection to minority trade unions.

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<sup>689</sup> Constitution of the Republic of South Africa Act 200 of 1993.

<sup>690</sup> See Chapter 4 at 3.6 and 3.7.

<sup>691</sup> As above.

<sup>692</sup> *Digest of Decisions* (2006) 348 and 354. See also Chapter 2 at 2.1.

**Chapter 5**  
**Statutory Organisational Rights and the Right to Engage in**  
**Collective Bargaining**

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1. Introduction

As indicated in chapter 4, the Ministerial Task Team introduced proposed measures that would effectively lead towards an overhaul of the labour dispensation under the LRA of 1956. According to Van Niekerk *et al*<sup>693</sup> “a voluntarist system of collective bargaining, underpinned by a set of organisational rights for registered trade unions and coupled to a right to strike” was introduced. Statutory organisational rights constitute trade union rights and cannot be exercised by an individual employee.<sup>694</sup> When the Ministerial Task Team proposed organisational rights for trade unions should be introduced it accepted that they were not to be absolute as each would be qualified by what is reasonable in the

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<sup>693</sup> Van Niekerk *et al* (2015) 387. See also the Explanatory Memorandum *ILJ* (1997) 292 and the discussion in Chapter 4.

<sup>694</sup> Mischke (2004) 53.

circumstances.<sup>695</sup> Du Toit *et al*<sup>696</sup> confirm that these rights are subject to conditions such as time, size and place that are reasonable and necessary. The Ministerial Task Team also suggested that these rights should be qualified by thresholds of representivity and that social partners had to decide on these aspects.<sup>697</sup>

Section 23(5) of the Constitution, 1996 provides that “[n]ational legislation may be enacted to regulate collective bargaining.” The LRA of 1995 was enacted to give effect to this right. However, the South African system of collective bargaining and the statutory organisational rights dispensation as contained in the LRA 1995 possibly is in contradiction to the constitutionally guaranteed right to freedom of association<sup>698</sup> and the right to organise<sup>699</sup> within the context of constitutional democracy.

The first part of this chapter is an exposition of the purpose of organisational rights. The second part examines the impact of the definition of “workplace” on two distinct aspects, namely the right to engage in collective bargaining and organisational rights. The third part examines the statutory methods of acquiring statutory organisational rights by registered trade unions. The fourth part analyses these organisational rights and their significance for sufficiently representative and minority trade unions. The final part analyses the amendments to the LRA of 1995 on statutory organisational rights and the impact these amendments have on the acquisition of statutory organisational rights. The exposition of these issues ultimately demonstrates that inasmuch as organisational rights are critical to support a trade union in collective bargaining they are equally important in relation to the protection of the right to freedom of association for sufficiently representative and minority trade unions.

It should be noted that the acquisition of organisational rights by means of collective agreement as well as the establishment of thresholds will be examined

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<sup>695</sup> In the Explanatory Memorandum *ILJ* (1995) 294 the Task Team said that none of the organisational rights are absolute and “each is qualified by what is reasonable in the circumstances: the right of access, for example, is granted subject to reasonable and necessary conditions to safeguard life and property and to prevent the undue disruption of work.”

<sup>696</sup> Du Toit *et al* (2015) 261.

<sup>697</sup> Explanatory Memorandum *ILJ* (1995) 294.

<sup>698</sup> S 18 of the Constitution, 1996.

<sup>699</sup> S 23(4)(b) of the Constitution, 1996. See also Chapter 3 at paras 6.2 and 6.3 for a discussion of the constitutional rights to freedom of association and to engage in collective bargaining in South Africa and how they interrelate with the right to organise.

in chapter 6. This chapter examines only the acquisition of statutory organisational rights through membership of a bargaining council and the section 21 procedure.

## 2. The Purpose of Organisational Rights

The purpose of organisational rights in the LRA of 1995 is connected to the right to engage in collective bargaining. This is how the current labour relations framework is structured. These organisational rights are thus not clearly portrayed as also advancing the right to freedom of association. It is a widely held view that the relationship between the employer and their employees is a relation that reflects an imbalance of power in society.<sup>700</sup> Kahn-Freund claims:

“[t]he relation between an employer and an isolated employee or worker is typically a relation between a bearer of power and one who is not a bearer of power. The main object of labour law has and we venture to say will always be, to be a countervailing force to counteract the inequality of bargaining which is inherent and must be inherent in the employment relationship.”<sup>701</sup>

Trade unions serve as agents for their members during collective bargaining with employers and government. Grogan<sup>702</sup> mentions that when unions engage in collective bargaining organisational rights coupled to the right to strike ensure that in this situation they are not rendered weak by powerful employers. A more equal balance of power between employers and trade unions establishes an environment that is more conducive to compromise being reached during collective bargaining.<sup>703</sup>

The Constitution, 1996 and the LRA of 1995 do not offer a definition of the concept of “collective bargaining.” Gernigon *et al* aptly state that:

“Collective bargaining is deemed to be the activity or process leading up to the conclusion of a collective agreement...between an employer, a group of employers or one or more employers’ organisations, on the one hand, and one or more representative workers’ organisations, or, in the absence

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<sup>700</sup> Godfrey *et al* (2010) 4. The assertion denotes the need for the trade union as the entity that does not bear social power to be in a position to engage effectively and meaningfully with the employer during collective bargaining.

<sup>701</sup> Cabrieli (2016) 12. See also Godfrey *et al* (2010) 4 who mention that organisational rights are an enabling factor for the trade union to partake in effective collective bargaining.

<sup>702</sup> Grogan (2010) 54.

<sup>703</sup> Grogan (2010) 101.



of such organisations, the representatives of the workers duly elected and authorised by them.”<sup>704</sup>

The description of collective bargaining aligns well with the purpose of the LRA of 1995. Section 1 of the LRA of 1995 provides that:

“1. The purpose of this Act is to advance economic development, social justice, labour peace and the democratisation of the workplace by fulfilling the primary objects of the Act, which are –  
(a) to give effect to and regulate...rights...conferred by section 23 of the Constitution;  
(b) to give effect to international obligations...  
(c) to provide a framework within which employees and their trade unions, employers and employer’s organisations can –  
(d) promote -  
(i) orderly collective bargaining;”

This section provides content with regard to the purpose of the LRA of 1995. It does not elevate one purpose above another, but portrays each identified purpose as being equally significant. For example, the promotion of orderly collective bargaining depends upon giving effect to international obligations with labour peace also being at the centre of the purpose of the Act.<sup>705</sup>

How the different elements in the purposes of the LRA of 1995 have been captured is demonstrable by reference to a number of court decisions. In *OCGAWU v Total SA (Pty) Ltd*<sup>706</sup> the commissioner of the CCMA upheld the argument of the employer that “accepting depots that were not functionally independent” would lead to what the Act does not desire, namely, a proliferation of workplaces and this would be contrary to the promotion of orderly collective bargaining”. This argument has been raised in cases where the majority trade union and a minority trade union exist in the same workplace. The need to promote orderly collective bargaining

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<sup>704</sup> Gernigon *et al* (2000) 9. Article 4 of Convention No 98 of 1949 provides that collective bargaining is the “system of voluntary negotiation” between parties in the workplace for the purpose of entering into a collective agreement. Article 2 of the Collective Bargaining Convention No 154 of 1981 refers to collective bargaining as all negotiations between employers and trade unions determining conditions of employment and regulating their relations between themselves and amongst themselves. See also Van Niekerk *et al* (2015) 385. The Appellate Division in *NUM v Ergo* (1991) 12 *ILJ* 1221 (A) 1237 also held that “the fundamental philosophy of the LRA of 1956 is that collective bargaining is the means preferred by the legislature for the maintenance of good labour relations and for the resolution of labour disputes.”

<sup>705</sup> See Chapter 6 at 3 where the current labour law is attributed as a possible contributor towards compromising labour peace in the workplace with Marikana as a case in point.

<sup>706</sup> [1999] 6 *BLLR* 678 (CCMA) cited in Du Toit *et al* (2015) 261 at fns 287 and 288.

has been used on a number of occasions as a basis for the rejection of pluralism in the workplace.<sup>707</sup>

In *Hospersa and Zuid- Afrikaanse Hospital*,<sup>708</sup> the purpose of organisational rights was described as a method for trade unions ‘to get a foot in the door’; Mischke<sup>709</sup> expands on this idea:

“Organisational rights make it possible for a trade union to build up, consolidate and maintain a power-base of sufficient strength among the employers’ employees – it is only once the union has attained sufficient strength that it can exercise sufficient economic power on the employer to compel the employer to bargain on wages and terms of conditions of employment.”

It is submitted that the most significant way of assisting trade unions ‘to get a foot in the door’ is through a statutory scheme of organisational rights for registered trade unions that defines their existence. It is beyond the capacity of a start-up trade union to be an effective collective bargaining agent from the outset which is dependent on having sufficient membership to be canvassed by the collective bargaining agent. Mischke in describing the purpose of organisational rights in the way he does, not only captures the significance of organisational rights from the collective bargaining dimension only. Organisational rights serve the purpose of enabling start-up registered trade unions that may relatively be unrepresentative to be able to recruit and organise to reach whatever threshold level is required for full recognition status in the workplace.<sup>710</sup> In addition, the admission to a bargaining council is determined by satisfying a set threshold to show the influence the trade union has in the workplace.<sup>711</sup>

It is accepted that one of the positive effects of statutory organisational rights besides giving the trade union party in collective bargaining power to equally engage with the employer from a position of strength. However, organisational

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<sup>707</sup> See Chapter 2 at 4.3 on the discussion of the concept of pluralism and how it is important to distinguish between pluralism and proliferation.

<sup>708</sup> *Hospersa and Zuid- Afrikaanse Hospital* GA 637 (unreported CCMA award, 3 February 1997) cited in Du Toit et al (2015) 250. See also Van Niekerk et al (2015) 373.

<sup>709</sup> Mischke *CLL* (2004) 52.

<sup>710</sup> Esitang and Van Eck *ISSL* paper (2015) 24.

<sup>711</sup> See para 6.2 of the Constitution of the General Public Service Sectoral Bargaining Council (GPSSBC) set at 30 000 members for a trade union to be admitted. See also Chapter 6 at 4.2 on the discussion of membership to one of the public sector bargaining councils.

rights also serve to ensure that trade unions are able to perform activities that are unrelated to collective bargaining. These instances are entry to the premises of the employer to recruit new members and significantly to represent members in disciplinary and grievance processes.<sup>712</sup>

This thesis argues that organisational rights serve as the organisational oxygen of trade unions. Without these rights start-up and unrepresentative trade unions would find it extremely difficult to establish themselves and to continue to exist.<sup>713</sup>

Organisational rights were introduced in an effort to correct the imbalance in the relations between organised business and organised labour. A trade union cannot from its inception automatically become a functioning collective bargaining agent. It is only through vigorous recruitment efforts, supported by the enjoyment of organisational rights, that this can be achieved.

It is argued that in order to assist unrepresentative trade unions to meet their obligations as identified by the ILO and as confirmed by South Africa's constitutional framework, policy makers can consider one of the following theoretical options. Firstly, the LRA of 1995 could have provided all registered trade unions, irrespective of their size, with a suite of "basic" organisational rights such as the right to elect trade union representatives, the right of access and the right of disclosure pertaining to the individual dispute. This option is based on the fact that the right to represent their members in disciplinary and grievance hearings is key to the realisation of the right to freedom of association and all associated rights will require enjoyment by a trade union for the representation to be effective. The other organisational rights, such as trade union dues and disclosure of information for collective bargaining purposes, may remain subject to the attainment of statutory thresholds.

Secondly, rather than differentiating between basic and other organisational rights, the statutory thresholds could be lowered in respect of all organisational rights. Taking the cue from international law and South Africa's constitutional dispensation, in terms of which interests of minorities are to be protected and promoted where they are limited unjustifiably, the percentage could be lowered.

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<sup>712</sup> See *Digest of Decisions* (2006) para 974.

<sup>713</sup> See *Esitang and Van Eck ILJ* (2016) 766.

What the percentage is to be could range between 1% and 10% before any of the organisational rights can be claimed subject to agreement between the employer and trade union party.<sup>714</sup> The proposed percentages are drawn from the determinations of the ILO's supervisory bodies; the percentages that relate to the proportional acquisition of seats in institutions of democracy as sanctioned by South Africa's electoral system and also taking cognisance of what is already available as the framework for thresholds to qualify for trade union representatives.<sup>715</sup>

Thirdly, with specific reference to the public sector, noting that the public sector operates at the level of the scope of the Public Service Co-ordinating Bargaining Council (PSCBC) and different sector councils, the organisational rights could be made enjoyable and to be acquired by those trade unions that are already active in the general public sector. It is submitted that this will address the question of proliferation of trade unions in the general public service.

The main principles in all three of the dimensions of the theoretical framework are firstly, that organisational rights are significant and serve the purpose of realising the enjoyment of the right to freedom of association.<sup>716</sup> Secondly, the thresholds in satisfying the purpose of orderly collective bargaining require that there be recognition of the right of unrepresentative trade unions to represent their members in individual cases.<sup>717</sup> This recognition for individual cases is to be within the context of low thresholds as agreed to by parties and ensuring that proliferation does not negate the unity of purpose and the collective voice of workers in a workplace, whilst bearing in mind that diversity remains possible.<sup>718</sup>

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<sup>714</sup> See Explanatory Memorandum (1995) 294 and *Digest of Decisions* (2006) 75 para 356. A fixed percentage is in line with the recommendations of the Ministerial Task Team and also aligns with the principle of the ILO that thresholds are to be objective, precise and pre-established. According to Hopper (2008) 1 the Interim Constitution established a multi-party system and enabled minority parties with 5% of the national vote a position in the cabinet and introduced proportional representation.

<sup>715</sup> See CEACR Report (2013) 59 on the applicability of 10% and the rationale thereto; See also s 14 of the LRA of 1995 on the numbers to qualify for a trade union representative, namely one representative for 10 members and the electoral system of proportional system where 1% of the vote is sufficient to secure a single seat.

<sup>716</sup> See Chapter 2 at 3.3 and 4 on what the ILO's position is with regards to the different models of collective bargaining and what its overall stance of the right and the extent of the protection of the right to freedom of association.

<sup>717</sup> As above.

<sup>718</sup> See Chapter 2 at 4.3, 4.4 and 4.5.

### 3. Definition of “Workplace”

The architects of the LRA of 1995 resolved that statutory organisational rights accrue to majority and sufficiently representative trade unions per “workplace”.<sup>719</sup> An employer can control more than one workplace or bargaining constituency. What is this workplace that is referred to? In relation to the public service, section 213 of the LRA of 1995 defines this term as follows:

“(i) for the purposes of collective bargaining and dispute resolution, the registered scope of the Public Service Co-ordinating Bargaining Council (PSCBC) or a bargaining council in a sector in the public service, as the case may be; or  
(ii) for any other purpose, a national department, provincial administration, provincial department or organisational component contemplated in section 7(2) of the Public Service Act, 1994...or any other part of the public service that the Minister for Public Service and Administration...demarcates as a workplace.”

The definition of the term in section 213 recognises three purposes in which workplace applies, namely: in “collective bargaining;” “dispute resolution;” and for “any other purpose.” However, it does not make clear which applies in respect of the acquisition of organisational rights. It is submitted that the phrase “for any other purpose” is wide enough to include reference to the acquisition of organisational rights.<sup>720</sup> It is also argued that the second part of the definition should not relate to collective bargaining for substantive issues such as the improvement of conditions of employment like wage increases, but rather to the exercise of the right to freedom of association and organisational rights, including the engagement that unrepresentative trade unions may enter with employers on low thresholds for acquisition of organisational rights.<sup>721</sup>

From these possibilities it is argued that trade unions that do not qualify as collective bargaining agencies may still enjoy organisational rights such as the right to represent members in disciplinary hearings and grievance proceedings.<sup>722</sup> It is

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<sup>719</sup> Ss 12, 13, 14, 15 and 16 of the LRA of 1995.

<sup>720</sup> S 4 of the LRA of 1995 which provides for the right to freedom of association for employees includes the right to elect trade union representatives and to stand for election.

<sup>721</sup> See Chapter 6 at 2.3 on the agreements on thresholds that an employer may enter with parties, be they majority trade unions or unrepresentative trade unions.

<sup>722</sup> See the discussion about representation in Chapter 2 at 3.2, 3.4 and 4.2 where it is discussed in more detail.

submitted that the enjoyment of organisational rights in the public service for purposes other than collective bargaining should not be determined through admission to the public service bargaining councils which is subject to meeting threshold levels which should be applicable for the collective bargaining purposes.<sup>723</sup> It is significant to note that in the public service the state is the employer and not the different national or provincial departments or individual departmental offices in which employees work.<sup>724</sup> Having regard to the public service in general and the specific national or provincial departments may ease the applicability of the purposes to the two dimensions, namely, the right to engage in collective bargaining and the acquisition of organisational rights.

In relation to the private sector, section 213 of the LRA of 1995 defines “workplace” as:

“the place or places where the employees of an employer work. If an employer carries on or conducts two or more operations that are independent of one another by reason of their size, function or organisation, the place or places where employees work in connection with each independent operation, constitutes the workplace for that operation;”

Clearly the private sector constitutes both small and large employers. The private sector also has sectoral bargaining councils. The private sector is accommodated in the definition of “workplace” in section 213 of the LRA of 1995 in the expression “all other instances.” In the case of the private sector the definition of “workplace” does not differentiate between different purposes as is the case in the context of the public sector.

The definition of a “workplace” recently was considered by the Constitutional Court in *Association of Mineworkers and Construction Union v Chamber of Mines*.<sup>725</sup> The Association of Mineworkers and Construction Union (AMCU) represents the majority of workers in only five mines associated with the Chamber of Mines.<sup>726</sup> The Chamber of Mines represented the employers during collective bargaining. The National Union of Mineworkers (NUM), Solidarity and the United Association

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<sup>723</sup> See the discussion on how the acquisition of organisational rights is linked to the admission of trade unions to the bargaining council in Chapter 5 at 4.2 below.

<sup>724</sup> For the confirmation hereof see *Member of the Executive Council for Transport: Kwazulu-Natal & others v Jele* (2004) 25 ILJ 2179 (LAC) at paras 38 and 39.

<sup>725</sup> (2017) 38 ILJ 831 (CC).

<sup>726</sup> AMCU at para 5.

of South Africa (UASA)<sup>727</sup> acting jointly constitute a majority in representation in all of the mines added together.

The three unions acting jointly reached a collective wage agreement with the employer. Even though AMCU participated in collective bargaining, they rejected the wage agreement.<sup>728</sup> AMCU gave notice of its intention to strike which was successfully interdicted by the Chamber of Mines. AMCU raised the following in its arguments:

“the definition of workplace does not apply to the reference in section 23(1)(d)(iii) to ‘the majority of employees employed by the employer in the workplace.’ This is because the statute’s definitions apply only ‘unless the context otherwise indicates.’ It also contends that, if the definition does apply, it can be interpreted in what it calls a ‘broad’ way – with the effect that ‘workplace’ means an individual mine and not all an employer’s operations taken together.”<sup>729</sup>

In the event that this argument should fail, AMCU argued that section 23(1)(d) of the LRA of 1995 was unconstitutional as it unjustifiably limits its members’ “rights to fair labour practices, including the right to bargain collectively, the right to strike and the right to freedom of association.”<sup>730</sup>

The Constitutional Court held that the individual operations where AMCU had the majority of members would be individual workplaces only if these were independent operations.<sup>731</sup> However, the Constitutional Court held that the five individual mines in which AMCU had majority membership operated integrally as a single workplace and each of the mines was not an independent operation, as argued by AMCU.<sup>732</sup>

Du Toit *et al*<sup>733</sup> state that the independence referred to in the private sector definition of workplace may be established “with reference to one or more criteria

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<sup>727</sup> AMCU at para 6.

<sup>728</sup> AMCU at para 7.

<sup>729</sup> AMCU at para 11. This provision clearly stipulates that the agreement entered by an employer and a majority trade union party is binding on all employees in that workplace

<sup>730</sup> AMCU at para 16. See also at para 17 where AMCU raised several arguments but significantly added that the extension in terms of section 23(1) of the LRA of 1995 is offensive to the rule of law as there are no remedies under it.

<sup>731</sup> AMCU at paras 27 and 30.

<sup>732</sup> As above.

<sup>733</sup> Du Toit *et al* (2015) 255.

of size, function or organisation where a business has various operations at different sites”.<sup>734</sup> The authors do not make any reference to the purpose served by the definition of workplace as central to determining the workplace.

It is submitted that to ensure consistency and to give recognition to the right to freedom of association for trade unions, the distinction between different purposes in the definition of the workplace applicable in the public service should also apply in the private sphere. This would necessitate an amendment to the definition of “workplace”. This amendment will affect two things. First, for the purposes of collective bargaining the definition of workplace would cover all workplaces of the employer. For example, in the public sector within the PSCBC and in the different sectors, for purposes of collective bargaining the workplace would be the general public service and the sectors in question. In the case of the private sector, where there are bargaining councils established, these would constitute the workplace for purposes of collective bargaining to. For purposes of collective bargaining this would include even those workplaces which are independent operations but still belong to the same employer. However, in the case of individual departments and provincial departments for the public sector, and the individual workplaces independent or otherwise, these would constitute workplaces for purposes of trade unions acquiring organisational rights. It is submitted that should a distinction be drawn in the definition of workplace for both the public and private sectors with reference to the purposes as alluded to it would give effect to each of the constitutional rights.

This thesis argues that it is inappropriate for the right to freedom of association to be limited by means of high thresholds or abuse by majority trade unions and the definition of workplace. It is argued in conformity to the ILO’s dimension, the only instances where thresholds should become relevant is in the spheres identified, *inter alia*, collective bargaining where the majority trade union and the employer or bargaining council negotiate substantive issues concerning changes to the conditions of service for all employees. It is argued that collective bargaining as the source of thresholds of representivity should not introduce unjustifiable limitations on the acquisition of organisational rights in pursuit of the exercise of

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<sup>734</sup> Du Toit *et al* (2015) 256 suggest that the criteria must be interpreted with reference to a specific organisation. For example, size need not refer only to absolute size, such as the number of employees, but also to relative size or financial turnover.



the right to freedom of association. This right to freedom of association has already been recognised in representation of members in individual cases.

Corazza and Fergus<sup>735</sup> state that the definition of workplace as it currently stands “has implications for organisational rights”. As an example of such an implication they state that “unions with significant percentages of workers as members at a particular operation may be precluded from accessing organisational rights”. This situation will not arise should the purposes be separated. The authors caution that although “majoritarianism has certain value, it should not be regarded as an end in itself” and majority trade unions should not operate unchecked.<sup>736</sup> These majority trade unions would certainly be able to operate in these workplaces unchecked as there will be no entity in existence to keep them in check and to provide an alternative voice to workers. As discussed in chapter 6, this caution is relevant in circumstances where majority trade unions pursue collective agreements that deny the exercise of the right to freedom of association of minority trade unions.

#### 4. Acquisition of Organisational Rights

##### 4.1. Introduction

The acquisition and the enjoyment of organisational rights is significant for both representative or majority trade unions on the one hand, and unrepresentative or minority trade unions on the other. As is currently is the case, the statutory organisational rights form an integral part of the right to engage in collective bargaining in terms of the structure of the LRA of 1995.<sup>737</sup>

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<sup>735</sup> Corazza and Fergus in Hepple *et al* (2015) 88.

<sup>736</sup> As above. The authors warn that where majority trade unions are unchecked the rights of smaller trade unions and non-unionised workers are constrained. An agreement that sets a wide workplace for purposes of enjoying organisational rights is one such constraint and has the effect of determining the majority trade union as the sole bargaining agent.

<sup>737</sup> Part A of Chapter III provides for all organisational rights under the collective bargaining chapter of the LRA of 1995. There is no separate structure that deals with organisational rights in pursuit of the right to freedom of association.

Statutory organisational rights can be acquired in three ways. First, through membership in a bargaining council,<sup>738</sup> second, in terms of section 21 of the LRA of 1995<sup>739</sup> and, third, these rights may be acquired in terms of collective agreements.<sup>740</sup> In this last instance majority trade unions are at liberty to include thresholds of representivity which have an exclusionary effect on unrepresentative trade unions, including those trade unions that are sufficiently representative. The first and the second methods of acquisition of organisational rights are examined in this part. The last-mentioned method of acquisition is examined in the next chapter, this chapter deals only with the first and second methods of acquisition of organisational rights.

#### 4.2. Membership of the Bargaining Council

A bargaining council is established by agreement between one or more registered trade unions and one or more registered employers' organisations for a sector.<sup>741</sup> Each bargaining council must adopt a constitution which meets the requirements set out in the LRA of 1995.<sup>742</sup> Section 30(2) of the LRA of 1995 provides that reference to an employers' organisation includes the state as the employer of public servants.

Registered trade unions in bargaining councils automatically acquire the right to access in the workplace and the right to stop order facilities within the registered scope of the bargaining council.<sup>743</sup> Conflict may arise where a particular trade union is recognised as the exclusive collective bargaining agent.<sup>744</sup> In *NUMSA v Feltex Foam*<sup>745</sup> the majority trade union had entered into a recognition agreement

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<sup>738</sup> S 19 of the LRA of 1995 provides for the rights to access and to trade union dues. See also the constitutions of bargaining councils that also regulate organisational rights in Chapter 5 at 4.2 below.

<sup>739</sup> See Chapter 5 at 4.3 below on the discussion of s 21(8) of the LRA of 1995 that has recently been amended and has a bearing on the acquisition of organisational rights.

<sup>740</sup> This method of acquisition will be discussed in detail in Chapter 6.

<sup>741</sup> S 27 read with s 29 of the LRA of 1995.

<sup>742</sup> S 30 of the LRA of 1995 provides, *inter alia*, for the appointment of representatives of parties to bargaining council, the rules for meetings, the election and appointment of office bearers.

<sup>743</sup> S 19 of the LRA of 1995.

<sup>744</sup> The acquisition of organisational rights through a collective agreement is discussed more fully in Chapter 6.

<sup>745</sup> [1997] 6 BLLR 798 (CCMA) 797 and 804. The majority trade union argued that this recognition agreement takes precedence over any other provision of the LRA of 1995 and relied heavily on section 23(1)(d) which stipulates that non-members to a trade union party to the collective agreement are bound if identified.

with the employer that conferred on the union the exclusive right to represent the workers. The commissioner of the CCMA held that a trade union that is a member of a bargaining council automatically acquires the rights of access and to stop order facilities.<sup>746</sup> In *Feltex Foam* the CCMA held that the fact that they are not a majority in the total business of the employer, but nonetheless sufficiently representative in the workplace, Feltex Foam should have them by virtue of membership to the sector bargaining council acquiring some organisational rights.<sup>747</sup>

In what seems to be an anomaly, bargaining councils are entitled to set thresholds before a trade union may become a member of a bargaining council. This regulation could bar an unrepresentative trade union that does not meet the threshold from gaining organisational rights, including the right to represent members in individual cases. This situation is illustrated by the Constitution of the General Public Service Sectoral Bargaining Council (GPSSBC).<sup>748</sup> This public service bargaining council is the largest in the country and covers a total of 303 000 public servants which constitutes about 86% of public service departments.<sup>749</sup> Paragraph 6.2 of the Constitution of the GPSSBC provides that the threshold for admission of any trade union to the bargaining council is 30 000 members.

Trade unions not meeting the set threshold of 30 000 members in this sector of the public service are excluded from the acquisition of statutory organisational rights and the GPSSBC collective bargaining processes. The GPSSBC has set out the organisational rights dispensation in terms of an organisational rights agreement.<sup>750</sup> The organisational rights covered in this agreement are access to the workplace, meetings on the premises of the employer, utilisation of facilities,

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<sup>746</sup> As above.

<sup>747</sup> *Feltex Foam* at 802.

<sup>748</sup> The GPSSBC Constitution is contained in Resolution 2 of 2003. This means that it is the second collective agreement entered into by this sectoral bargaining council in the year 2003. The GPSSBC is one of the sectoral bargaining councils in the public service and is made up of national departments such as the national Departments of Agriculture, Forestry and Fisheries, Arts and Culture, Basic Education (non-educators), Environmental Affairs, Home Affairs, Tourism and Rural Development amongst others. The other bargaining councils are the Education Labour Relations Council (ELRC) for educators, the Safety and Security Sectoral Bargaining Council (SSSBC) for the police services and Public Health and Social Development Sectoral Bargaining Council (PHSDBC).

<sup>749</sup> GPSSBC Annual Report 2016/2017. According to the Report the diverse scope of the GPSSBC spans 9 Provincial Departments, 93 Provincial Departments and 45 National Departments.

<sup>750</sup> GPSSBC Resolution 3 of 2014 "Organisational Rights Agreement between the State as employer in the sector and admitted trade unions."

deduction of trade union subscriptions, election of trade union representatives, leave for representatives and disclosure of information.<sup>751</sup>

The definition of “trade union” in this sector excludes non-members from the bargaining council and from the acquisition of organisational rights. The definition of trade union refers only to trade unions admitted to the bargaining council.<sup>752</sup> However, unrepresentative trade unions, including sufficiently representative trade unions that do not meet the set threshold, may be excluded from acquiring organisational rights including the right to represent their members in individual cases simply because they do not meet the set threshold and are a threat to the majority trade union.<sup>753</sup>

This thesis supports the lowering of the thresholds of representivity for the acquisition of all organisational rights by registered trade unions. It is submitted this complies with the requirements set by the ILO for the establishment of clear criteria in relation to thresholds.<sup>754</sup> Such a threshold, for example of 10%, sets a clear target for minority trade unions in order to acquire organisational rights.<sup>755</sup>

#### 4.3. Section 21 Procedure

The second mechanism for the acquisition of statutory organisational rights is by means of section 21(1) of the LRA of 1995. It provides that a registered trade union may notify the employer about its wish to exercise one or more of the statutory organisational rights. The trade union must indicate the workplace where these rights are to be enforced, demonstrate that it is representative and identify the

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<sup>751</sup> See paras 5 to 11 of GPSSBC Resolution 3 of 2014 for all the organisational rights covered. The organisational rights dispensation in terms of the GPSSBC Organisational Rights Agreement resembles that of the LRA of 1995.

<sup>752</sup> See definition of “trade union” in the GPSSBC Organisational Rights Agreement. The definition also includes one or more registered trade unions acting together that are admitted to the bargaining council.

<sup>753</sup> Esitang and Van Eck *ILJ* (2015) 768.

<sup>754</sup> See Chapter 2 at 4.2 on the criteria for thresholds of representivity including where they are to be relevant. See also Esitang and Van Eck *ILJ* (2015) 777 argue that the vagueness associated with the basket of factors to be considered by the arbitrator in determining which trade union acquires organisational rights and which one does not deem it non-compliant with the ILO standard of a precise, pre-established and objective criteria as set out by the ILO.

<sup>754</sup> *Digest of Decisions* (2006) para 348.

<sup>755</sup> See Chapter 5 at 2 where the purpose of organisational rights is discussed and recommended percentages in line with various instruments are made.

rights it wishes to exercise.<sup>756</sup> Thereafter, the employer meets with the trade union and seeks to enter a collective agreement.<sup>757</sup>

This provision establishes a hierarchical structure for the acquisition of organisational rights. The current organisational dispensation provides for differentiation in the acquisition of organisational rights by majority trade unions and sufficiently representative trade unions.<sup>758</sup> As mentioned, this thesis considers an organisational dispensation approach that considers a suit of organisational rights that will be enjoyed by a registered trade union that meets a low threshold in pursuit of the right to freedom of association over and above the organisational rights serving to bolster the power of the trade union party during collective bargaining.<sup>759</sup>

Within the current organisational rights dispensation, disputes arise when the representivity of a trade union that seeks to exercise some or all organisational rights is questioned by the employer or contested by another trade union. Should a dispute about representivity arise, section 21(8) of the LRA of 1995 provides for the procedure to be followed. The first part of the section states that:

“[i]f the unresolved dispute is about whether or not the registered trade union is a representative trade union, the commissioner-

- (a) must seek
- (i) to minimise the proliferation of trade union representatives in a workplace and where possible, to encourage a system of a representative trade union in a workplace; and
- (ii) to minimise the financial and administrative burden of requiring an employer to grant organisational rights to more than one registered trade union;”

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<sup>756</sup> S 21(2) of the LRA of 1995 provides that:

“The notice referred to in subsection (1) must be accompanied by a certified copy of the trade union’s certificate of registration and must specify -

- (a) the workplace in respect of which the trade union seeks to exercise the rights;
- (b) the representativeness of the trade union in that workplace, and the facts relied upon to demonstrate that it is a representative trade union; and
- (c) the rights that the trade union seeks to exercise and the manner in which it seeks to exercise those rights.”

<sup>757</sup> S 21(3) of the LRA of 1995.

<sup>758</sup> See Chapter 5 at 5 the discussion of the acquisition of organisational rights by majority trade unions exclusively and those that could be acquired by sufficiently representative trade unions in Chapter 5 at 5 below.

<sup>759</sup> See Chapter 5 at 4 and 6 below for the discussion of the options attached to thresholds of representivity especially in relation to the exercise of the right to freedom of association.

The second part adds a list of factors that must be considered by the commissioner of the Commission for Conciliation, Mediation and Arbitration (CCMA) before reaching a decision. This basket of factors consists of the nature of the workplace; the nature of the organisational rights sought; the nature of the sector; the organisational history at the workplace; and the composition of the workforce.<sup>760</sup>

The LRA of 1995 does not prescribe what percentage constitutes representivity in acquiring organisational rights.<sup>761</sup> The mentioned factors must be applied to determine whether a trade union is sufficiently representative. The requirements stipulate that the trade union seeking statutory organisational rights in terms of the LRA of 1995 as a prerequisite must “show the facts relied on to prove that it is representative”.<sup>762</sup> The onus rests on such a trade union to prove that it is indeed representative.

According to *Du Toit et al*<sup>763</sup> the basket of factors listed in section 21(8) of the LRA of 1995 may be divided into two parts. The first set relates to “proliferation” and the “financial and administrative burden” on the employer. This part directs the arbitrator towards a higher threshold.<sup>764</sup> However, the second part focusses on the nature of the workplace, the rights sought, the history and the composition of the workforce. These factors could direct the arbitrator towards accepting a lower threshold.<sup>765</sup> This thesis is not opposed to majoritarianism. However, it does not support an interpretation which limits the right to freedom of association in the manner majoritarianism did. It is a sigh of relief that *POPCRU v Ledwaba*<sup>766</sup> was overturned by the LAC in *SA Correctional Services Workers Union v Police and Prisons Civil Rights Union (SACOSWU)*<sup>767</sup> where it was held that the principle of majoritarianism should not be interpreted to permit the suppression of minority trade unions.<sup>768</sup>

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<sup>760</sup> S 21(8) (b) of the LRA of 1995.

<sup>761</sup> S 11 of the LRA of 1995 describes a “representative trade union” with reference to one or more trade unions that are sufficiently representative in a workplace.

<sup>762</sup> S 21(2)(b) of the LRA of 1995.

<sup>763</sup> *Du Toit et al* (2015) 258-259.

<sup>764</sup> As above.

<sup>765</sup> *Du Toit et al* (2015) 259.

<sup>766</sup> [2013] 11 *BLLR* 1137 (LC) at paras 46 and 48.

<sup>767</sup> (2017) 38 *ILJ* 2009 (LAC) para 17.

<sup>768</sup> *SA Correctional Services Workers Union* at para 30.

The common trend regarding section 21 disputes is the prominent consideration given to the need to prevent the proliferation of trade unions. It is important to consider what the often referred to proliferation of trade unions entails within the context of section 21 disputes. In *Clothing and Textile Workers Union v Marley (SA) (Pty) Ltd t/a Marley Flooring (Mobeni)*<sup>769</sup> the commissioner had to consider whether a trade union which represented 42.3% of the workers constituted a representative trade union. There were two trade unions at the workplace and the other union represented 55.7% of the workers. Although the CCMA did not define the term “proliferation” the dictionary describes it as the “rapid increase in the number or amount of something”.<sup>770</sup> It is submitted that if this meaning of “proliferation” is accepted then this decision may have misconstrued the concept of “proliferation” because only two trade unions were involved. The *Marley* case understanding of the concept of “proliferation” creates a misalignment with the model of South Africa’s constitutional democracy and the protection and promotion of minority interests, including the recognition of the rights to freedom of association of minority trades.<sup>771</sup>

As indicated in chapter 2, a study conducted in French-speaking Africa provides useful insight into the concept of “proliferation” presented in the context of the aftermath of colonialism and the oppression of the indigenous peoples of Africa.<sup>772</sup> In the South African context pluralism emerged after “apartheid” policies ended, similar to the situation at the end of colonial rule in French-speaking Africa.

Added to this, as discussed in chapter 2, the ILO accepts that thresholds may be set by the majority trade union and that this is compatible with the right to freedom of association.<sup>773</sup> However, the ILO does require member states to establish criteria for thresholds that would be “objective, precise and pre-established, in order to avoid any possibility of bias or abuse”.<sup>774</sup> It is argued that this vague basket

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<sup>769</sup> (2002) 21 *ILJ* 425 (CCMA) at 427G and 428C the concept “proliferation” is mentioned several times without providing a definition.

<sup>770</sup> See the Oxford dictionary definition of “proliferation” at <https://en.oxforddictionaries.com/definition/proliferation> (accessed February 2017).

<sup>771</sup> See Chapter 3 at 4.5.

<sup>772</sup> See *TU Pluralism* (2010) 11-13 and Chapter 2 at 4.2. The conclusions made in this study were that firstly, trade union pluralism emerged at the same time as political pluralism; and secondly, it is not trade union pluralism that results in proliferation, but rather the incorrect interpretation of what pluralism is and what it entails which leads to abuse and ultimately the undesired proliferation.

<sup>773</sup> *Digest of Decisions* (2006) para 356. See also Chapter 2 at 4.2.

<sup>774</sup> As above.

of factors is contrary to the conditions set by the CFA and that section 21(8) of the LRA of 1995 may not meet the mentioned test.<sup>775</sup>

Cases that demonstrate the “abuse and bias” referred to by the ILO are rampant in South Africa. The first case is *Marley*<sup>776</sup> referred to above. It dealt with the determination of a sufficiently representative trade union and the attempt by such a trade union to acquire organisational rights in terms of section 21(8) of the LRA of 1995. The minority trade union sought to acquire only the rights of access and to stop order facilities.<sup>777</sup> The commissioner of the CCMA in this matter refused to grant these organisational rights stating that:

“[t]he majority of the employees in the workplace under consideration are already represented by a registered and established union...NUMSA...[A]n agency shop agreement with the respondent, which ensures that the workforce as a whole pay subscriptions to NUMSA...is an indirect compulsion on the employees to join NUMSA. Such a situation is desirable as it avoids fragmentation of the workforce amongst various unions, and ensures that the employees speak with one voice.”<sup>778</sup>

Another case where pluralism rather than proliferation is sought to be prevented leading to conclusions of abuse and bias is *Oil Chemical General and Allied Workers Union v Volkswagen of SA*.<sup>779</sup> In this case the threshold that was set to determine the acquisition of organisational rights was increased from 30% to 40% immediately after the minority trade had attained the first threshold of 30%. The CCMA commissioner in this case held that “threshold agreements keep potential rival unions out of the workplace”. It is submitted that thresholds by their very nature prevent minority trade unions from being able to get a foothold in the workplace. It is for this reason, it is argued that thresholds should be lowered in respect of organisational rights to ensure that trade unions that already have a foothold in the workplace can get them.

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<sup>775</sup> *Digest of Decisions* (2006) para 1178.

<sup>776</sup> (2000) 21 *ILJ* 425 (CCMA).

<sup>777</sup> *Marley* at 426E-F.

<sup>778</sup> *Marley* at 429G-H. Clearly, the reasonable inference that can be drawn from this decision is that the CCMA commissioner was not in support of what he perceived as the fragmentation of the workforce.

<sup>779</sup> (2002) 23 *ILJ* 220 (CCMA).



Even though the GPSSBC threshold of 30 000 has the effect of precluding minority trade unions from the collective bargaining table, it does establish certainty.<sup>780</sup> This thesis argues against the use of the same threshold for purposes of acquiring organisational rights. Furthermore, it is submitted that the section 21(8) considerations are to be also subject to the context of the constitutional framework and must take cognizance of ILO principles that seek to ensure that there is diversity in the workplace.

Notwithstanding some CCMA commissioners' support for majoritarianism, there are examples where a relatively unrepresentative trade union was granted organisational rights. In *Organisation of Labour Affairs v Old Mutual Life Assurance Company*,<sup>781</sup> the trade union had 2% membership in the workplace and requested the rights to access and stop order facilities. The arbitrator held that fairness required that the applicant union be granted the rights sought because other trade unions had already been granted these rights.<sup>782</sup>

*Organisation of Labour Affairs*<sup>783</sup> followed the same stance adopted by the erstwhile Industrial Court in *BAISEMWU and others v ISCOR*.<sup>784</sup> In this case the Industrial Court held that where there had been an "existing practice" of consultation with a minority trade union, and the practice ceased when it is reasonably expected not to, which constituted an unfair labour practice.<sup>785</sup> Similarly, if one minority trade union acquires some organisational rights, other minority trade unions are entitled to them as a matter of consistency. Van Niekerk *et al*<sup>786</sup> add that where fairness requires it the arbitrators may be willing to fix lower thresholds.

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<sup>780</sup> *Digest of Decisions* (2006) para 1178.

<sup>781</sup> [2003] 9 BALR 1052 (CCMA) 1052.

<sup>782</sup> *Organisation of Labour Affairs* at 1055. The position of the Industrial Court was that it is not in the spirit of the LRA of 1956 that recognition extend to negotiating with the minority trade union. However, previous consultation with it may justify future negotiations with minority trade unions.

<sup>783</sup> At 1055.

<sup>784</sup> At 161 the Industrial Court held that the employer cannot negate an existing practice of consulting with a minority trade union. However, when this happens any other minority trade union that is not consulted can challenge the employer's conduct as an unfair labour practice.

<sup>785</sup> As above at 160J-161A. See also *Volkswagen* at 229 G where the Labour Court held that where the threshold agreement was not applied to one specific minority trade union it cannot be applied to other minority trade unions unless there was a just error. The error in this case was for a period of five months.

<sup>786</sup> Van Niekerk *et al* (2015) 376.

The second instance where it would be problematic to apply section 21 procedure relates to the situation where there is no history of trade unionism in the workplace in question. According to Todd,<sup>787</sup> when arbitrators deal with organisational rights disputes in a workplace where there is no history of trade unionism, it would be appropriate to require a lower threshold of representivity. This suggestion provides an opportunity for minority trade unions to operate and acquire statutory organisational rights.

It is argued that the effect of the Constitution, 1996 should extend to having minority trade union organisational rights recognised, at least to the extent of recognition by the ILO of minority trade unions in the exercise of the right to freedom of association. As discussed later in chapter 6 the LRA of 1995 recent amendments give a glimmer of hope to minority trade unions in so far as South African labour law recognises that their position should be improved.

However, the Constitutional Court has recently in *AMCU*<sup>788</sup> unequivocally endorsed the notion of majoritarianism in the context of collective bargaining. However, the Constitutional Court has also unequivocally confirmed the principle on the protection and the promotion of the right to freedom of association of minority trade unions.<sup>789</sup> This principle in these two cases does not go as far as endorsing the right of unrepresentative trade union to represent members in individual cases, but goes as far as stating that unrepresentative trade unions may enter negotiated and they can even strike for these organisational rights.

## 5. Content of the Statutory Organisational Rights

### 5.1. Introduction

The part that follows covers the content of the statutory organisational rights in the context of the LRA of 1995. In a unionised environment, where there are one or more active trade unions, organisational rights serve to regulate the relationship between the trade unions and the employer. In general, problems do not occur in

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<sup>787</sup> Todd (2004) 23.

<sup>788</sup> At paras 56 and 57.

<sup>789</sup> See Chapter 6 on the discussion of the two significant Constitutional Court case of *NUMSA v Bader Bop* (2003) 2 BLLR 103 (CC) and *Association of Mineworkers and Construction Union v Chamber of Mines* (2017) 38 ILJ 831 (CC).

instances where a trade union represents a large percentage of employees in the workplace. However, problems arise when the representative status of a minority trade union is questioned by the employer and when minority trade unions seek to exercise organisational rights.<sup>790</sup>

There are five organisational rights, namely access to the workplace,<sup>791</sup> stop-order facilities,<sup>792</sup> election of trade union representatives,<sup>793</sup> granting leave to trade union representatives<sup>794</sup> and the disclosure of information.<sup>795</sup> Depending on the level of its representivity, a trade union can claim all five rights or some of the statutory organisational rights.

This part examines how the listed organisational rights serve the interests of both unrepresentative trade unions and representative trade unions in the workplace. It is significant to note that the right to organise is incidental on the right to freedom of association in the same way that the right to engage in collective bargaining finds its origin in the right to freedom of association.<sup>796</sup> The significance of statutory organisational rights cannot be examined without providing an exposition of the link between the acquisition of organisational rights and the impact they have on the right to freedom of association of unrepresentative trade unions.

## 5.2. Access to the Workplace

Section 12 of the LRA of 1995 provides that the right of access can be claimed by sufficiently representative trade unions and the majority trade union for purposes of recruiting new members, to hold meetings with either members or employees outside working hours and to hold elections for trade union representatives. This organisational right requires a trade union only to have sufficient representative status. Van Jaarsveld *et al*<sup>797</sup> mention that this right includes seeking access in order to look after the interests of its members.

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<sup>790</sup> S 11 of the LRA of 1995.

<sup>791</sup> S 12 of the LRA of 1995.

<sup>792</sup> S 13 of the LRA of 1995.

<sup>793</sup> S 14 of the LRA of 1995.

<sup>794</sup> S 15 of the LRA of 1995.

<sup>795</sup> S 16 of the LRA of 1995.

<sup>796</sup> See Cheadle *et al* (2015) 18:20.

<sup>797</sup> Van Jaarsveld *et al* (2012) 379.

It is accepted that an organisational right may be excluded when it is limited or clashes with another right. For example, according to Du Toit *et al*,<sup>798</sup> in the domestic sector the right of access may be subject to reasonable limitations by the employer in terms of the Extension of Security of Tenure Act.<sup>799</sup> In this regard section 6(2)(b) of this Act provides that:

“(i) the owner or person in charge may impose reasonable conditions that are normally applicable to visitors entering such land in order to safeguard life or property or to prevent the undue disruption of work on the land; and  
(ii) the occupier shall be liable for any act, omission or conduct of any of his or her visitors causing damage to others while such a visitor is on the land if the occupier, by taking reasonable steps, could have prevented such damage.”

This provision protects property against potential damage. In addition, the right to access cannot be relied on should it impede on the smooth operation of the workplace. Section 12(4) of the LRA of 1995 provides that:

“[t]he rights conferred by this section are subject to any conditions as to time and place that are reasonable and necessary to safeguard life or property or to prevent undue disruption of work.”

By limiting the statutory right to access to representative trade unions has both direct and indirect consequences. The direct consequence is that unrepresentative trade unions will not have the right to access. The indirect consequence is that the office bearers or trade union officials of unrepresentative trade unions are prevented from representing a trade union representative if he or she happens to undergo a disciplinary process<sup>800</sup> or wishes to be assisted in grievance proceedings.<sup>801</sup>

An unrepresentative trade union that satisfies a low threshold may require this right to enter premises and represent members in grievance or disciplinary proceedings. It is argued that majority trade unions or parties admitted to the

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<sup>798</sup> Du Toit *et al* (2015) 261.

<sup>799</sup> Act 67 of 1997.

<sup>800</sup> Item 4(2) of Schedule 8 of the LRA of 1995 (Code of Good Practice) provides that before instituting discipline against trade union representatives the trade union must be informed and consulted.

<sup>801</sup> See Chapter 2 at 2.1 and 3.4 for the discussion around the ILO propagating the idea that minority trade unions must be able to assist their members in grievance proceedings even in majoritarian collective bargaining systems.

bargaining council are not the only trade unions that should enjoy the right to acquire organisational rights by virtue of being collective bargaining agents. It is argued that the exclusion of unrepresentative trade unions from exercising the right of access has a negative impact on their rights to freedom of association and to organise. Such trade unions are not afforded the opportunity to gain entry to a workplace at all. This situation reflects negatively in that it such trade union is precluded from establishing its position in the workplace and to gradually seek to grow and attain collective bargaining status.<sup>802</sup> It is argued that the threshold to the right of access to the workplace should be lowered.

### 5.3. Stop-order Facilities

Section 13 of the LRA of 1995 permits members of a majority trade union and a sufficiently representative trade union to authorise the deduction of subscription fees or levies from members' wages every month. There is no provision in the LRA of 1995 that allows the employer to hold back any part of union subscriptions as an administrative charge.<sup>803</sup> However, according to *Du Toit et al*<sup>804</sup> an agreement to this effect can be concluded.

In *SACTWU V Sheraton Textiles*<sup>805</sup> stop order facilities were granted to a union with 30% representation of workers. In this case the commissioner considered all the factors in section 21 of the LRA of 1995 and reasoned that such facilities would not be problematic for a large organisation with a sophisticated financial system.<sup>806</sup> Based upon this reasoning, there is no cogent reason for an employer with a sophisticated financial system to use the minimisation of the proliferation of trade

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<sup>802</sup> It is to be noted that the LRA of 1995 does not prohibit a minority trade union from entering the employer's premises, but rather they cannot claim it as a right if the employer refuses to grant it them.

<sup>803</sup> S 178(1B) of the LRA of 1995 made provision for such administration fee deductions to be made by the employer.

<sup>804</sup> *Du Toit et al* (2015) 262 state that stop order facilities may be granted by an employer in favour of an unregistered union and may be enforceable at common law provided the employees consent to the deductions.

<sup>805</sup> (1997) 5 BLLR 662 (CCMA) 667 and 670. In this case the dispute arose as a result of the letter from the employer that stated, "In our client's opinion your union is not representative at its workplace." Under these circumstances the employer said they are not able to grant the union organisational rights. The commissioner added generally a union should be considered to be sufficiently representative if it can influence negotiations.

<sup>806</sup> *Sheraton Textiles* at 671. See also *Du Toit et al* (2015) at 262 where the authors state that "given the availability of electronic technology to process stop orders ... it is in most cases no longer likely that the award of such facilities would be ... placing a significant burden on an employer."

unions in a single workplace as a factor in justifying denying trade unions other than majority and sufficiently representative trade unions the enjoyment of this organisational right.

In *OCGAWU v Woolworths*<sup>807</sup> the trade union sought the right to stop order facilities based on its 6% membership of the total workforce. The other rights in section 12, 14 and 15 were sought on the basis of its majority status in one of its operations. The commissioner held that the trade union did not qualify as it was not representative and reasoned that the workplace constitutes the entire workforce of the employer.<sup>808</sup>

Du Toit *et al*<sup>809</sup> advance the cogent argument that lower thresholds should be required for organisational rights.<sup>810</sup> They suggest that the right to stop order facilities is one such right where a lower threshold should be required.<sup>811</sup> It is submitted that the same argument applies to the right of access. The right to stop order facilities and the right of access can be said to serve as the organisational oxygen of unrepresentative trade unions and their right to exist depends on them. It is important to note that here reference is made to the right to exist, not necessarily the right to be an influential force in matters that constitute the subject of collective bargaining such as wage increases and other improvements in the conditions of employment. Lowering the threshold of organisational rights will benefit unrepresentative trade unions immensely as they will be in a position to look after the interests of their members without being concerned about the collection of trade union dues from members.<sup>812</sup>

There are minority trade unions that may be a significant force in the workplace. Mischke,<sup>813</sup> identifies “skilled artisans” at an airport company as workers having the potential through their economic power to influence the business of their employer, an airport company. Such influential groups of workers are often represented by minority trade unions. In South Africa, the ILO Fact Finding mission

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<sup>807</sup> [1997] 7 BALR 813 (CCMA) para 6.

<sup>808</sup> *Woolworths* at paras 20, 21 and 30.

<sup>809</sup> Du Toit *et al* (2015) 262.

<sup>810</sup> As above. See also *Woolworths* at para 29.

<sup>811</sup> As above.

<sup>812</sup> See *Sheraton Textiles* at 667 for the number of activities that a trade union is involved in. See also Van Jaarsveld *et al* (2012) para 379.

<sup>813</sup> See Mischke *CLL* (2004) 54–55.

determined that trade unions in South Africa have different histories and associational bases.<sup>814</sup> It is submitted that the Constitution, 1996 and the LRA of 1995 direct that all members of society can rely on the right to freedom of association to establish associations in line with their interests. Section 4 of the LRA of 1995, which falls under Chapter III which deals with freedom of association, provides that:

- “(1) [e]very employee has the right –
  - (a) to participate in forming a trade union...; and
  - (b) to join a trade union, subject to its constitution.
- (2) 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;
  - (c)...
  - (d) to stand for election...as a trade union representative and...to carry out the functions of a trade union representative.<sup>815</sup>

Clearly, these provisions in the LRA in pursuit of the right to freedom of association do not propose thresholds in the exercise of the right to freedom of association in respect of key players only. However, the regulatory framework is quite different in Chapter III of the LRA of 1995 which regulates organisational rights and collective bargaining.

Proponents of the majoritarian model of collective bargaining advance their main argument on the basis of the minimisation of a proliferation of trade unions in the workplace to promote orderly collective bargaining.<sup>816</sup> As previously argued, there should be a clear distinction between pluralism and a proliferation of trade unions: these terms are not synonymous but are different concepts.<sup>817</sup> For the reasons mentioned above it is submitted that the threshold for this organisational right should be low.

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<sup>814</sup> See Chapter 3 at 4.4.

<sup>815</sup> S 4 of the LRA of 1995.

<sup>816</sup> *Kem-Lin Fashions CC v Brunton* (2001) 22 ILJ 109 (LAC) para 19 and *Police and Prisons Civil Rights Union v Ledwaba* [2013] 11 BLLR 1137 (LC) paras 46, 47 and 48.

<sup>817</sup> See Chapter 2 at 4.3 where this aspect is dealt with in the discussion of the ILO position on the pluralist model of collective bargaining and the need to draw on the distinction between pluralism and proliferation.

#### 5.4. Election of Trade Union Representatives

Section 14(1) of the LRA of 1995 provides for the election of “representatives” or shop stewards by a trade union or two or more trade unions acting jointly, which have as members the majority of employees at a particular workplace.<sup>818</sup> If the majority trade union has less than 10 members it will not qualify to elect shop stewards.<sup>819</sup> The functions of a trade union representative are numerous. Du Toit *et al*<sup>820</sup> list these as follows:

- to receive collective agreement arbitration awards and determinations in terms of the Basic Conditions of Employment Act;<sup>821</sup>
- to represent members in disciplinary hearings and grievances;<sup>822</sup>
- to monitor compliance with the law and collective agreements to the employer, the representative trade union and a responsible authority or agency;<sup>823</sup>
- to report any contravention of either the law or collective agreements;<sup>824</sup>
- to perform any function agreed to between the employer and the trade union;<sup>825</sup> and
- to take time off to perform these duties and attend training.<sup>826</sup>

The functions of trade union representatives identified in section 14 relate to organisational rights required for both collective bargaining and matters unrelated to collective bargaining. Of significance for the purpose of this thesis is the second listed function, namely the right to represent members in disciplinary and grievance processes, which does not relate to collective bargaining.<sup>827</sup> Sufficiently representative and minority trade unions are precluded from claiming this statutory

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<sup>818</sup> S 14 (2) of the LRA of 1995 provides the formula for the number of trade union representatives that may be elected by reference to the number of members.

<sup>819</sup> S 14(2) of the LRA of 1995 provides that if there are 10 members the trade union will qualify for one, more than 10 members 2, more than 50 members the trade union will qualify for two for the first 50 members and so on. The principle is that the more members the trade union has the more representatives it will qualify for.

<sup>820</sup> Du Toit *et al* (2015) 263.

<sup>821</sup> S 204 of the LRA of 1995.

<sup>822</sup> S 14(4)(a) of the LRA of 1995. It is submitted that this is one of the instances where the trade union official or office bearer may consult with the employer on pending disciplinary proceedings against a trade union representative.

<sup>823</sup> S 14(4)(b) of the LRA of 1995.

<sup>824</sup> S 14(4)(c) of the LRA of 1995.

<sup>825</sup> S 14(4)(d) of the LRA of 1995.

<sup>826</sup> S 14(5) of the LRA of 1995.

<sup>827</sup> S 213 of the LRA of 1995 defines trade union representative as a member of a trade union elected to represent employees in a workplace.



right in both contexts. However, the LRA of 1995 does not prohibit them from enjoying this right and having their trade union representatives perform these functions if they have entered into such an agreement with their employer.<sup>828</sup>

This section places a minority trade union in a precarious situation in that its members may be subject to a disciplinary hearing or grievance proceedings without trade union representation. The non-availability of this right affects their right to be represented as provided for in the LRA of 1995. Schedule 8 of the LRA of 1995 provides that:

“The employer should notify the employee of the allegations...The employee should be entitled to a reasonable time to prepare the response and to the assistance of a trade union representative or fellow employee.”<sup>829</sup>

Item 4(1) of Schedule 8 of the LRA of 1995 does not specifically mention that the trade union representative is limited to members of majority trade unions. As strongly advocated by the ILO, member states that follow a majoritarian system of collective bargaining are required to permit minority trade unions to represent their members in individual cases.<sup>830</sup> It is submitted that the right to represent members emanates from the right to elect a trade union representative. Where the statutory right to elect trade union representatives is an organisational right that is exercisable by a majority trade union only, sufficiently representative and minority trade unions may be excluded from exercising this right. This practice is contrary to guidelines provided by the ILO. It is also contrary to the Constitution, 1996 which provides the context for South Africa’s model of constitutional democracy which recognises minority interests.

In a different part of the LRA of 1995 not dealing with organisational rights, section 200 provides as follows:

“(1) A registered trade union...may act in any one or more of the following capacities in any dispute to which any of its members is a party -  
(a) in its own interest;  
(b) on behalf of its own members;  
(c) in the interest of any of its members.

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<sup>828</sup> See ss 20 and 200 of the LRA of 1995.

<sup>829</sup> Item 4(1) of Schedule 8 of the Code of Good Practice: Dismissal of the LRA of 1995.

<sup>830</sup> See Chapter at 4.2 wherein the ILO stance on majoritarianism.

(2) A registered trade union or a registered employers' organisations entitled to be a party to any proceedings in terms of this Act if one or more of its members is a party to those proceedings."<sup>831</sup>

This section has no provision for a threshold and applies to unrepresentative trade unions. In *Manyele & others v Maizecor (Pty) Ltd & another*<sup>832</sup> the Labour Court held that the reference in section 200 to "any dispute" includes "any issue in which differences of opinion are expressed across the management-labour divide and in respect of which either side seeks to assert its point of view". In *National Union of Mineworkers obo Mabote v CCMA and others*,<sup>833</sup> the employer disputed the right of the trade union to represent its member. Steenkamp J in *Mabote*<sup>834</sup> held that:

"[s]ection 200(1)(b) and CCMA rule 25(1)(a)(iii), on the face of it, grant an employee and his or her chosen trade union – such as the applicant in this case – an unfettered right for the union to represent the employee in arbitration proceedings. That right is in line with the right to freedom of association guaranteed in the LRA, the Constitution and ILO Convention 87."

*Mabote*<sup>835</sup> further confirmed that the only requirement specifically provided for in CCMA rule 25(1)(b)(3) is registration of the trade union. There is no reference to the trade union having majority status to represent its members. The Court further added that "if the LRA is to achieve its constitutional goals, courts have to be vigilant to safeguard those employees who are particularly vulnerable to exploitation".<sup>836</sup>

Although *Mabote* concerned the "unfettered right for the union to represent an employee" in the context of arbitration proceedings, it is argued that the ruling also applies to cases of representation of members in grievance and disciplinary proceedings. As mentioned above, the ILO supports the notion that permission should be granted to minority trade unions to represent their members in grievance

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<sup>831</sup> S 200 of the LRA of 1995.

<sup>832</sup> (2002) 23 *ILJ* 1578 (LC) para 14.

<sup>833</sup> (2013) 34 *ILJ* 3296 (LC) at para 1. The basis for disputing the right was that the work of the member "does not fall within the scope of the union's constitution."

<sup>834</sup> *Mabote* at para 25. See also *Maizecor* at para 12 wherein the Labour Court remarked that the purpose of s 200 of the LRA of 1995 confers on a trade union "a right in law to make itself a party to any dispute" and it participates in the proceedings relating to such dispute "without having to require the leave of the CCMA or the Labour Court" to do so.

<sup>835</sup> *Mabote* at para 21.

<sup>836</sup> *Mabote* at para 31. It is argued that members of a minority trade union if they are unable to claim the right to represent their members and elect their trade union representatives without the option of collective bargaining or strike action may end up as this vulnerable group.

proceedings in a majoritarian collective bargaining system.<sup>837</sup> How else is the trade union representative able to represent members in such proceedings if they are not eligible to be elected as a trade union representative?

It is argued that there is a dichotomy between the LRA of 1995's section 200 which permits a registered trade union to represent members and the section 14 organisational right that can be claimed only by a majority trade union. Item 4(1) of Schedule 8 of the LRA of 1995 makes it clear that over and above a trade union representative a fellow employee may be represented by another fellow employee. A fellow employee may lack the requisite skill to represent an employee in a disciplinary hearing whereas the trade union representative from a minority trade union probably would be more experienced and skilled in this regard.

Para 4(11) of the Constitution of the Safety and Security Sectoral Bargaining Council specifically excludes unrepresentative trade unions in the security cluster sector from representing their members, yet permits a legal practitioner who has no constituency at all amongst employees in this sector. In the same vein it is irrational that a legal practitioner who has no constituency in the workplace is allowed to represent employees and at the same time a minority trade union is not allowed to represent its members, notwithstanding the fact that the same minority trade union may be sufficiently representative in the public service at large.<sup>838</sup>

The right to represent members in terms of section 200 of the LRA supports the principle of the ILO and the Constitution, 1996 on minority interests and the extent of their protection and promotion. As held in *NUMSA v Bader Bop*<sup>839</sup> the right to represent members in a disciplinary or grievance proceeding advances the right to freedom of association. There can be no doubt that section 200 is aligned to the right to freedom of association in Chapter II of the LRA of 1995. However, it is doubtful that the same can be said of section 14 of the LRA of 1995.

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<sup>837</sup> *Digest of Decisions* (2006) para 974 the CFA held that in a collective bargaining system that draws a distinction between the most representative trade union and others should not result in minority trade unions being unable to represent their members at least in grievance proceedings.

<sup>838</sup> Para 4(11) of the Constitution of Safety and Security Sectoral Bargaining Council specifically excludes a minority trade union from representing a member yet includes a legal practitioner who has no constituency at all amongst employees in this sector.

<sup>839</sup> [2003] 2 BCLR (CC) para 34.

As mentioned section 14 of the LRA of 1995 makes provision for the election of trade union representatives for purposes of collective bargaining and representation during individual disputes. Even though it may be relevant consideration to include a statutory threshold in relation to collective bargaining, the same threshold is not relevant for purposes of acquiring organisational rights. Such limitation militates against ILO provisions, section 200 of the LRA of 1995 and Item 4 of Schedule 8.

It is suggested that similar to other organisational rights, the threshold should be lowered to 10%. However, the section should specify that it does not limit the right of a trade union member to be represented by their trade union, irrespective of its level of representivity. Such an amendment would align the section to section 200 and the Code of Good Practice of the LRA of 1995.

#### 5.5. Reasonable Time Off and Leave for Trade Union Activities

Section 14(5) of the LRA of 1995 provides for reasonable time-off for trade union representatives. This right is linked to the right to elect trade union representatives and is granted with pay. In *NACTWUSA v Waverley*<sup>840</sup> the dispute was whether permission was required from the employer before taking reasonable time off. The agreement between the trade union and the employer was silent in this regard. However, the arbitrator held that prior permission was necessary in the exercise of this right as per section 14(5) of the LRA of 1995. The arbitrator relied on the fact that the exercise of this right is subject to reasonable conditions.<sup>841</sup>

Trade union representatives, office bearers and officials require such reasonable time off for purposes of performing their functions and acquiring training.<sup>842</sup> The number of days that trade union representatives should be entitled to is subject to an agreement being arrived at.<sup>843</sup>

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<sup>840</sup> *Waverley* at 1914B.

<sup>841</sup> *Waverley* at 1912J.

<sup>842</sup> S 15 (1) of the LRA of 1995. See also Van Jaarsveld *et al* (2012) para 380.

<sup>843</sup> S 15(2) of the LRA of 1995.

In *National Union of Metalworkers of SA v Exacto Craft*<sup>844</sup> the dispute concerned the interpretation of a collective agreement which regulated “time off for attendance of disciplinary hearings and the like” only. The provision relied upon by the trade union to have their shop-steward attend meetings at the training institution dealt with attendance at training and not time off for attendance at disciplinary hearings.<sup>845</sup> The arbitrator refused to grant additional unpaid leave beyond the scope of the collective agreement.<sup>846</sup>

The difficulty with making the right to paid leave available only to trade union officials and office bearers denotes that trade union representatives and officials of minority trade unions cannot claim the right when they need to attend training to gain capacity in their function of representing members in grievance or disciplinary proceedings.

It is argued that the right to time off and leave for trade union activities should be subject to a low threshold. Under such circumstances the minority trade union representative that seeks to represent a member in disciplinary or grievance proceedings can utilise it concurrently with the right to access the workplace.

## 5.6 Disclosure of Information

The right to disclosure of information can be claimed in terms of the LRA of 1995 only by a majority trade union or two or more trade unions acting jointly which have as members the majority of employees.<sup>847</sup> The employer’s duty is to disclose all relevant information to the union to enable the trade union representatives effectively to perform their functions.<sup>848</sup>

According to *Du Toit et al*<sup>849</sup> the right to disclosure of information has proven contentious. The LRA of 1995 sought to strike a balance between the competing

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<sup>844</sup> (2000) 21 *ILJ* 2760 (CCMA) at 2766C-D. The relevant clause related to the training of shop-stewards “attending courses, seminars and conventions of an educational nature so that the shop stewards are trained and informed.”

<sup>845</sup> *Exacto Craft* at 2761J-2762A.

<sup>846</sup> *Exacto Craft* at 2766J-2767A.

<sup>847</sup> S 16(1) of the LRA of 1995.

<sup>848</sup> S 16(2) of the LRA of 1995.

<sup>849</sup> *Du Toit et al* (2015) 264, 265 and 266. The authors provide an exposition of what the arbitration process will entail in a dispute related to the exercise of this right.

interests of bargaining parties by “carefully defining the scope of the right and establishing a dedicated dispute resolution procedure to work out its content in any given case”.<sup>850</sup> Where a dispute arises on whether information must be disclosed, the aggrieved party may refer the matter to the CCMA first for satisfaction through conciliation and if unresolved through arbitration.<sup>851</sup>

Both sufficiently representative and minority trade unions are excluded from acquiring this organisational right. According to *Van Niekerk et al*<sup>852</sup> such disclosure relates to all relevant information that will enable a trade union representative to carry out their functions as per section 14(4) of the LRA of 1995. The information that may be relevant under the listed functions may be divided into information relating to an individual employee, such as a disciplinary hearing, and that which involves matters concerning collective bargaining. It is submitted that disclosing such information in this context and for this purpose only to a majority trade union may be appropriate if the information relates to collective bargaining, but where the matter involves information pertinent in a disciplinary or a grievance process such information should be provided. For this reason, it is argued that the threshold should like all other organisational rights be lowered to 10%.

## 6. Labour Relations Amendment Act of 2014<sup>853</sup>

In a positive development, the legislature deemed it necessary to amend section 21 of the LRA of 1995. With effect 1 January 2015 section 21(8) has added a new section 21(8A) which provides that:

“Subject to the provisions of subsection (8), a commissioner may...grant a registered trade union that does not have as members the majority of employees...in a workplace-

- (a) the rights referred to in section 14;<sup>854</sup>
- (i) the trade union is entitled to all the rights referred to in section 12, 13 and 15...and
- (ii) no other trade union has been granted the rights referred to in section 14.”

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<sup>850</sup> As above.

<sup>851</sup> See s 16(6) – (9) of the LRA of 1995.

<sup>852</sup> *Van Niekerk et al* (2015) 380.

<sup>853</sup> Act 6 of 2014.

<sup>854</sup> The right in s 14 of the LRA of 1995 is the right to elect trade union representatives.

According to Du Toit *et al*<sup>855</sup> the amendments to section 21(8) of the LRA of 1995 reflect the realisation that limiting the number of trade unions in a workplace not necessarily is conducive to orderly collective bargaining in cases where a majority union does not effectively represent its constituency. The practical effect of section 21(8A) of the LRA of 1995 is:

“to qualify the principle of majoritarianism only to the extent that the ‘most representative’ union in a workplace can acquire rights previously reserved for majority unions in workplaces where no majority union is present. Where majority unions are present, it may be assumed that they will have acquired the rights in question, thus preventing any other union from acquiring them.”<sup>856</sup>

The recognition of the need to introduce amendments to section 21 of the LRA of 1995 is a starting point in addressing the concerns raised in the interpretation and application of the provisions of the LRA of 1995 in relation to the acquisition of organisational rights. Du Toit *et al*<sup>857</sup> recognise that these amendments provide an opportunity for non-standard employees to become organised. Most significantly the amendments make it easier for trade unions that would otherwise not qualify for statutory organisational rights to now qualify.

The requirements imposed in the amendments effectively retain the possibility of some organisational rights being exclusively enjoyed by majority trade unions. It is submitted that the amendments in this regard do not go far enough and that the threshold for the acquisition of organisational rights should still just be lowered. Although the removal of all thresholds may be an option, it could have the effect of trade union proliferation in the workplace which the LRA of 1995 seeks to prevent.<sup>858</sup> Therefore, this thesis argues for the lowering of the threshold for the acquisition of all organisational rights and for removing the threshold altogether for purposes of exercising the right to represent members in individual cases.<sup>859</sup>

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<sup>855</sup> Du Toit *et al* (2015) 260. The author lists these non-standard employees as “employees assigned to work by TESS, employees employed on fixed term contracts, part-time employees or employees in other categories of non-standard employment.”

<sup>856</sup> As above.

<sup>857</sup> Du Toit *et al* (2015) 261.

<sup>858</sup> See s 21(8) of the LRA of 1995.

<sup>859</sup> See Chapter 8 at 2.5, 4.2 and 4.3.

## 7. Conclusion

The purpose of organisational rights and its corollary, the right to strike is a feature that was absent in the previous LRA of 1956.<sup>860</sup> These features of the LRA of 1995 serve to strengthen the right to engage in collective bargaining by ensuring that a trade union party to collective bargaining has the requisite bargaining power to effectively engage in collective bargaining.<sup>861</sup> Currently, the LRA of 1995 identifies only the majority trade union and sufficiently representative trade unions, including the bargaining council as qualifying to acquire statutory organisational rights.<sup>862</sup>

However, the argument made in the thesis is that the ILO cannot regard the function of organisational rights as only empowering trade unions when involved in collective bargaining.<sup>863</sup> The ILO is clear in its view that member states that opt for a majoritarian system of collective bargaining at the very least ought to allow minority trade unions to represent their members in grievance and disciplinary proceedings, including significantly to ensure that within their systems there is room for diversity.<sup>864</sup> The question is then how will these be realized if the system is such that organisational rights may be made the exclusive preserve of majority trade unions and bargaining councils?

The answer is found in the structure of organisational rights. As alluded to the LRA of 1995 is pro-majoritarian and sections 14 and 16 demonstrate that. It has been submitted that effective representation of members in grievance proceedings or individual cases as alluded to by the ILO is possible only when the right to elect trade union representatives is made possible. It is accepted that the space for a voice of the unrepresentative trade union is something that, inasmuch as it is arguably provided for within the context of South Africa's constitutional framework, it may be ousted by drawing on principles of majoritarianism.<sup>865</sup> However, the least

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<sup>860</sup> See Chapter 4 at 4.4.

<sup>861</sup> See Chapter 4 at 4.3 and Chapter 5 at 2.

<sup>862</sup> See Chapter 5 at 4.2 and 4.3 for the discussion on the benefits that go with admission to the bargaining council and the s 21 procedure of acquiring organisational rights for representative trade unions. See also s 11 for the definition of representative trade union.

<sup>863</sup> See Chapter 5 at 2 and 5.4 on the purpose of organisational rights and the significance of the right to elect trade union representatives within the context of the right to freedom of association.

<sup>864</sup> See Chapter 2 at 4.2, 4.3 and 4.3 on the discussion of the ILO stance towards different models of collective bargaining and what it requires to remain possible in so far as the right to freedom of association and diversity is concerned.

<sup>865</sup> See Chapter 1 at 2.2 and 2.3 on the opportunities to have this voice in the workplace was lost when workplace forums were not supported by trade union majorities. The option discussed in the



that can be permitted are activities that fall within the ambit of the individual and that do not have a bearing on numbers *per se*.

The two methods of acquisition of statutory organisational rights benefit majority trade unions and sufficiently representative trade unions as well as members of bargaining councils. Minority trade unions have to find other means to acquire organisational rights as they are not recognised by Part A of Chapter III of the LRA of 1995 or the members of the bargaining council. In addition, as will be discussed in chapter 6, collective agreements regarding organisational rights often exclude minority trade unions as high thresholds for the acquisition of organisational rights are set in these instances. The discussion in next chapter will also demonstrate how sufficiently representative trade unions may also end up with minority status and consequently without organisational rights with the application of threshold agreements.

The exposition of organisational rights performed in this chapter clearly demonstrates the purpose that organisational rights serve, namely to empower collective bargaining agents and to provide a minority trade union with an avenue for gaining a foothold in the workplace.<sup>866</sup> It is accepted that proliferation of trade unions is not a desirable result of this stance, and it can be avoided by ensuring that there is room to allow unrepresentative trade unions on meeting a low threshold before negotiating with an employer to acquire certain or all organisational rights.<sup>867</sup> This threshold can be set between 1% and 10% subject to agreement between the parties. Significantly, the percentage will take into cognisance alignment to the ILO's premise, the context of South Africa's constitutional framework and the already existent premise of the LRA of 1995 to have a trade union qualifying for one shop-steward for every 10 members.<sup>868</sup>

The complication brought to bear on the current organisational rights dispensation is brought to bear by section 200 of the LRA of 1995 which does not establish

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thesis is the advancement of this voice through collective bargaining and within the context of an adversarial relationship.

<sup>866</sup> See Chapter 5 at 2 on the significance of organisational rights to minority trade unions and the promotion and protection of the right to freedom of association.

<sup>867</sup> See Chapter 5 at 2 on the threshold that could be applicable to the acquisition of organisational rights subject to agreement between the parties and the rationale.

<sup>868</sup> As above.

thresholds for the right of a registered trade union to represent members. Section 200 of the LRA of 1995 is read to be readily available to unrepresentative trade unions. It has been argued that section 14 of the LRA of 1995 has to be aligned to this section. It has been submitted that inasmuch, as the right to represent members of a minority trade union in grievance and disciplinary proceedings is not explicitly excluded under statutory organisational rights, a minority trade union is able to discharge this function only by being afforded a right to elect trade union representatives.

The right to elect trade union representatives has a bearing on the right to have trade union representatives that are available to represent members in both collective and individual cases. This conclusion makes the right significant to trade unions in individual cases including the concomitant organisational rights to access the premises, to reasonable time off and to the disclosure of information in relation to this individual case.<sup>869</sup>

One other difficulty identified in the current labour dispensation has been identified as the definition of “workplace.” It is submitted that the definition of workplace has to be associated with the purpose as is the case within the context of the state as employer. Where the purpose of the definition is related to a collective bargaining purpose, the definition should have the all- encompassing effect on the business of the employer and its employees. Where the purpose is related to the acquisition of organisational rights, the definition should place emphasis on the specific workplaces. A good example of these two scenarios are found in the public service. For collective bargaining purposes, the entire state apparatus would be regarded as the workplace, whilst for purposes of acquiring organisational rights the individual departments would be regarded as workplaces with low thresholds being set for such acquisitions of organisational rights and in line with the premise of the thesis to fully recognise the right to freedom of association.<sup>870</sup>

For a trade union to serve as an effective collective bargaining agent will rely on its high level of membership. However, it is submitted that the same requirement

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<sup>869</sup> See Chapter 5 at 5.

<sup>870</sup> See Chapter 5 at 3 for the discussion of the definition of workplace and the implications of adopting the definition in the context of the state and the content to be given thereto to give effect to the identified purpose of organisational rights within the context of minority trade unions and the right to freedom of association.

is not applicable in respect of the exercise of organisational rights and for the purpose of exercising the right to freedom of association.<sup>871</sup> It is for this reason that an amended definition is proposed in the final chapter.

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<sup>871</sup> See Chapter 2 at 2.2 on the relevance of thresholds.

## Chapter 6

### Acquisition of Organisational Rights by Collective Agreement

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#### 1. Introduction

In chapter 5 it was explained that there are three ways by means of which majority and sufficiently representative trade unions gain organisational rights. These are by means of membership of the bargaining council, by claiming these rights through the section 21 process and lastly by way of collective bargaining.<sup>872</sup> The previous chapter covered the first two mechanisms and chapter 6 analyses the acquisition of statutory organisational rights through collective bargaining.

The Constitution, 1996 enshrines the following labour rights: the rights to freedom of association,<sup>873</sup> to organise<sup>874</sup> and to engage in collective bargaining.<sup>875</sup> All trade unions, irrespective of their representivity, enjoy these constitutional rights. Despite their doing so Chapter III of the LRA of 1995, under the heading “Collective

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<sup>872</sup> See Chapter 5 at 4.1 and 4.2.

<sup>873</sup> S 18 of the Constitution, 1996 provides that the constitutional right to freedom of association belongs to “everyone.” S 23(2) and (4) also make provision for the right to freedom of association.

<sup>874</sup> S 23(4)(b) of the Constitution, 1996.

<sup>875</sup> S 23(5) of the Constitution, 1996.

Bargaining,” accords organisational rights and other collective bargaining rights to majority and sufficiently representative trade unions only.<sup>876</sup>

This thesis argues that the limitations on minority trade unions gaining organisational rights unduly restrict the constitutional rights to freedom of association and to organise. It was suggested in chapter 5 that the thresholds pertaining to the acquisition of organisational rights in terms of the LRA of 1995 should be lowered. Nevertheless, it is uncertain to what extent employers and minority trade unions are at liberty to conclude collective agreements which secure organisational rights or the degree to which majority trade unions can counter these efforts with threshold agreements. This chapter debates these issues, draws conclusions and formulates recommendations.

## 2. Acquisition of Organisational Rights through Collective Bargaining

### 2.1. Introduction

This thesis questions the type of majoritarianism that is entrenched in the LRA of 1995 in so far as majority trade unions and employers are entitled to conclude collective agreements which exclude unrepresentative trade unions from gaining organisational rights. It will be shown that the conclusion of these agreements may impact even on the acquisition of such organisational rights by sufficiently representative trade unions as well.

The current state of affairs is that the LRA of 1995 does not make provision for the acquisition of organisational rights by minority trade unions without an agreement to that effect being concluded. This deficiency has a bearing on the employer’s willingness to enter such agreement. This part analyses how minority trade unions may acquire organisational rights and the legal implications of the provisions of the LRA of 1995 on this method of acquiring organisational rights. The focus first is on the legal framework provided by the LRA of 1995 pertaining to collective agreements and the acquisition of organisational rights. The second part examines the impact of collective agreements that empower the setting of thresholds. The

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<sup>876</sup> See Chapter 5 at 5 for the discussion of all the organisational rights.

third part analyses the legal effect of collective agreements on trade unions that are not party to the collective agreement.

## 2.2. Acquisition by Collective Agreement

Section 20 of the LRA of 1995 is formulated in broad terms and provides that “[n]othing in this Part precludes the conclusion of a collective agreement that regulates organisational rights”. According to Du Toit *et al*<sup>877</sup> section 20 confirms that this agreement can relate to any matter of mutual interest and includes the acquisition of organisational rights. The provision is broad enough to cover agreements which limit organisational rights. It is argued that these agreements would be acceptable if they do not limit unjustifiably other fundamental labour rights. The current dispensation is that negotiations may relate to substantive issues related to improvement in conditions of employment such as wages. However, these negotiations are also extended to organisational rights being a subject matter for collective bargaining. This is where the problem lies that the thesis seeks to overcome.<sup>878</sup>

A majority trade union, sufficiently representative trade unions and trade unions admitted to a bargaining council do not need to strike in order to acquire organisational rights as they acquire these rights through membership of the bargaining council or through the section 21 process.<sup>879</sup> The conclusion of the collective agreement is the only mechanism that minority trade unions have at their disposal to acquire organisational rights.

Section 20 of the LRA of 1995 does not set a numerical figure that serves as a prerequisite with regard to the capacity to enter into this type of collective agreement, and collective agreements apply to two situations. The first is where a collective agreement is entered between the employer and the minority trade union which grants the union one or more organisational rights. The second is when such an agreement is entered into between a majority trade union and the employer which

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<sup>877</sup> Du Toit *et al* (2015) 253.

<sup>878</sup> As above. See also ss 64 and 65 of the LRA of 1995 which provides for the right to strike and the limitations thereto.

<sup>879</sup> Majority trade unions acquire all statutory organisational rights, whereas sufficiently representative trade unions acquire all these except the rights to elect trade union representatives and to the disclosure of information.

excludes minority trade unions from obtaining organisational rights. In the latter instance, a situation in which a majority trade union is prepared even to strike over this collective agreement limiting the acquisition of organisational rights by an unrepresentative trade union would create difficulties for that unrepresentative trade union.

*NUMSA v Bader Bop*<sup>880</sup> is one of the leading Constitutional Court cases regarding the conclusion of a collective agreement between a minority trade union and an employer pertaining to organisational rights. Bader Bop was a private company that manufactured leather products and had in their employ 1108 semi-skilled and unskilled employees.<sup>881</sup> The National Union of Metalworkers of South Africa (NUMSA) was a minority trade union, which had 26% membership in the workplace. There was a majority trade union<sup>882</sup> at the workplace that already enjoyed statutory organisational rights, but NUMSA sought to exercise the rights to access,<sup>883</sup> to stop order facilities,<sup>884</sup> to elect trade union representatives<sup>885</sup> and gain leave for trade union representatives.<sup>886</sup> There was no threshold agreement with a majority trade union which precluded NUMSA from gaining organisational rights.

As was explained in chapter 5 in terms of the statutory framework only majority trade unions are entitled to the rights to elect trade union representatives and to the disclosure of information. Sufficiently representative trade unions are entitled to the remaining rights, namely, the rights of access, to stop order facilities and to leave for trade union representatives.<sup>887</sup> When NUMSA sought to bargain about organisational rights, the employer refused to entertain the trade union on the basis that it was not representative of the majority of employees.<sup>888</sup>

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<sup>880</sup> (2003) 2 BLLR 103 (CC) paras 40 and 41.

<sup>881</sup> *Bader Bop v NUMSA* [2002] 2 BLLR 139 (LAC) para 3.

<sup>882</sup> *Bader Bop* at para 65 identified the General Industrial Workers Union of South Africa (GIWUSA) as the majority trade union.

<sup>883</sup> S 12 of the LRA of 1995.

<sup>884</sup> S 13 of the LRA of 1995.

<sup>885</sup> S 14 of the LRA of 1995. See also *Bader Bop* at para 68. The employer was prepared to permit NUMSA two trade union representatives despite their minority trade union status.

<sup>886</sup> S 15 of the LRA of 1995. See also *Bader Bop* at para 8 where the right to disclosure of information in terms of s 16 of the LRA of 1995 was omitted and not sought by NUMSA. The facts of the case do not provide the reasons why NUMSA did not seek to exercise this organisational right.

<sup>887</sup> See ss 12-16 of the LRA of 1995.

<sup>888</sup> *Bader Bop* at para 8.

In their letter to the employer NUMSA raised a significant issue. The basis of the claim for organisational rights was based on the right to freedom of association. In this regard the Constitutional Court noted the argument of NUMSA as being that:

“section 4 of the LRA (freedom of association) as a basis for claiming organisational rights. The latter claim was clearly not based on Part A of Chapter III...[t]he dispute between NUMSA and Bader Bop consisted of two alternative disputes, namely, whether NUMSA could assert majority status on the basis of its combined membership at Bader Bop and Bader Sewing; and if not, whether NUMSA was nevertheless entitled to obtain organisational rights outside of the ambit of Part A of Chapter III.”<sup>889</sup>

NUMSA declared a dispute on two issues, namely the question of organisational rights and the right to bargain on behalf of its members.<sup>890</sup> The employer was informed of the trade union’s intention to strike and the employer applied for an interdict to prevent the strike. The Labour Court had to consider whether a minority trade union is entitled to strike to acquire organisational rights. The Labour Court dismissed the application and the employer lodged an appeal to the Labour Appeal Court (LAC) which was upheld.<sup>891</sup>

The LAC reasoned that the “the purpose of Part A was to avoid disputes about the entitlement of unrepresentative unions, and should they arise as a matter of interpretation, that they should be solved by arbitration and not by strike action”.<sup>892</sup> The LAC added that section 14 of the LRA of 1995, which regulates the appointment of trade union representatives, is a right that can be claimed by a majority trade union and that a registered minority trade union “simply falls outside the contemplation of section 14”.<sup>893</sup>

The Constitutional Court<sup>894</sup> disagreed with the LAC with reference to the view that section 20 of the LRA of 1995 did not provide minority trade unions with an avenue to conclude collective agreements on organisational rights. It held that section 20 must be viewed as “an express confirmation of the internationally recognised rights

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<sup>889</sup> *Bader Bop* at para 54.

<sup>890</sup> *Bader Bop* at para 9.

<sup>891</sup> *Bader Bop* at paras 9 and 10.

<sup>892</sup> *Bader Bop* at para 91.

<sup>893</sup> *Bader Bop* at para 58 the LAC held that the demand by NUMSA to be granted the right to elect trade union representatives while there is a majority trade union in the workplace was to “demand the impossible.”

<sup>894</sup> *Bader Bop* at para 10.



of minority unions to seek to gain access to the workplace, the recognition of their shop-stewards as well as other organisational facilities through collective bargaining”.<sup>895</sup> In this regard, the Constitutional Court held that:

“[t]here is nothing in part A of Chapter III...which expressly states that unions which admit that they do not meet the requisite threshold membership levels are prevented from using the ordinary processes of collective bargaining and industrial action to persuade employers to grant them organisational facilities such as access to the workplace, stop-order facilities and recognition of shop stewards.”<sup>896</sup>

In a positive development the Constitutional Court endorsed the view that although majority trade unions and sufficiently representative trade unions may acquire statutory organisational rights, unrepresentative trade unions may still acquire non-statutory organisational rights.<sup>897</sup> The Constitutional Court held that section 21 of the LRA of 1995 does not exclude the right of minority trade unions to seek to bargain about organisational rights with the employer.<sup>898</sup> If an employer refuses to agree to workers’ demands for organisational rights, they may invoke sections 64 and 65 of the LRA of 1995 and elect to strike.<sup>899</sup> In fact, the LRA of 1995 provides that the limitation of strike action does not apply to issues relating to organisational rights.<sup>900</sup> This is a significant qualification as organisational rights are treated differently from substantive issues such as wage increases and other issues pertaining to the improvement of working conditions of employees.<sup>901</sup>

There are two principles that emanate from this Constitutional Court case. First, the LRA of 1995 allows minority trade unions to engage in collective bargaining regarding the acquisition of organisational rights. Second, a majoritarian system may be incompatible with the right to freedom of association if it does not allow minority trade unions within that framework “to exist, to organise members, to represent members in relation to individual grievances and to seek to challenge majority unions from time to time”.<sup>902</sup>

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<sup>895</sup> *Bader Bop* at para 41.

<sup>896</sup> *Bader Bop* at para 40.

<sup>897</sup> *Bader Bop* at paras 61-62.

<sup>898</sup> *Bader Bop* at para 42.

<sup>899</sup> *Bader Bop* at para 43.

<sup>900</sup> S 65(2) of the LRA of 1995. It is to be noted that the right to disclosure of information is excluded from the list of organisational rights as issues in dispute in s 65(2).

<sup>901</sup> See Chapter 5 at

<sup>902</sup> *Bader Bop* at para 31. See also *Bader Bop* at para 34 the Constitutional Court held that according to the ILO where employees are denied representation by their trade union of choice and

*Bader Bop*<sup>903</sup> articulated the ILO principles partly in as far as minority trade unions may engage the employer to seek to gain organisational rights in terms of section 20 and they may strike if the employer does not agree. As alluded to, the ILO does not permit a majoritarian collective bargaining model to limit a minority trade union to represent its members in grievance proceedings.<sup>904</sup> According to *Bader Bop*<sup>905</sup> section 20 of the LRA of 1995 was not included with a view to depriving registered trade unions of their rights conferred on them in terms of statute. The Constitutional Court interpreted the provisions of the LRA of 1995 in a manner that would avoid the limitation of constitutional labour rights.<sup>906</sup>

It was conceded by the Constitutional Court that this principle was not without practical challenges for minority trade unions. The Court held that:

“[a] minority union that does not qualify even as sufficiently representative will rarely be able to launch an effective strike against an employer to secure access to the workplace, stop-order facilities or time off for trade union activities.”<sup>907</sup>

It is submitted that a minority trade union is more likely to be successful if their membership constitutes workers with scarce and critical skills that have the potential to cause significant harm to the business of the employer if they engage in industrial action. As Mischke indicates,<sup>908</sup> an example of such scarce and critical skills can be “skilled artisans and pilots” who have the potential to harm the business of an airport company through the exercise of their economic power.

Basson *et al*<sup>909</sup> correctly state that section 20 of the LRA of 1995 does not prescribe any representivity requirement before an employer agrees to grant any trade union organisational rights through a collective agreement. However, there is a final question as to whether a minority trade union is entitled to reach an agreement on

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have to be represented by a rival trade union their right to freedom of association would actually be impaired.

<sup>903</sup> *Bader Bop* at para 34.

<sup>904</sup> See Chapter 2 at 3.5, 4.2 and 4.3.

<sup>905</sup> At para 65.

<sup>906</sup> *Bader Bop* at para 37.

<sup>907</sup> *Bader Bop* at para 45.

<sup>908</sup> See Mischke *CLL* (2004) 54–55. See also Chapter 5 at 2 where the author discusses the purpose of organisational rights.

<sup>909</sup> Basson *et al* (2005) 246.

the acquisition of organisational rights if a pre-existing threshold agreement with a majority trade union prohibits it. It is argued that in so far as South Africa's collective bargaining system is voluntary in nature, it allows leeway for such a possibility.

An amendment to the LRA of 1995 on these lines would be consistent with the approach adopted by the Constitutional Court in *Democratic Alliance v Masondo NO and another*.<sup>910</sup> The Constitutional Court in *Masondo*<sup>911</sup> held that democracy in the South African context is not tantamount to a situation where the "winner takes all until the next voting-counting exercise occurs." Rather, it ought to create an environment within which minority parties will have the opportunity to exercise some organisational rights and permit them to organise and to exercise their right to freedom of association.

Du Toit *et al*<sup>912</sup> caution that a section 20 agreement "cannot limit organisational rights exclusively to one trade union if other unions also qualify for" statutory organisational rights by means of the section 21 procedure or by virtue of membership of a bargaining council.

Within the current collective bargaining framework, it sometimes happens that the rights to access to the workplace and to stop order facilities are often granted quite readily to minority trade unions.<sup>913</sup> However, one of the main arguments in the thesis is that the organisational right pertaining to the election of trade union representatives should not be subject to a threshold when it relates to representation in grievances and disciplinary proceedings.

### 2.3. Collective Agreements Containing Thresholds

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<sup>910</sup> 2003 (2) SA 413 para 42. See also Chapter 6 at 4 to compare the stance of South Africa's Constitutional Court on minority rights and the United States of America's exclusive representation model of collective bargaining.

<sup>911</sup> *Masondo* at para 42.

<sup>912</sup> Du Toit *et al* (2015) 253.

<sup>913</sup> In *SACTWU v Sheraton Textiles* [1997] 5 BLLR 662 (CCMA) at 667 the arbitrator, using the criteria of s 21(8) of the LRA of 1995, permitted the granting of the right to access and to stop order facilities to a trade union that had a membership total of 29.7% and had been organising for ten years in the employer's workplace. In *UPUSA v Komming Knitting* [1997] 4 BLLR 508 (CCMA) 509 the minority trade union with 22.5 % membership was granted the rights to access and to stop order facilities.

In chapter 5 reference was made to the fact that the level of representivity of the trade union determines whether or not a particular trade union enjoys statutory organisational rights in a workplace.<sup>914</sup> The section 21 process<sup>915</sup> and admission to a bargaining council are identified as mechanisms readily available to majority trade unions to set thresholds of representivity regarding the acquisition of specific organisational rights in the workplace.

It is significant to note that the South African system accommodates the acting together of minority trade unions for three purposes. Firstly, the acting together of minority trade unions will exclude them from the payment of the agency fee by members.<sup>916</sup> Secondly, this arrangement enables the minority trade union so acting together to acquire organisational rights in the workplace.<sup>917</sup> Thirdly, the arrangement will have the trade union being admitted as an acting together party and also having a voice in collective bargaining itself.<sup>918</sup> This does not exclude the possibility that two or more minority trade unions may act together such that they reach majority status with the concomitant benefits in terms of the LRA of 1995.

In addition to section 20, section 18 of the LRA of 1995 also provides for the thresholds in that:

“(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.  
(2) A collective agreement concluded in terms of subsection (1) is not binding unless the thresholds of representativeness in the collective agreement are applied equally to any registered trade union seeking any of the organisational rights referred to in that subsection.”

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<sup>914</sup> See chapter 5 at 5 for the detailed analysis of the acquisition of organisational rights by majority trade unions and sufficiently representative trade unions or trade union parties in the bargaining council. See also chapter 6 at 2.2 above on how minority trade unions may gain organisational rights.

<sup>915</sup> See Chapter 5 at 4.3.

<sup>916</sup> Ss 25 and 26 of the LRA of 1995.

<sup>917</sup> For public sector examples see paras 5.3.2 and 5.4 of PSCBC Resolution 2 of 2017 which provides that trade unions acting together and meeting the threshold or at least 75% thereof will be granted the right to access, to stop order facilities and to time off for trade union representatives.

<sup>918</sup> As per para 5.3.2 of PSCBC Resolution 2 of 2017 minority trade unions may be admitted as parties on meeting the threshold on acting together. See also Esitang and Van Eck ISLSSL World Conference Paper (2015) 10-11 in their discussion of thresholds in the public sector.

On the face of it, this provision is straightforward and without legal complexity. However, an in-depth analysis of a number of cases pertaining the interpretation and application of this provision have proven otherwise.

There are three key principles that arise from section 18 of the LRA of 1995. The first principle is that a threshold agreement may be entered into only by a majority trade union or parties to a bargaining council.<sup>919</sup> The second is that the collective agreement in question may relate to three organisational rights only, namely the rights to access, to stop order facilities and to leave for trade union activities.<sup>920</sup> The remaining rights, namely the rights to elect trade union representatives<sup>921</sup> and to the disclosure of information,<sup>922</sup> are not included in this section. The third principle is that the agreement must be applied consistently.<sup>923</sup> Regarding the last principle, Du Toit *et al*<sup>924</sup> mention that the thresholds must apply to all unions equally and if different thresholds are set for different trade unions they are invalid.

To demonstrate the impact of threshold agreements on minority trade unions, the case of *Police and Prisons Civil Rights Union v Ledwaba*<sup>925</sup> is significant. In *Ledwaba*<sup>926</sup> the workers were represented by two trade unions, namely POPCRU, a majority trade union, and SACOSWU a minority trade union. POPCRU was admitted to the Departmental Bargaining Chamber (DBC) and SACOSWU was not. The employer, the Department of Correctional Services, had entered into a threshold agreement with the majority trade union which regulated organisational rights and the exercise of the right of representation in grievance and disciplinary processes.<sup>927</sup>

Subsequent to the first agreement, the minority union SACOSWU and the employer entered into an agreement which granted organisational rights, the union gained access to the workplace and the right to deduct trade union

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<sup>919</sup> S 18(1) of the LRA of 1995.

<sup>920</sup> Ss 12, 13 and 15 of the LRA of 1995.

<sup>921</sup> S 14 of the LRA of 1995.

<sup>922</sup> S 16 of the LRA of 1995.

<sup>923</sup> S 18(2) of the LRA of 1995.

<sup>924</sup> Du Toit *et al* (2015) 260.

<sup>925</sup> [2013] 11 *BLLR* 1137 (LC)

<sup>926</sup> *Ledwaba* at paras 5 and 6. The Departmental Bargaining Chamber (DBC) is an extension of the General Public Sectoral Bargaining Council (GPSSBC). Only trade unions admitted in the GPSSBC and the DBC may enter collective agreements to regulate organisational rights and the right to engage in collective bargaining.

<sup>927</sup> *Ledwaba* at para 12.

subscriptions.<sup>928</sup> POPCRU lodged a dispute that the Department's conduct constituted a contravention of the collective agreement entered into in the DBC.<sup>929</sup> The arbitrator found in favour of SACOSWU and held that the second collective agreement entered into between SACOSWU and the Department was valid.<sup>930</sup> Both parties to the dispute accepted that the arbitrator exceeded his powers when he granted all and not only some organisational rights to SACOSWU.<sup>931</sup>

The arbitrator relied on the Constitutional Court case of *Bader Bop* which held that the provisions of the LRA of 1995 were not to be interpreted as preventing minority trade unions from seeking organisational rights outside the statutory framework through collective bargaining.<sup>932</sup> The arbitrator understood section 20 of the LRA of 1995 to mean that a minority trade union can enter into a collective agreement with the employer to gain organisational rights despite the existence of a threshold agreement.<sup>933</sup>

In *Ledwaba*<sup>934</sup> the Labour Court held that the arbitrator had misdirected himself on a principle of law established in *Bader Bop* in two significant respects. Firstly, the court held that the arbitrator failed to consider "what impact the existing and binding collective agreements between the Department and POPCRU had" on the right to strike. Secondly, the arbitrator was held to have failed to consider what the "true nature and purpose of the collective bargaining process and the importance of and sanctity of the existing POPCRU collective agreement were". For Snyman AJ the legal issue in *Bader Bop* was determined as whether "Part A of Chapter III of the LRA was the exclusive platform for a trade union to obtain organisational rights to the exclusion of the right to otherwise collectively bargain for it and ultimately exercise the right to strike to get it".<sup>935</sup>

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<sup>928</sup> *Ledwaba* at para 3.

<sup>929</sup> *Ledwaba* at para 13.

<sup>930</sup> *Ledwaba* at para 2.

<sup>931</sup> In *Ledwaba* at para 3 it was common cause between POPCRU and SACOSWU that the arbitrator exceeded his powers in granting SACOSWU all organisational rights instead of the rights of access and to stop order facilities which were sought.

<sup>932</sup> *Ledwaba* at para 14.

<sup>933</sup> *Ledwaba* at para 3.

<sup>934</sup> *Ledwaba* at para 40.

<sup>935</sup> *Ledwaba* at para 30.

The reasoning in the *Ledwaba*<sup>936</sup> decision is problematic in as far as it did not effectively appreciate that the LRA of 1995 is pluralistic in nature, albeit with a strong slant towards majoritarianism. Snyman AJ approved of the view expressed in *Profal (Pty) Ltd and National Entitled Workers Union*<sup>937</sup> which held that:

“one of the primary objectives of the legislature in crafting the LRA, was to promote the principle of majoritarianism in preference to the all-comers principle that would encourage the proliferation of unions. The idea was to create an orderly system of collective bargaining at industry level in which a union or a group of unions, that collectively represent the majority of employees above a pre-determined threshold in the industry, with the right to collective bargaining with employers on substantive conditions of employment.”

This decision correctly mentions that an all-comers approach recognises every trade union member or trade union for purposes of collective bargaining. This is what causes the proliferation of trade unions in the workplace which the LRA of 1995 aims to prevent. However, as has been stated, pluralism is not equivalent to proliferation,<sup>938</sup> nor is it comparable and equivalent to the all-comers approach. Moreover, the thesis does not advance the argument that seeking the right to engage in collective bargaining is the same as seeking organisational rights. These are different aspects. In the instance of *Profal*<sup>939</sup> the issue was that despite its minority status the minority trade union demanded to be a collective bargaining partner at plant level. It means the trade union was not seeking organisational rights in pursuit of its right to freedom of association, but sought these in order to seek collective bargaining rights.

According to Esitang and Van Eck<sup>940</sup> collective agreements which contain thresholds are similar to closed shop agreements which provide majority trade unions “with a monopoly”. Such agreements enable them to exclude if they want to, other trade unions from acquiring organisational rights, whether they are sufficiently representative or minority trade unions. This situation makes it difficult

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<sup>936</sup> *Ledwaba* at para 46.

<sup>937</sup> (2003) 24 *ILJ* 2416 (BCA) 2427J.

<sup>938</sup> See chapter 5 at 3.6 and chapter 2 at 3 and 4 for a comparison with the all-comers approach and how it differs from pluralism in pursuit of the constitutional imperative of promoting the interests of minority political parties rather than the fragmentation of the collective effort in line with the Constitution, 1996.

<sup>939</sup> *Profal* at para 2428 B-C.

<sup>940</sup> Esitang and Van Eck *ILJ* (2016) 767.

for a minority trade union or a rival trade union to gain organisational rights.<sup>941</sup> *Brassey et al*<sup>942</sup> and *Du Toit et al*<sup>943</sup> confirm that agreements setting thresholds lead to connivance between majority trade unions and employers, thus preventing minority trade unions from ‘getting a foot in the door’. Collective agreements which set thresholds in terms of section 18 of the LRA of 1995 promote a strict form of majoritarianism, which, it is argued, clashes with other fundamental labour rights. In *Ledwaba*,<sup>944</sup> the Labour Court did not draw a distinction between the concepts of proliferation and pluralism. It is submitted that it is not correct to argue that if minority trade unions are given the right to bargain in respect of organisational rights, that this situation is tantamount to a proliferation of trade unions.

In *Ledwaba*<sup>945</sup> the only rights sought to be exercised by SACOSWU were in terms of sections 12 (right of access to premises) and 13 (right to stop order facilities). *Ledwaba* distinguishes the facts of this case from those of *Bader Bop* in which no threshold agreement existed. The Court held that two collective agreements cannot exist side by side, “one must stand, and one must fall.” It is submitted that on a fundamental question, the *Ledwaba* decision of Labour Court was not aligned to *Bader Bop*<sup>946</sup> where it was held 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...have held that a majoritarian system will not be incompatible with freedom of association, as long as minority unions are allowed to exist, to organise members, to represent members in relation to individual grievances and to seek to challenge majority unions from time to time.”

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<sup>941</sup> As above at 766.

<sup>942</sup> *Brassey* (2006) A3-23. See also *SACTWU v Marley* (2000) 21 *ILJ* 425 (CCMA) at paras 2, where two trade unions, one in the majority and the other in the minority, had a membership of 55.8% and 42.3%. The latter could not acquire organisational rights because of an agreement between the employer and the majority trade union to exclude them from acquiring organisational rights. In *SA Post Office Ltd v Commissioner Nowosenetz* at paras 30-32 on raising the threshold of representivity from 30% to 40 % with the sole intention of excluding a rival trade union in the workplace.

<sup>943</sup> *Du Toit et al* (2015) 261.

<sup>944</sup> It is argued in the study that proliferation and pluralism are not interchangeable or refer to the same phenomenon. The detail of the argument is provided in chapter 2 at 4.3. The question to ask in *Ledwaba* is whether the proliferation referred to was tantamount to allowing a multitude of small trade unions to spring up as per the definition of proliferation.

<sup>945</sup> *Ledwaba* at para 3.

<sup>946</sup> *Bader Bop* at para 31.



*Ledwaba* did not pay sufficient attention to the negative consequences of not allowing minority trade unions to exist and even be in a position to represent members in their individual cases, including being in a position to challenge the dominance of majority trade unions. This could only take place if they have organisational rights. It is submitted that the Labour Court in its interpretation and application of provisions that promote majoritarianism in the LRA of 1995 did not interpret sections 18 and 20 correctly so as to conform to the spirit of the Constitution, 1996 and to comply with ILO norms. Fortunately, *Ledwaba* was overturned on appeal and this decision is discussed later.

In *SA Correctional Services Workers Union v Police and Prisons Civil Rights Union*,<sup>947</sup> the Labour Appeal Court (LAC) overturned the *Ledwaba* decision of the Labour Court. The Labour Court in *Ledwaba* had favoured majoritarianism to the extent that it held the employer was precluded from negotiating with the minority trade union about organisational rights because of the threshold agreement.<sup>948</sup>

In *SA Correctional Services Workers Union*, the LAC gave sections 18(1) and 20 a different interpretation. First, section 18(1) thresholds establish a minimum which, once reached, confers organisational rights on the minority trade union with no need to bargain for them. Secondly, despite a section 18 agreement having been concluded and having regard to section 20, which reads that “nothing...precludes the conclusion of a collective agreement that regulates organisational rights,” a minority trade union is not barred from seeking to bargain organisational rights. Thirdly, the LAC held that:

“Since a majoritarian system can only operate fairly where a minority is allowed to co-exist, including ‘to represent members in relation to individual grievances,’ to deny an employee a choice and impose on him or her representation by a majority trade union, of which that employee is not a member, is conceivably contrary to and in breach of the employee’s constitutional rights to freedom of association and to join a trade union and the right in s 23(1) to fair labour practices.”<sup>949</sup>

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<sup>947</sup> (2017) 38 ILJ 2009 (LAC).

<sup>948</sup> *SA Correctional Services Workers Union* at para 14.

<sup>949</sup> *SA Correctional Services Workers Union* at 37.

There can be no doubt that *SA Correctional Services Workers Union*<sup>950</sup> arrived at the correct conclusion in following the approach adopted in *Bader Bop*.

The decision of *Transnet Soc Ltd v National Transport Movement*,<sup>951</sup> decided almost at the same time as the decision of *Ledwaba* adopted a more enlightened approach. In this case the employer concluded a recognition agreement with a number of trade unions representing its workers in 2007.<sup>952</sup> This agreement fixed a threshold of 30% for recognition.<sup>953</sup> The National Transport Union (NTM) broke away from its affiliation and this minority trade union sought organisational rights.<sup>954</sup> NTM could not reach the 30% threshold nevertheless it gave notice of a strike.<sup>955</sup> The employer applied for an interdict on grounds that the threshold agreement precluded the employer from granting organisational rights.<sup>956</sup>

NTM relied on the principle established in *Bader Bop* in relation to allowing a minority trade union to strike to gain organisational rights.<sup>957</sup> The employer argued that in this matter the issue is distinguishable from *Bader Bop* because a section 18 agreement with the group of unions precluded NTM from gaining organisational rights.<sup>958</sup>

Van Niekerk J decided *Transnet Soc Ltd* clarified two significant issues in relation to section 18 of the LRA of 1995. First, the Court held that section 18 of the LRA of 1995 referred to a registered trade union “whose members are a majority”.<sup>959</sup> In this instance the threshold agreement was concluded with a group of trade unions.<sup>960</sup> Second, even if a group of trade unions were entitled to conclude a threshold agreement, the Court held that section 18 of the LRA of 1995 does not contain a specific provision which precludes a minority trade union from striking to gain organisational rights in the shadow of a threshold agreement.<sup>961</sup>

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<sup>950</sup> *SA Correctional Services Workers Union* at 39.

<sup>951</sup> [2014] 1 BLLR 98 (LC).

<sup>952</sup> *Transnet Soc Ltd* at para 2.

<sup>953</sup> *Transnet Soc Ltd* at para 3.

<sup>954</sup> *Transnet Soc Ltd* at para 2.

<sup>955</sup> *Transnet Soc Ltd* at para 6.

<sup>956</sup> *Transnet Soc Ltd* at para 1.

<sup>957</sup> *Transnet Soc Ltd* at para 14.

<sup>958</sup> *Transnet Soc Ltd* at para 11.

<sup>959</sup> *Transnet Soc Ltd* at para 16.

<sup>960</sup> *Transnet Soc Ltd* at para 2.

<sup>961</sup> *Transnet Soc Ltd* at para 18.

Significantly, *Transnet Soc Ltd* held and endorsed the important principle that:

“Given that this court is enjoined to adopt an interpretation of the LRA that is consistent with international labour standards and with the fundamental rights contained in section 23 of the Constitution, section 18 does not present a bar to the exercise of the right to strike in the present instance.”<sup>962</sup>

It is submitted that *Transnet Soc Ltd* reached the correct conclusion. It supported the Constitutional Court in *Bader Bop*<sup>963</sup> and confirmed the international labour standard that entails that it is to fly in the face of the right to freedom of association to limit the organisational rights of minority trade unions. However, it is argued that this decision and those that followed, which are discussed below, have not resolved the problematic nature of section 18 threshold agreements.

The third Labour Court case which was close to the rationale in *Transnet* discussed above was *United Association of SA and Another v BHP Billiton Energy Coal SA Ltd and another*.<sup>964</sup> The facts are that in 2005 the employer and a number of unions reached a threshold agreement which required a minimum of 15% representation.<sup>965</sup> In 2009 a dispute arose between the employer and two of the minority trade unions.<sup>966</sup> In terms of a settlement agreement the 2005 threshold was confirmed, and the agreement resolving the dispute was certified as a CCMA award.<sup>967</sup> In 2013 the majority trade union, the National Union of Mineworkers (NUM), concluded a new threshold agreement which set the minimum at 30%. The two minority unions sought an order which declared the latter agreement null and void.

Although Steenkamp J regarded this as a special case, he held that the settlement agreement in question is binding on the employer, and the collective agreement entered into between the employer and the majority trade union to raise the threshold cannot have the effect of ignoring the binding settlement agreement.<sup>968</sup>

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<sup>962</sup> *Transnet Soc Ltd* at para 18.

<sup>963</sup> [2003] 2 BLLR 103 (CC).

<sup>964</sup> (2013) 34 ILJ 2118 (LC).

<sup>965</sup> *BHP Billiton Energy Coal SA Ltd* at para 8.

<sup>966</sup> *BHP Billiton Energy Coal SA Ltd* at para 9.

<sup>967</sup> *BHP Billiton Energy Coal SA Ltd* at para 10.

<sup>968</sup> As above at para 45. At paras 34-36. Steenkamp J in establishing the requirements of the interim relief granted the order in favour of the minority unions, namely, UASA and AMCU. It held that the

Effectively, this decision created two instruments regulating thresholds of representivity. Also, it did not prevent the Labour Court from holding that section 18 of the LRA of 1995 provides the employer and the majority trade union with the authority to enter a collective agreement on the threshold of representativeness for the acquisition of organisational rights. In this regard Steenkamp J agreed with Brassey's comment that section 18 of the LRA of 1995:

“permits a union or group of unions that have recruited the majority of employees in a workplace to introduce, by agreement with the employer, a new threshold for the acquisition of those rights that the statute confers on unions which can demonstrate sufficient representativeness. The new standard will then apply to third parties who seek to exercise statutory rights provided it is universally applicable to all unions ... the primary object of the section is to promote workplace majoritarianism, that is, the system under which a single union or group of unions enjoy exclusive rights or representation within a workplace.”<sup>969</sup>

According to Steenkamp J the issue before him is whether the minority parties that benefitted from the award established “a *prima facie* right for the interim relief sought”.<sup>970</sup> The Labour Court held that the requirements for granting the relief sought had been met.<sup>971</sup> Further, Steenkamp J in his judgement agreed with the principles of majoritarianism and the effect of section 18 of the LRA of 1995 in respect of setting thresholds of representivity for the acquisition of organisational rights.<sup>972</sup> The Labour Court however made the following significant comment:

“[t]here is no obligation on the union to demand new thresholds or on the employer to agree to them. The matter is left to be determined in the process of collective bargaining. If the employer refuses to agree to a union proposal, however, the union can call its members to strike over the issue.”<sup>973</sup>

Inasmuch as this decision held that the employer could not disentangle itself from the settlement agreement, it confirmed the possibility of the existence of more than one arrangement for the regulation of organisational rights. This conclusion is

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earlier certified agreement with a lower threshold of 15% established “a *prima facie* right for the interim relief sought pending the arbitration.”

<sup>969</sup> Brassey *et al* (2006) A3:23-24.

<sup>970</sup> *BHP Billiton Energy Coal SA* para 35.

<sup>971</sup> According to *BHP Billiton Energy Coal SA* at para 35 these requirements were “a *prima facie* right; irreparable harm; balance of convenience favouring the grant of relief; and the absence of a satisfactory alternative remedy.”

<sup>972</sup> *BHP Billiton Energy Coal SA* paras 47, 48, 49 and 53.

<sup>973</sup> *BHP Billiton Energy Coal SA* at para 49.

based on the view that if a minority trade union validly entered into a settlement agreement certified to be final between the employer and the minority trade union, then a majority trade union cannot nullify such an agreement by negotiating a new threshold collective agreement.<sup>974</sup>

It is not contested that as section 18 of the LRA of 1995 currently stands it permits a majority trade union to establish thresholds of representivity. However, it is submitted that the principle of majoritarianism must be applied in its proper context which leaves room for the recognition that minority trade unions need to be permitted to exercise the right to freedom of association. All trade unions should have the right to represent their individual members in disciplinary and grievance matters.

The cases discussed above indicate the complexity of the issues arising out of the interpretation and application of sections 18 and 20 of the LRA of 1995 and the impact on the constitutional rights to freedom of association, to engage in collective bargaining and to strike. This thesis supports the principle adopted in *SA Correctional Services Workers Union*<sup>975</sup> that the employer and the majority trade union are at liberty to enter a collective agreement setting thresholds. However, it also supports the agreement that may be entered between the employer and the minority trade union on organisational rights.

It is submitted that the decisions above are on the correct path. However, these court decisions arguably do not go far enough in establishing a foothold for the right to freedom of association in the workplace. Against this background it is argued that section 18(1) of the LRA of 1995 should be amended to give effect to the ILO norms and also to take cognisance of the context provided by the constitutional dispensation that is accommodating of minority interests and where justified will not permit majoritarianism to unjustifiably limit these interests.

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<sup>974</sup> See *BHP Billiton Energy Coal SA* paras 53 and 54.

<sup>975</sup> (2017) 38 *ILJ* 2009 (LAC) para 37.

## 2.4. Legal Effect of Collective Agreements on Non-Party Trade Unions

It has been agreed that majority trade unions and employers may enter threshold agreements in terms of either section 18 or 20 of the LRA of 1995.<sup>976</sup> As was confirmed in *Bader Bop*,<sup>977</sup> minority trade unions collectively may bargain with employers for the acquisition of organisational rights. The provisions in Part A of Chapter III of the LRA of 1995 do not prevent them from going on strike if their demands are not met. Minority trade unions can rely on section 20 of the LRA of 1995 to engage in collective bargaining with a view to reaching agreement regarding organisational rights.<sup>978</sup>

Section 23 of the LRA of 1995 supports majoritarianism in so far as collective agreements negotiated by majority trade unions are extended to include minority trade unions and trade unions not party to the collective agreement. In this regard section 23(1) of the LRA of 1995 provides that:

“(1) A collective agreement binds-

- (d) 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.”

In *Association of Mineworkers and Construction Union v Chamber of Mines*<sup>979</sup> the Constitutional Court dealt with majoritarianism. In this case the Association of Mineworkers and Construction Union (AMCU) represented the majority of workers at five mines.<sup>980</sup> The issue in dispute was whether the members of a minority trade union were at liberty to strike after a wage agreement with the majority trade unions had been extended to them.<sup>981</sup> The other question in *AMCU* related to whether the

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<sup>976</sup> See chapter 6 at 2.2.

<sup>977</sup> *Bader Bop* at paras 39-43. The conclusion by the Constitutional Court was that inasmuch as Part A of Chapter III of the LRA of 1995 expressly grants sufficiently representative and majority trade unions organisational rights that did not bar it from concluding that unrepresentative trade unions may also conclude collective agreements in terms of s 20 despite being unrepresentative.

<sup>978</sup> See chapter 6 at 2.2.

<sup>979</sup> (2017) 38 *ILJ* 831 (CC) paras 43-57.

<sup>980</sup> Refer to the detailed facts of the case in chapter 5 at 3 where the Constitutional Court in *AMCU* determined that the “workplace” refers to all the independent operations of the employer, and not only the place where the employees work.

<sup>981</sup> *AMCU* at para 1.

collective agreement ought to have been extended in terms of section 32 of the LRA of 1995, which applies to bargaining councils, and which provides that:

“(1) A bargaining council may ask the Minister...to extend a collective agreement concluded in a bargaining council...to any non-parties to the collective agreement...within the registered scope and are identified...  
(2) Within 60 days...the Minister must extend the collective agreement.”<sup>982</sup>

AMCU argued that the Chamber of Mines operated as a bargaining council and used section 23(1) of the LRA of 1995 to circumvent section 32 of the same Act which requires the extension to be ordered by the Minister of Labour.<sup>983</sup> In an alternative argument, AMCU claimed that section 23(1)(d) was unconstitutional as unjustifiably it limits its members’ “rights to fair labour practices, including the right to bargain collectively, the right to strike and the right to freedom of association.”<sup>984</sup>

Most significantly, *AMCU* held that even if section 23(1)(d)(iii) of the LRA of 1995 extends the application of the collective agreement to non-parties, this does not mean that a minority trade union cannot bargain about the acquisition of organisational rights. Section 65(2) of the LRA of 1995 gives them the authority to strike to attain that goal.<sup>985</sup>

In this regard, the Constitutional Court in *AMCU*<sup>986</sup> clearly indicated that the “winner takes all” approach attributed to the principle of majoritarianism is inappropriate. Notwithstanding the fact that the Constitutional Court in *AMCU*<sup>987</sup> dismissed the appeal of AMCU to be allowed to strike, there are three key points worth mentioning. First, the Constitutional Court concurred with the approach adopted by *Bader Bop*. AMCU held that *Bader Bop*:

“interpreted the provisions of the LRA to protect the organisational rights of minority trade unions. The Court underscored the importance of freedom of association...It noted that...a majoritarian system can operate fairly, only in accordance with certain conditions. It must allow minority trade unions to

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<sup>982</sup> Section 32 of the LRA of 1995.

<sup>983</sup> *AMCU* at para 13.

<sup>984</sup> *AMCU* at para 16.

<sup>985</sup> S 65(2) of the LRA of 1995 provides that:

“(a) Despite section 65(1) (c), a person may take part in a strike or lockout or in any conduct in contemplation or in furtherance of a strike or lockout if the issue in dispute is about any matter dealt with in terms of sections 12 and 13.”

<sup>986</sup> *AMCU* at para 47.

<sup>987</sup> *AMCU* at para 90.

co-exist, to organise members, to represent members in relation to individual grievances and to seek to challenge majority trade unions.”<sup>988</sup>

Secondly, the Constitutional Court confirmed that the minority trade union, AMCU, already enjoyed both organisational rights and collective bargaining rights despite their minority status in the workplace.<sup>989</sup> They were therefore bound if the majority trade unions have entered into a collective agreement that settles a dispute that also affects them.<sup>990</sup>

Thirdly, even though the LRA of 1995 is premised on majoritarianism, the Constitutional Court held that it should not serve as an instrument of oppression for minority trade unions. The Court in *AMCU* held that the LRA of 1995 does “give ample scope for minority trade unions to organise within the workforce, and to canvass support to challenge the hegemony of established unions”.<sup>991</sup>

However, according to Van Eck,<sup>992</sup> the Constitutional Court cases of *AMCU* and *Bader Bop* are not finely attuned to one another as one endorses majoritarianism and the other recognises minority trade unions. The author mentions that there is a significant distinction to be drawn between the Constitutional Court in *Bader Bop* and *AMCU*. In *Bader Bop* the subject of collective bargaining was organisational rights, whilst in *AMCU* it was about a wage dispute and a substantive improvement of conditions of employment.<sup>993</sup> This distinction resembles the very essence of the need to identify purposes in the definition of workplace. In this way, in the case of the public sector for example, the entire state apparatus is to be bound in matters of collective bargaining on substantive issues pertaining to the improvement of conditions of employment. If the bargaining and resultant agreement pertains to organisational rights the national department will be regarded as the workplace in line with the principle of ensuring that minority trade unions continue to exist and represent their members in individual cases including challenging the hegemony of majority trade unions.

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<sup>988</sup> *AMCU* at para 52.

<sup>989</sup> *AMCU* at para 54.

<sup>990</sup> *AMCU* at para 56. The Constitutional Court based its finding on majoritarianism enhances orderly collective bargaining.

<sup>991</sup> *AMCU* at para 55.

<sup>992</sup> Van Eck *ILJ* (2017) 1509.

<sup>993</sup> Van Eck *ILJ* (2017) 1507.



It is submitted that the Constitutional Court in *AMCU*<sup>994</sup> does not negate *Bader Bop* with regard to the position of minority trade unions and their organisational rights within a majoritarian collective bargaining system. As in the case of *Bader Bop*,<sup>995</sup> *AMCU*<sup>996</sup> confirms the need to protect the right to freedom of association and to allow minority trade unions to exercise these within a majoritarian system of collective bargaining.<sup>997</sup>

It is submitted that for a minority trade union such as AMCU to be allowed to be a party to the collective bargaining process, even though it is a minority in the context of collective bargaining, is a development worth exploring. Where the trade union is a majority in some operations, but not in the total business of the employer, it may be considered by the employer for collective bargaining purposes. This suggests the granting of a voice albeit not one that is decisive in the sense that it cannot strike if it disagrees with the substantive agreement. This, conforms to the constitutional framework which accommodates minority interests.<sup>998</sup> This thesis does not argue that minority trade unions should be permitted to demand the right to engage in collective bargaining as regulated in terms of the LRA of 1995. However, it focuses on the impact of thresholds on the organisational rights of minority trade unions especially those in line with international norms and with the right to freedom of association where membership numbers are not of the essence.

### 3. Effect of Section 21(8C) of the LRA of 1995 on Organisational Rights

As discussed above, sections 18, 20 and 23(1) of the LRA of 1995 confirm the principle of majoritarianism in the South African collective bargaining system. However, the amendments to the LRA of 1995 introduced a number of changes regarding the principle of majoritarianism and the right to freedom of association.

Section 21(8C) of the LRA of 1995 for the first time introduced the following principle:

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<sup>994</sup> At para 52.

<sup>995</sup> At para 36.

<sup>996</sup> At para 52.

<sup>997</sup> As above.

<sup>998</sup> See chapter 3 at 3, 4 and 5. In the context of labour relations the decision-making authority and channel in labour relations between employers and trade unions is the collective bargaining arena.

“(8C) Subject to the provisions of subsection (8), a commissioner may ...grant the rights referred to in sections 12, 13 or 15 to a registered trade union, or two or more registered trade unions acting jointly, that does not meet thresholds of representativeness established by a collective agreement in terms of section 18, if -  
(a) all parties to the collective agreement have been given an opportunity to participate in the arbitration proceedings; and  
(b) the trade union, or trade unions acting jointly, represent a significant interest, or a substantial number of employees, in the workplace.”

It is notable that this amendment focusses on the threshold agreement provisions<sup>999</sup> and does not relate to section 20 of the LRA of 1995 that also permits a majority trade union to establish thresholds regarding organisational rights.<sup>1000</sup>

Section 21(8C) grants CCMA Commissioners the power to determine whether trade unions that do not necessarily meet thresholds set by the employer and a majority trade union or the bargaining council have certain organisational rights. However, this amendment does not go far enough in preventing employers and majority trade unions or bargaining councils, by means of collective agreements, from entering agreements setting thresholds on organisational rights that are high. This, as already indicated infringes on the rights of minority trade unions to freedom of association. Furthermore, the commissioner’s powers in terms of section 21(8C) and those of the majority trade union to strike for the exclusion of a minority trade union remain intact and may conflict.

Du Toit *et al*<sup>1001</sup> emphasise that a collective agreement in relation to organisational rights that limits this right to freedom of association or the protection of employees either directly or indirectly will be invalid unless permitted by the LRA of 1995.<sup>1002</sup> From a policy point of view this change was essential. The ultimate to avoid this conflict between the CCMA Commissioner and the majority trade union that wants to enter a threshold agreement can be avoided by lowering the threshold for the acquisition of organisational rights and ensuring that minority trade unions are permitted to represent members in individual cases. Esitang and Van Eck also

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<sup>999</sup> S 18 of the LRA of 1995.

<sup>1000</sup> See Chapter 6 at 2.2.

<sup>1001</sup> Du Toit *et al* (2015) 253.

<sup>1002</sup> S 5(4) of the LRA of 1995.

suggest the possibility of placing the burden of proof in excluding organisational rights from trade unions that seek these threshold levels.<sup>1003</sup>

The Labour Court in *IMATU v Williams NO and others*,<sup>1004</sup> was confronted with a dispute between the Independent Municipal and Allied Workers Union (IMATU) and the Municipal and Allied Workers Union of South Africa (MATUSA). When MATUSA, a minority trade union, approached the employer seeking to exercise organisational rights the employer turned down their request.<sup>1005</sup> Two trade unions in the workplace, namely IMATU and the South African Municipal Workers Union (SAMWU) that acted together, constituted a majority.<sup>1006</sup> The two trade unions agreed to set the threshold for the acquisition of organisational rights in the local government sector at 15%.<sup>1007</sup> The arbitrator considered the amendments to section 21(8) of the LRA of 1995 and concluded as follows:

“The rationale for the new amendments of section 21 of the LRA is... broadening...the scope to grant organisational rights to unions that do not enjoy a majority in the workplace. The amendments give effect to the principles of freedom of association in that employees have the right to choose their representation and that minority trade unions can approach the CCMA where they have not been granted organisational rights.”<sup>1008</sup>

The arbitrator was not persuaded that he lacked the powers to grant organisational rights in terms of section 18 of the LRA of 1995. The arbitrator based the decision on the fact that the acquisition of organisational rights would not necessarily undermine collective bargaining rights in the workplace.<sup>1009</sup>

The arbitration award was taken on review and the applicant argued that the arbitrator did not apply the correct test in terms of section 21(8) of the LRA of 1995, namely to consider, *inter alia*, seeking to minimise the proliferation of trade unions, to minimise the financial and administrative burden on the employer and to

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<sup>1003</sup> Esitang and Van Eck *ILJ* (2015) 777. This requirement may already be built into the provisions of s 21(8C) of the LRA of 1995 as the majority trade union would be party to the dispute anyway. Ordinarily, they would need to lead evidence if they do not wish to challenge the minority trade union from acquiring organisational rights based on the provision.

<sup>1004</sup> Unreported Case No C 344/2016 (31 January 2017) at paras 4 and 5.

<sup>1005</sup> *Williams* at para 8.

<sup>1006</sup> *Williams* at para 7.

<sup>1007</sup> *Williams* at para 8.

<sup>1008</sup> *Williams* at para 10.

<sup>1009</sup> *Williams* at para 12.

consider the nature of the workplace. The Labour Court set the arbitration award aside.<sup>1010</sup>

Furthermore, it is submitted that the model of majoritarianism in South Africa's collective bargaining framework is misaligned with South Africa's model of constitutional democracy which reflects a pluralist system that accommodates minority interests.<sup>1011</sup> This principle must allow space for minority trade union activity in line with South Africa's constitutional obligations and the principles of the ILO.<sup>1012</sup>

#### 4. Advancing Labour Peace

Cohen<sup>1013</sup> mentions that the "strike violence that has marred the labour market in recent times reveal the flaws in the majoritarian framework and the changed dynamic of the collective bargaining environment." The tragic death of more than 34 miners at the Marikana mine serves as evidence that the majoritarian system of collective bargaining does not necessarily foster orderly collective bargaining.<sup>1014</sup> In his comment on Marikana, Ngcukaitobi criticises the current collective bargaining system and states that:

"[w]hat materialized during wage negotiations in Marikana was a distinct alienating dynamic whereby workers who were previously unionized either rejected trade unions entirely or joined a small union to compete for political ground with their former union...but the perception that the interests of the workers no longer constituted the core focus of...the majority trade union ...which had been granted full organisational rights...resulted in sporadic clashes between members of these unions...Many smaller factions of the labour force who do not reach the stipulated threshold of representation... are denied an effective voice through this structure."<sup>1015</sup>

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<sup>1010</sup> *Williams* at paras 19 and 20.

<sup>1011</sup> See chapter 3 at 4.4 and 5.

<sup>1012</sup> See Chapter 2 at 3.5 and Chapter 3 at 2.2 on the content of these constitutional and ILO principles.

<sup>1013</sup> As above.

<sup>1014</sup> Cohen *PELJ* (2014) 2222 makes this observation having concluded that majoritarianism as a system of collective bargaining has the consequence of favouring majority trade unions, but the Marikana experience is cause for a return to the drawing board.

<sup>1015</sup> Ngcukaitobi *ILJ* (2013) at 852-853. According to Ngcukaitobi, thirty-four people died and seventy eight were wounded after being shot by members of the South African Police Service at Marikana during a labour dispute for higher wages.

It is argued that the exclusion of minority trade unions from the acquisition of organisational rights and the right to represent members in individual cases, limits the possibility of raising an alternative voice in a diverse workforce.<sup>1016</sup> This lack of an alternative can lead to intense rivalry and violence. This thesis propagates a point of view which leaves room for the establishment of minority trade unions and which protects the right to freedom of association. Curtis<sup>1017</sup> offers an accurate description of the South African context when she mentions that:

“Freedom of association and democracy share the same roots: liberty, independence, pluralism, and a voice in decision-making...If there is no democracy at the political level, there will be no right for workers and employers to join freely the organisation of their own choosing and exercise their legitimate activities. If freedom of association is not recognised...the very foundations of a democratic political system will necessarily be shaken.”

In addition, Mischke<sup>1018</sup> aptly states that:

“Organisational rights make it possible for a trade union to build up, consolidate and maintain a power base of sufficient strength among the employers’ employees – it is only once an employer has attained sufficient strength that it can exercise sufficient economic power on the employer to compel the employer to bargain on wages and terms of conditions.”

Whether organisational rights are acquired through the mechanisms of the LRA of 1995 or by means of collective agreements these rights relate to entry to the workplace, the right to represent members in individual disputes and, subsequently, when sufficient support has been canvassed to represent the collective interests of its members.

In *FEDCRAW v Edgars Consolidated Stores Limited*<sup>1019</sup> the Labour Court recognised that the cause of conflict under the Industrial Court before the enactment of the LRA of 1995 was the need to attain organisational rights through industrial action. Statutory organisational rights therefore were supposed to have

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<sup>1016</sup> See chapter 5 at 5 where the examination of statutory organisational rights provides an exposition of the value that attaches to organisational rights for majority trade unions as well as to minority trade unions.

<sup>1017</sup> Curtis in Politakis ILO (2004) 91 also available at [https://www.law.lu.se/WEBUK.nsf/\(MenuItemById\)/.../\\$FILE/Karen%20Curtis.pdf](https://www.law.lu.se/WEBUK.nsf/(MenuItemById)/.../$FILE/Karen%20Curtis.pdf) (accessed June 2016).

<sup>1018</sup> Mischke *CLL* (2004) 52.

<sup>1019</sup> (2002) 11 BLLR 1069 (LC) 1073.

removed the need to strike over organisational rights. This was not to be the case. The Constitutional Court in *Bader Bop* opened the avenue to strike action in order to gain organisational rights to minority trade unions. A strike by a minority trade union to acquire organisational rights is not guaranteed to be effective. These obstacles to acquiring organisational rights may have the effect of minority trade unions seeking unconventional ways, such as violence, to get recognition in the workplace.<sup>1020</sup>

It is argued that there can be no orderly collective bargaining if there is no labour peace in the workplace. It should therefore not be that orderly collective bargaining, albeit essential, is elevated to the main standard to measure the effectiveness of the LRA of 1995. Whether industrial peace can be achieved and sustained when excluding unrepresentative trade unions from acquiring organisational rights should also be a measure like all purposes. It is in this context that the thesis argues that organisational rights serve as the organisational oxygen of trade unions, signifying that without the availability of these rights they will be unable to exercise their right to freedom of association and may ultimately cease to exist.<sup>1021</sup> It is this inability that leads to frustrations amongst workers that lead for one reason or another to loss of confidence in the trade union.

## 5. Conclusion

The LRA of 1995 contains two main mechanisms to regulate organisational rights by means of a collective agreement, namely a general section 20 collective agreement that provides that all or some organisational rights may be the subject of agreement with a majority or minority trade union. The second mechanism available to a majority trade union is the threshold agreements by way of section 18(1) which can be entered in respect of three specific rights, namely, the right to access, the right to stop order facilities and the right to leave for trade union representatives.

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<sup>1020</sup> In *Ngcukaitobi ILJ (2013) 854* the author cautions that where employers increasingly are perceived as unrelenting under the current system of labour relations, even majority trade unions may seek unconventional ways to advance their interests. It is submitted that the current system includes the element of give and take in collective bargaining and, when it fails, to go on strike.

<sup>1021</sup> See *Esitang and Van Eck ILJ (2016) 766*.

On the face of it section 18(1) agreements seem to limit minority trade unions' right to gain organisational rights as a majority trade union and an employer can establish unrealistically high thresholds to exclude them from acquiring the three specified organisational rights. It is recognised that these thresholds are based on the principle of majoritarianism and are meant to bolster the power of a party to the collective bargaining process. It has been made clear that there is no challenge to the principle of majoritarianism, and the majority trade union or the parties admitted to the bargaining council will be at the forefront in entering agreements and determining improvements in conditions of employment for all workers. However, these threshold agreements have been instruments of abuse by majority trade unions to rid the workplace of rival trade unions, including preventing them from representing their members in individual matters. To resolve the challenge of unjustifiable limitation of the rights of minority trade unions, the recommendation to lower the thresholds where they form part of collective bargaining and result in a collective agreement becomes appropriate.<sup>1022</sup>

The Constitutional Court in *Bader Bop*<sup>1023</sup> established that minority trade unions may bargain for organisational rights and that they could strike. The Constitutional Court in *AMCU*<sup>1024</sup> confirmed *Bader Bop* is so far as the rights of a minority trade union in relation to organisational rights are concerned. As observed by Van Eck,<sup>1025</sup> the distinction between *Bader Bop* and *AMCU* is that in the one instance at issue was organisational rights and in the other the issue was negotiations for improvement of conditions of employment. It has been submitted that this is the distinction to be drawn to purposes in the definition of "workplace" that is recommended to alleviate the seeming different approaches by the Constitutional Court. In *AMCU* where the subject was negotiations for substantive issue in respect of improvements in condition of employment the Constitutional Court pronounced that the minority trade union's right to strike over that is justifiably limited based on the principle of majoritarianism. In *Bader Bop* the pronouncement was that the right to strike of the minority trade union is not limited as the subject of collective bargaining relates to organisational rights.

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<sup>1022</sup> See Chapter 5 at 2, 4.3 and 7.

<sup>1023</sup> See *Bader Bop* at paras 73 and 75.

<sup>1024</sup> *AMCU* at para 52. See also the discussion and confirmation of the principle of the Constitutional Court case of *Bader Bop* in the Labour Court case of *Transnet* at paras 14, 16 and 18 and the Labour Court Case of *SA Correctional Services* at para 37.

<sup>1025</sup> Van Eck *ILJ* (2017) 1508.

It is recognised that a great deal of uncertainty arose out of different cases about the effect of an application of the principle of majoritarianism and its effect on the interpretation and application of sections 18 and 20 of the LRA of 1995. The conclusion though is simply that inasmuch as the principle of “majority rule” prevails, there is accepted recognition of the right of minority trade unions to exist, to represent their members in grievance and disciplinary proceedings and to challenge the domination of majority trade unions.

*SA Correctional Services*, firstly, held that section 20 permits negotiation on all or some organisational rights and that the section prevails over section 18. Secondly, the LAC held that section 18 establishes a minimum and nothing precludes minority trade unions from bargaining about organisational rights. Thirdly, in line with ILO provisions, every trade union must be allowed to represent its members in individual disputes.

The amendments to the LRA of 1995 in seeking to protect and promote the right to freedom of association have not gone far enough. In this regard section 21(8C) places the power of the CCMA Commissioner at loggerheads with the rights of majority trade unions. What if the majority trade unions or admitted members are in disagreement with the CCMA Commissioner that wants to grant one or more organisational rights to a minority trade union? Will the right to strike be allowed? As provided in section 65(2) of the LRA of 1995, it is submitted that such a strike will be lawful. This is once again a threat to labour peace.



## CHAPTER 7

### Comparative Analysis: Majoritarianism and Pluralism

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## 1. Introduction

As expressed in the previous two chapters South Africa adopted a pluralist system of collective bargaining,<sup>1026</sup> but which strongly inclines towards majoritarianism. Majority trade unions acquire all organisational rights and can conclude threshold agreements to the exclusion of minority trade unions.<sup>1027</sup> Even though the Labour Appeal Court (LAC) in *South African Correctional Services Workers Union v Police and Prisons Civil Rights Union*<sup>1028</sup> recently confirmed that minority trade unions are entitled to negotiate the acquisition of organisational rights, this ruling is not a guarantee that they will be accorded organisational rights. This situation applies especially if the employer and the minority trade union cannot conclude a collective agreement.

The impact that threshold agreements have on minority trade unions is such as to negate the principles of democracy and freedom of association in terms of the Constitution, 1996<sup>1029</sup> and of international law.<sup>1030</sup> The Constitution enjoins that the interpretation of South African law must consider international law and may consider foreign law.<sup>1031</sup>

The main purpose in this chapter is to conduct a comparative analysis between countries that follow a pro-majoritarian system and others that follow a system of pluralism. According to Hyman<sup>1032</sup> a comparative study entails:

“the systematic cross-analysis of phenomena displaying both similarities and differences. It is often considered the nearest functional equivalent in the social sciences to the laboratory experiment of the natural scientist.”

This comparison of different systems at opposite ends of the spectrum offers an opportunity to evaluate South African arrangements and to discover whether there are lessons to be learned in order to protect and promote the constitutional right to

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<sup>1026</sup> See Chapter 5 at 5, Chapter 6 at 2.3 and 4.

<sup>1027</sup> See Chapter 1 at 6 and Chapter 6 at 2.3.

<sup>1028</sup> *SA Correctional Services Workers Union* (2017) 38 *ILJ* 2009 (LAC).

<sup>1029</sup> See Chapter 3 at 4.4 and 4.5.

<sup>1030</sup> See Chapter 2 at 4.2.

<sup>1031</sup> S 39 of the Constitution, 1996.

<sup>1032</sup> Hyman in Blanpain *et al* (2009) 3.

freedom of association by drawing on international experiences.<sup>1033</sup> The method in the chapter draws on examining the ILO's stance in relation to their compliance with international standards, specifically the right to freedom of association.

The ILO recognises that the prevailing conditions and circumstances of member states differ. However, this understanding is not an excuse for them to abrogate workers' right to freedom of association. In this regard, the CFA states that:

“[t]he Committee always takes account of national circumstances, such as the history of labour relations and the social and economic context, but the freedom of association principles applies uniformly and consistently among countries.”<sup>1034</sup>

Analysing different systems of collective bargaining should take into account the significant role historical context plays. According to Bamber and Sheldon<sup>1035</sup> the differences in the behaviour of employers towards trade unions is influenced by historical factors. The authors mention that:

“[i]n Western Europe together with Britain...multi-employer bargaining emerged as the predominant pattern largely because employers...were confronted with the challenge of national unions organised along occupational or industrial lines. In contrast, single-employer bargaining emerged in the USA and Japan because the relatively large employers that had emerged at an early stage of industrialization were able to exert pressure on unions to bargain at enterprise level.”<sup>1036</sup>

The first part of the chapter examines the USA system of labour relations and its main elements. The second part of the chapter explores the Japanese system of labour relations and the extent to which the system adheres to ILO standards. The third part of the chapter on Germany will first provide an exposition of the labour law relating to collective bargaining in the workplace and the position of minority trade unions within this realm. In addition, it will provide an exposition of the German system of works councils. In the exposition of both collective bargaining

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<sup>1033</sup> See Chapter 2 at 6.2 where it is explained that the rights to organise and to engage in collective bargaining are incidents of the right to freedom of association. The origin of the two latter rights lies in the right to freedom of association. See also Chapter 6 at 4 and Mischke *CLL* (2004) 52.

<sup>1034</sup> *Digest of Decisions* (2006) para 10. See also Thomas (1921) 5 regarding the origin of the principle and Hepple (2005) 34 where the author discusses the challenges faced by the ILO when it admitted countries previously excluded. One of these challenges was the demand for greater flexibility in standard setting to accommodate disparities in the economic and political conditions of member states.

<sup>1035</sup> According to Bamber and Sheldon in Blainpain (ed) *CLLIR* (2004) 515-516.

<sup>1036</sup> As above.

and works councils this chapter will also shed light on trade union rights under the German labour relations system. Finally, the chapter will analyse the extent and challenges that the comparative analysis brings to the fore in relation to compliance with international standards.

The final part identifies differences and similarities between South Africa, the USA, Japan and Germany. The conclusion formulates recommendations for South Africa based on the understanding gained through the comparison.

## 2. The United States of America

### 2.1. Introduction

The USA is an example of the majoritarian system in labour relations. The South African system of collective bargaining, albeit pluralistic, is strongly inclined towards majoritarianism in that minority trade unions may be excluded from acquiring statutory organisational rights by means of the setting of thresholds in collective agreements.<sup>1037</sup> The primary reason for the comparison between the USA and South Africa is that the USA system of collective bargaining recognises only the majority trade union for the purposes of collective bargaining.

The second reason for the comparison with the USA is that in the USA the Constitution is the supreme law of the land.<sup>1038</sup> Both countries have a superior court with authority to overturn laws deemed unconstitutional.<sup>1039</sup> In the USA this is the Supreme Court and in South Africa this role is filled by the Constitutional Court.<sup>1040</sup>

The third reason for the comparison between South Africa and the USA is that contrary to the position of South Africa, there is no specific trade union rights

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<sup>1037</sup> See Chapter 6 at 2.2 and 2.3.

<sup>1038</sup> According to Goldman and Corrada (2010) 27 the legislative branch of the USA is Congress and its authority is limited to the powers granted to it by the Constitution. Congress has two chambers, namely the House of Representatives and the Senate.

<sup>1039</sup> USA Courts available at <http://www.uscourts.gov/about-federal-courts/court-role-and-structure/comparing-federal-state-courts> (accessed June 2017) where it is stated that as a consequence of the Federal system, the federal government and all the state governments have their own court systems.

<sup>1040</sup> S 2 of the Constitution, 1996.

dispensation dedicated to the regulation of the organisational rights of trade unions in the USA. The acquisition of trade union rights finds expression within the collective bargaining framework in the USA.<sup>1041</sup> The entitlement to trade union rights depends on whether or not the trade union is formally recognised by the employer for the purposes of collective bargaining. This position is in contrast to South Africa where majority trade unions and sufficiently representative trade unions gain organisational rights according to a statutory scheme.

The fourth reason is that although the USA has not ratified Convention No 87 of 1948 and Convention No 98 of 1949<sup>1042</sup> it is bound by the core conventions. Article 2 of the ILO Declaration on Fundamental Principles provides that:

“all Members, even if they have not ratified the Conventions in question, have an obligation arising from the very fact of membership in the Organisation to respect, to promote and to realize, in good faith and in accordance with the Constitution, the principles concerning the fundamental rights which are the subject of those Conventions, namely: (a) freedom of association and the effective recognition of the right to collective bargaining.”<sup>1043</sup>

The study of the USA commences by examining the Constitution to determine whether its provisions provide for the protection of labour rights. Thereafter, it examines the National Labour Relations Act (NLRA)<sup>1044</sup> and the relevant provisions that regulate the enjoyment of trade union rights and what these rights entail. This chapter explores the extent to which trade union rights are protected in the USA. The final part examines the extent to which the legislative framework of the USA complies with ILO principles.

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<sup>1041</sup> See Chapter 7 at 2.4.

<sup>1042</sup> See Ratification of Fundamental Conventions available at [www.ilo.org/dyn/normlex/en/f?p=100:0:CONVENTION...1...](http://www.ilo.org/dyn/normlex/en/f?p=100:0:CONVENTION...1...) (accessed in July 2015).

<sup>1043</sup> See also Article 22(3) of the International Covenant on Civil and Political Rights adopted by the United Nations in 1966 which provides that “[n]othing in this article shall authorize States Parties to the International Labour Organisation Convention of 1948 concerning Freedom of Association and Protection of the Right to Organise to take legislative measures which would prejudice, or to apply the law in such a manner as to prejudice the guarantees provided for in that Convention.” In 1992, the USA ratified this convention. According to Garcia *UPJEL* (2006) 344 Even if this Declaration is not binding as international law it reaffirms the principle that workers’ freedom of association is a recognised human right.

<sup>1044</sup> 29 USC of 1935.

## 2.2. The Constitution

The Constitution of the USA does not contain specific provisions that provide for labour rights in the same way the South African Constitution, 1996 does.<sup>1045</sup> The resemblances lie in the supremacy of the Constitution and secondly, the Bill of Rights. Article VI of the USA Constitution provides that “the Constitution together with the Laws made in pursuance thereof and Treaties of the land are supreme law”.<sup>1046</sup> The Constitution of the USA declares that:

“Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.”<sup>1047</sup>

Amendments 1 to 10 of the USA Constitution collectively are known as the Bill of Rights. However, the contents of the Bill of Rights are not the only constitutional rights that are highly regarded when an infringement of individual constitutional rights occurs. Both the First and Fourteenth Amendments have been considered by the courts in determining the application and interpretation of the provisions of the NLRA.

A case in point is *Hague, Mayor v Committee for Industrial Organisation*.<sup>1048</sup> In this case the Supreme Court confirmed that the NLRA was intended to remove obstructions to commercial activity “by encouraging collective bargaining, protecting full freedom of association and self-organisation of workers, and, through their representatives, negotiating as to conditions of employment”.<sup>1049</sup> The Supreme Court held that this was an issue that fell under the Fourteenth Amendment and therefore may be used as a basis to advance the right to assemble peaceably.<sup>1050</sup>

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<sup>1045</sup> Ss 18 and 23 of the Constitution, 1996 provide for the right to freedom of association, to organise and to engage in collective bargaining.

<sup>1046</sup> The principle of supremacy in the context of the USA is in relation to the Constitution and its Laws. This position is unlike the Constitution, 1996 which is supreme over all other law and conduct in the Republic of South Africa.

<sup>1047</sup> First Amendment of the USA Constitution.

<sup>1048</sup> 307 U.S. 496 (1939) 503.

<sup>1049</sup> *Hague, Mayor* at 513.

<sup>1050</sup> *Hague, Mayor* at 506.

According to Garcia, the right to organise arises from the rights of free speech and freedom of assembly, whereas the freedom to act collectively emanates from basic civil liberties.<sup>1051</sup> The author confirms that labour rights are not specifically mentioned in the Constitution of the USA, but are “firmly rooted in civil libertarian concepts”.<sup>1052</sup> The result is that workers wishing to protect their constitutional rights seek recourse to the same remedy as that of the entire citizenry. Significantly, Garcia states that Congress deems freedom of association as essential to establish a balance between the power of employers and that of employees.<sup>1053</sup>

Emerson<sup>1054</sup> mentions that the right to freedom of association was first recognised as worthy of constitutional protection in the case of *NAACP v Alabama*.<sup>1055</sup> In this case the Supreme Court held that the “freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the liberty assured by the Due Process Clause of the Fourteenth Amendment”.<sup>1056</sup> The author further comments Harlan J “elevated freedom of association to an independent right, possessing equal status with the other rights specifically enumerated in the First Amendment”.<sup>1057</sup> It is significant that the Supreme Court in this instance accepted the right to freedom of association as an independent constitutional right which served as precedent in cases that followed.<sup>1058</sup>

*Niemotko v Maryland*,<sup>1059</sup> is an example of a USA Supreme Court decision in which the constitutional protection of the First and Fourteenth Amendments was confirmed. The Supreme Court held that “the right to equal protection of the law had a firmer foundation than the whims or personal opinions of a local governing

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<sup>1051</sup> Garcia *UPJLEL* (2005) 288.

<sup>1052</sup> As above.

<sup>1053</sup> Garcia *UPJLEL* (2005) 290.

<sup>1054</sup> Emerson *YLJ* (1964) 2.

<sup>1055</sup> 357 U.S. 449 (1958) 460.

<sup>1056</sup> As above. See also the Fourteenth Amendment which provides that “(1) All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.”

<sup>1057</sup> Emerson *YLJ* (1964) 2.

<sup>1058</sup> As above.

<sup>1059</sup> 340 U.S. 267 (1950) 272 is not a labour relations case, but it sheds light on the principles on freedom of assembly from a religious gathering point of view. The appellants, who were members of Jehovah’s Witness, were refused permission to hold meetings and make speeches in a public park.

body”.<sup>1060</sup> The Supreme Court in *Niemotko*<sup>1061</sup> held further that the distribution of printed material, the holding of public meetings without permits, and freedom of speech and assembly are protected in terms of the First and Fourteenth Amendment.<sup>1062</sup>

This decision is consonant with the decision in *Senn v Tile Layers Union*<sup>1063</sup> where the Supreme Court held that giving publicity to a labour dispute by peaceful picketing in the street and, without intimidation was consistent with the Fourteenth Amendment.

### 2.3. Labour Legislation

The labour law system of the USA regulates the private sector mainly through the NLRA.<sup>1064</sup> The introductory paragraph to the NLRA provides that the rationale for its enactment is:

“to protect the rights of employees and employers, to encourage collective bargaining, and to curtail certain private sector labour and management practices, which can harm the general welfare of workers, businesses and the U.S. economy.”

The introduction to the NLRA recognises that without full freedom of association for employees the flow of commerce is substantially burdened and affected, in that, *inter alia*, it prevents the “stabilisation of competitive wage rates and working conditions within and between industries”. It is submitted that inasmuch as this provision regards its beneficiaries as business, labour and the US economy, it is clear that it does recognise the imbalance between business and labour and the

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<sup>1060</sup> As above.

<sup>1061</sup> As above.

<sup>1062</sup> As above

<sup>1063</sup> 301 U.S. (1937) 480.

<sup>1064</sup> Another piece of legislation, other than the NLRA, that regulates the enjoyment of trade union rights is the Railway Labour Act 45 USC of 1926. According to Compa *ILR* (2014) 92 and 95 the RLA was enacted in order to prevent conflict in the railroad and airline industries as they are considered vital for the national economy and strikes were deemed to have a disruptive effect. In the case of an impasse between parties in the railroad and airline industries, *inter alia*, they must follow a process of mediation, conciliation and arbitration “leaving unchanged the terms and conditions of employment under the prior collective agreement”. Only upon the expiration of the prior agreement can the workers strike.



need to remedy this imbalance through the right to freedom of association for workers.

The NLRA protects workers' rights to freedom of association, to organise themselves and to choose their own representatives for collective bargaining purposes.<sup>1065</sup> The NLRA confirms these principles and provides that:

“Employees shall have the right to self-organisation, to form, join, or assist labor organisations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities.”<sup>1066</sup>

It is significant to note that these rights, although clustered together, refer individually to the rights related to freedom of association, to organise and to engage in collective bargaining. The NLRA does not suggest any explicit limitation on the right of employees to “self-organisation, to form, to join, to assist” the trade union.<sup>1067</sup> It will be an unfair labour practice for an employer to discriminate “in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labour organisation”.<sup>1068</sup>

Inasmuch as section 7 does not suggest a limitation of the right to freedom of association, the limitation in relation to collective bargaining is clearly expressed in section 9(a). In this regard, the NLRA provides that:

“[r]epresentatives designated or selected for the purposes of collective bargaining by the majority of the employees in a unit appropriate for such purposes, shall be the exclusive representatives of all the employees in such unit for the purposes of collective bargaining in respect to rates of pay, wages, hours of employment, or other conditions of employment. Provided, that any individual employee or a group of employees shall have the right at any time to present grievances to their employer and to have such grievances adjusted, without the intervention of the bargaining representative, as long as the adjustment is not inconsistent with the terms of a collective- bargaining contract or agreement then in effect: Provided

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<sup>1065</sup> S 1 of the NLRA.

<sup>1066</sup> S 7 of the NLRA.

<sup>1067</sup> S 7 of the NLRA indicates that inasmuch as exclusive representation is permitted in the collective bargaining engagements of the majority trade union with the employer, the individual employee still has an avenue to present a grievance in issues affecting him negatively.

<sup>1068</sup> S 8(a)(3) of the NLRA.

further, that the bargaining representative has been given opportunity to be present at such adjustment.”<sup>1069</sup>

According to Schatzki<sup>1070</sup> the consequence of section 9 of the NLRA effectively is that “as many as one less than half the employees in a designated unit may have a bargaining representative imposed upon them”. The author also states that the certified majority trade union “not only negotiates collective bargaining contracts, but is also the exclusive agent of those opposition employees in settling their individual grievances with the employer”.<sup>1071</sup>

The principle of exclusive representation has the potential to impact on two aspects. First, in relation to collective bargaining and the influence it may have on minority trade unions and non-members. Secondly, it may impact on the rights of non-member employees to be represented in individual grievance and disciplinary proceedings.

In the first instance, where the dispute relates to the collectively bargained agreement, the effect of exclusive representation is that the non-member will be represented by the certified majority trade union in the dispute.<sup>1072</sup> Any minority trade union will not be able to represent its members in collective bargaining as doing so will be contrary to the principle of exclusive representation in section 9(a) of the NLRA. In *Sears, Roebuck & Co*<sup>1073</sup> the NLRB held that the exclusive authority to represent employees in all matters pertaining to collective bargaining, vests in the exclusive representative union. The request of the employee for a representative was refused by the NLRB on the ground that the workers did not have a majority union.<sup>1074</sup>

In the second instance, the impact is on the right to freedom of association, in that a minority trade union will be unable to represent its members in grievance and

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<sup>1069</sup> S 9 of the NLRA. See also Compa *ILR* (2014) 94 where the author mentions that the significant consequence of the certification process that leads to exclusive representation is that the certified trade union stands unchallenged for a year by any rival trade union in that bargaining unit.

<sup>1070</sup> Schatzki *UPLR* (1975) 898.

<sup>1071</sup> As above. See also Bellace (2002) 23 where the author mentions that a significant facet of labour relations in the USA is that “there is only one mode of employee voice sanctioned.”

<sup>1072</sup> As above. See also Weissbrodt and Mason *MLR* (2014) 1849 who confirm that minority trade unions in the USA do not have right to represent their members or to speak on their behalf as this may undermine the principle of exclusive representation.

<sup>1073</sup> 274 N.L.R.B. (1985) 230-231.

<sup>1074</sup> *Sears, Roebuck & Co* at 231.

disciplinary proceedings. The second part of section 9(a) of the NLRA has been interpreted to suggest that an employee shall have the right to present a grievance to the employer without the exclusive bargaining representative. However, imposing the condition that the presence of the exclusive representative is required as a pre-condition may effectively nullify this avenue. Even though Summers<sup>1075</sup> interprets the NLRA to be protective of the rights of minority trade unions within the exclusive representation principle, he concedes that the practice of the National Labour Relations Board (NLRB)<sup>1076</sup> has led to the right of minority trade unions to exist to be “lost in a black hole” after elections of exclusive representatives.

In *Black-Clawson Co v Machinists Lodge*<sup>1077</sup> which was about an individual employee’s right to invoke the grievance procedure provided for in a collective agreement. The employer in this case argued successfully that the grievance procedure could be invoked only by the majority trade union representative and not the individual employee.<sup>1078</sup>

Other than the NLRA which regulate private sector labour relations in the USA, the public sector labour laws of the individual states are worth noting. According to Secunda<sup>1079</sup> most of the states replicate the NLRA with regard to exclusive representation in a bargaining unit. According to Slater<sup>1080</sup> the subjection of public sector trade union activities to the regulation of individual state laws makes them

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<sup>1075</sup> Summers *CLR* (1990) 532.

<sup>1076</sup> S 3(a) read with s 9 of the NLRA confers power and authority on the NLRB to safeguard employee’s rights to organise, and to determine the status of a union to bargain collectively and to determine unfair labour practices. See also [https://www.nlr.gov/what do](https://www.nlr.gov/what-do) (accessed on 10 May 2017) describing the NLRB as an independent federal agency vested with power to safeguard the employees’ right to organise by conducting elections, investigate violations of employee rights, facilitate settlements, decide cases and enforce orders. According to Morris *BJELL* (2012) 67 the NLRB is made up of members that are not committed to encouraging union organising and collective bargaining.

<sup>1077</sup> 212 U.S. 818 (1962) 818.

<sup>1078</sup> *Black-Clawson Co* at 820.

<sup>1079</sup> Secunda *QLJ* (2011) 562. See also Malin *OHLJ* (2010) 908 where the author confirms that states use the labour relations model of the NLRA when enacting state laws. What they do is change the provisions where they deem necessary. For example, numerous states prohibit industrial action and where they allow it place restrictions more than the NLRA allows. Instead of allowing a strike in their states, some opt for an interest arbitration or fact finding which is not binding.

<sup>1080</sup> See Slater *ILJ* (2012) 191 and 193. According to the author when the newly-elected governor of the State of Wisconsin, Scott Walker, was elected he committed himself to abolishing “almost all collective bargaining rights of state and local public workers.” See also Malin (2010) 909 where the author indicates that states consider collective bargaining as a political process and matters provided for in federal statute do not form part of collective bargaining, whereas in the private sector collective bargaining it is considered to be an economic process.

“vulnerable to shifting political winds whereby they often lose and win trade union rights”. Secunda mentions that in some states’ anti-dues check-off provisions for trade unions are amended every year and this makes trade union life difficult.<sup>1081</sup> The yearly recertification process for trade unions is objectively cumbersome for the majority trade union that enjoys exclusive representation rights.

## 2.4. Collective Bargaining and Trade Union Rights

### 2.4.1. Access to the Workplace

Not a single labour statute in the USA provides trade unions with the right of access to the employer’s workplace. Trade union access to the workplace is deemed to restrict the property rights regime of the USA. According to Estlund<sup>1082</sup> the Congress of the USA rejected an interpretation of the NLRA that would give trade unions access. The author refers to the the remarks of Senator Wagner, who stated that “[n]o sensible person could interpret the language of section 7 to mean that while a factory is at work the workers could suddenly stop their duties to have a mass meeting in the plant on the question of organisation”.

An early case which confirms that property rights trump the NLRA, is *NLRB v Fansteel Metallurgical Corp*<sup>1083</sup> where the NLRB determined that the anti-union conduct of the employer provoked a sit-down strike and ordered reinstatement of dismissed employees. Although the Supreme Court upheld the finding of the NLRB against the conduct of the employer, it reversed the reinstatement of the dismissed employees.<sup>1084</sup> The rationale behind the decision was that where “physical seizure of the employer’s property is involved, property rights grounded in state law may limit” rights under section 7 of the NLRA.<sup>1085</sup>

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<sup>1081</sup> Secunda *QLJ* (2013) 549 and 562. The author laments the fact that Wisconsin, regarded as a progressive state and having been the first to enact a law for public service collective bargaining, now sets the tone in limiting the ability of public sector unions to bargain over wages and other matters of mutual interest.

<sup>1082</sup> Estlund *SLR* (1994) 311.

<sup>1083</sup> 306 U.S. 240 (1939).

<sup>1084</sup> *Fansteel Metallurgical* at 252.

<sup>1085</sup> As above at 253.

*NLRB v Babcock and Wilcox Co*<sup>1086</sup> serves as another example where the court deemed employee rights of unionisation subservient to property rights. In this instance union organisers were refused access to the property of the employer because allowing such access would result in all sorts of pamphlets littering the property of the employer.<sup>1087</sup> Alternative methods of communication, such as mail, telephones and visits to the employees' homes, were advanced by the employer as available alternatives.<sup>1088</sup> The NLRB found against the employer and ordered that at least it should allow access to union organisers in the "parking lot and the walkway from it to the gatehouse, where employees punched in for work" because these were the "only safe and practicable" places where it could be done.<sup>1089</sup>

When the US Supreme Court was petitioned for enforcement, it refused and stated that the NLRA did not authorise the imposition of a right of servitude on the property of the employer.<sup>1090</sup> The importance of this case is that it brought about a string of cases where courts would proceed to rule that employers' private property rights were paramount over those of workers.<sup>1091</sup> In the case of *Lechmere, Inc. v NLRB*,<sup>1092</sup> the US Supreme Court granted permission to an employer who claimed 'no interference' with the business to exclude organisers who were non-employees from the employer's property. It held that access would be allowable only where employees reside, which is beyond the reach of reasonable union efforts to interact and communicate with them.<sup>1093</sup>

The proponents of greater freedom of association for USA employees and trade unions are of the view that these principles of employer property rights are rooted in history and continue to override the principles of freedom of association.<sup>1094</sup> This is a reference to the common law notion of property rights in the USA.<sup>1095</sup>

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<sup>1086</sup> 351 U.S. 105 (1956) 111-112.

<sup>1087</sup> As above at 107.

<sup>1088</sup> As above.

<sup>1089</sup> As above at 351.

<sup>1090</sup> As above at 486. In this case it was not the employee that wanted to distribute the information, but rather the official.

<sup>1091</sup> See Gresham (1983) 111 where it is stated that employers used the so-called Babcock and Wilcox alternative channels of communication rule "to exclude virtually all non-employee organisational activity" from the workplaces in the private sector.

<sup>1092</sup> 112 U.S. 841 (1992) 849.

<sup>1093</sup> As above.

<sup>1094</sup> See Gross *ILRR* (2010) 9 and Estlund *SLR* (1994) 308 fn 20.

<sup>1095</sup> Bellace *UPJLEL* (2002) 11.

There have been instances where the USA Supreme Court has not upheld these traditional property rights and has permitted access and solicitation of membership in areas designated as non-work areas during non-working time on condition that production, discipline, or safety are not compromised.<sup>1096</sup> In *Republic Aviation Corp. v NLRB*,<sup>1097</sup> the USA Supreme Court held that the NLRA does not absolutely prohibit trade union activity on the employer's property. However it may restrict the exercise of these rights where they negatively impact on the employer's property rights.<sup>1098</sup> Despite the preparedness of the Supreme Court to balance trade union rights against the property rights of employers, the case of *Thunder Basin Coal v Reich* introduced complications.<sup>1099</sup> In this case, the USA Supreme Court held that the right of employers to exclude trade union officials from their private property stems from state common law, and though this right is not replaced by the NLRA, nothing in the NLRA protects it.

In addition, in the case of *NLRB v Magnavox Co*<sup>1100</sup> the existing collective agreement allowed the employer to set up a blanket rule for the maintenance of order in the workplace and a ban on the distribution of trade union material on the premises. The trade union later wanted to change this rule and challenged it successfully in the NLRB.<sup>1101</sup> However, the state Supreme Court disagreed with the NLRB and held that the trade union had waived its right to full enjoyment of its rights of access.<sup>1102</sup> The Federal Court of Appeals overruled the Supreme Court and held that the trade union cannot waive its right to distribute literature on the premises of the employer even through a collective agreement and confirmed that the trade union could distribute literature on the premises.<sup>1103</sup>

Access to the workplace for purposes of recruiting new members is a basic tenet of the right to organise, but this is not the case under the USA labour relations system where the interests of employers and workers are often at loggerheads.

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<sup>1096</sup> Estlund *SLR* (1994) 313.

<sup>1097</sup> 324 U.S. 793 (1945) 796. In this case the employee was found guilty of the offence of soliciting on the premises when he wore union insignia.

<sup>1098</sup> As above.

<sup>1099</sup> 510 U.S. 200 (1994) fn 21. According to Summers *CKLR* (1990) 533 the employer has built-in advantages in the campaign through its ability to interrogate employees. "

<sup>1100</sup> 415 U.S. 322 (1974) 323.

<sup>1101</sup> As above.

<sup>1102</sup> As above at 324.

<sup>1103</sup> As above at 324-326.

According to Bellace,<sup>1104</sup> trade unions face legal barriers in organising themselves and their members in the USA labour relations system. The extent of the USA property rights regime in terms of its having the ability to trump the rights to organise and freedom of association is difficult to reconcile with international law.<sup>1105</sup>

#### 2.4.2 Union Deductions of Trade Union Dues

The NLRA does not specifically refer to the deduction of trade union dues. Section 302 of the NLRA places restrictions on payments to employee representatives. However, an exception where the restriction is not applicable is:

“with respect to money deducted from the wages of employees in payment of membership dues in a labor organisation: Provided, that the employer has received from each employee, on whose account such deductions are made, a written assignment which shall not be irrevocable for a period of more than one year, or beyond the termination date of the applicable collective agreement, whichever occurs sooner.”<sup>1106</sup>

The deduction of union dues benefits trade unions. A valid reason for such deductions is that it creates financial stability for the trade union.<sup>1107</sup> If the employer does not deduct union dues, the trade union officials would be required to solicit for these dues themselves, which will interfere with their work.<sup>1108</sup>

The deduction of union dues may be a subject matter of collective agreement between the employer and the certified majority trade union, but is not the case all of the time. In the USA Court of Appeals case of *Hughes Tool Co. v NLRB*<sup>1109</sup> the employer had for years been a proponent of strict impartiality in deducting dues and paying them to the union irrespective of their size on the written authorisation of individual employees. At a time the certified majority trade union entered into a new collective agreement with the employer it objected to the enjoyment of general

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<sup>1104</sup> According to Bellace *UPJLEL* (2002) 7 the conclusion of *Babcock and Walcox* was that the employer's property rights trump those of the employee with regard to unionisation.

<sup>1105</sup> The ILO protects and promotes the rights to freedom of association, to organise and to collective bargaining through Convention no 87 of 1948 and Convention No 89 of 1949. The USA has not ratified these two conventions.

<sup>1106</sup> S 302(4) of the NLRA.

<sup>1107</sup> Anon *Ind.LJ.* (1951) 447.

<sup>1108</sup> As above.

<sup>1109</sup> U.S. Appeals Court (1945) para 74.

dues deduction by non-majority trade unions.<sup>1110</sup> When this dispute came before the NLRB it held that the deductions were a derogation of the certified majority trade union's right to bargain exclusively with the employer and determined it to be an unfair labour practice.<sup>1111</sup> This ruling is consistent with the principle of exclusive representation in the USA collective bargaining system where trade union rights are associated with a trade union's majority status.

#### 2.4.3. Elections of Representatives and the Duty of Fair Representation

The NLRA promotes and protects the right of trade unions to choose their own representatives for purposes of self-organisation, assisting the organisation and collective bargaining.<sup>1112</sup> Notwithstanding this protection, the right to elect trade unions for the exclusive trade union is not unencumbered and is limited through practices of the employer that are permitted in the NLRA, such as captive audience meetings. According to Slinn<sup>1113</sup> these meetings constitute a compulsory gathering of workers called by an employer in a workplace, where anti-union information is forced on the employees. Compa<sup>1114</sup> mentions that captive audience meetings have the effect of influencing the free election of trade union representatives.

According to Robbins,<sup>1115</sup> inasmuch as these meetings may be regarded as a consequence of the right of free speech enjoyed by the employer encompassed in section 8 of the NLRA, the NLRB accommodates them. The NLRB held that "captive audience meetings did not violate" section 8 of the NLRA where particular conditions are met.<sup>1116</sup>

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<sup>1110</sup> As above at para 71.

<sup>1111</sup> As above at para 72.

<sup>1112</sup> S 7 of the NLRA and s 152 of the RLA.

<sup>1113</sup> Slinn *CLLPJ* (2008) 79 and 91 argues that these meetings should be balanced with the right for employees not to be subjected to them. See also Robbins *ONULR* (2010) 594 that what happens during this meeting is that on being assembled during working time the employees are subjected to listening and watching anti-union speeches and videos. Non-attendance may lead to dismissal.

<sup>1114</sup> Compa *ILR* (2010) 15.

<sup>1115</sup> See Robbins *ONULR* 594. See also Secunda *QLJ* (2013) 556.

<sup>1116</sup> In terms of s 8 of the NLRA captive audience meetings are accommodated under the same provision that provides for the expression and dissemination of views. The condition is only that there must be no accompanying "threat of reprisal or promise of benefit". See also Cihon and Castagnera (2011) 418. This section is regarded as providing employers with ammunition against employees' rights by engaging in anti-union remarks during campaigning by trade unions, thus impacting negatively on the labour rights of freedom of association and to organise.



In the USA system of labour relations of exclusive representation by the certified majority trade union, individual employees or minority trade unions that rival the exclusive representative trade union find themselves without representation of their own choosing in the workplace. The only avenue available to them is to hope to be represented by the exclusive representative in a fair manner. Schatzki<sup>1117</sup> likens the expression “fair representation” to the representation of all citizens by the legislature. Once members of the legislature have been elected by the majority of the voting citizenry, they participate in the creation of all laws which incidentally affect everybody, including those who did not elect them to the legislature.<sup>1118</sup>

In *Conley v Gibson*,<sup>1119</sup> the exclusive trade union repeatedly refused to represent a group of ‘Negro’ employees against discriminatory practices. The employees who were the appellants in the Appeal Court sued the trade union to compel it to represent them.<sup>1120</sup> The Appeal Court in *Conley* held that the court *a quo* had erred in dismissing the case on the basis of jurisdiction or failure to join a party to the dispute.<sup>1121</sup> Significantly, it also held that:

“As individuals or small groups, the employees cannot begin to possess the bargaining power of their representative in negotiating with the employer or in presenting their grievances to him. Nor may a minority choose another agent to bargain on their behalf. We need not pass on the Union's claim that it was not obliged to handle any grievances at all, because we are clear that, once it undertook to bargain or present grievances for some of the employees it represented, it could not refuse to take similar action in good faith for other employees just because they were Negroes.”<sup>1122</sup>

Individual employees or members of a minority trade union who did not support the exclusive representation therefore can enforce their right to receive fair representation.<sup>1123</sup>

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<sup>1117</sup> Schatzki *UPLR* (1975) 901.

<sup>1118</sup> As above.

<sup>1119</sup> 355 U.S. 41 (1957) 43.

<sup>1120</sup> As above.

<sup>1121</sup> As above at 44 and 45.

<sup>1122</sup> As above at 47.

<sup>1123</sup> See also s 8(a)(3) of the NLRA and *Steele v Louisville and NR Co. et al* 323 U.S. 192 (1944) 204 where it was emphasised that the duty of fair representation entailed concluding contracts with the carrier to represent non-union members fairly and in good faith. The union is also required to consider requests that come from non - union members of the craft and to have them heard in their proposed action.

The duty of fair representation is not the same concept as the duty of good faith under the USA labour relations system. Section 8(d) of the NLRA provides for a mutual duty to bargain by the employer as well as the exclusive representative trade union. According to Brudney,<sup>1124</sup> the courts in the USA have held that:

“good faith only applies in relation to the express provisions of a contract and the parties' reasonable expectations flowing from those provisions. Accordingly, the doctrine does not create an additional, independent obligation to act fairly or reasonably that can be separately breached. Further, many courts have held that because the implied duty does not supersede express provisions of an agreement, parties can in effect contract around good faith with respect to particular terms.”

The trade union rights of the exclusive representative derive from this duty to bargain. This duty to bargain in good faith entails trade union rights that are ancillary to the right to collective bargaining, such as the employer's duty not to bypass a trade union representative<sup>1125</sup> and the employer's duty to furnish the union with relevant information.<sup>1126</sup>

This situation bolsters the fact that under the USA system there clearly is no role envisaged to be played by the minority trade union in the sphere of trade union activity, whether in an individual or a collective dimension. This position is contrary to the principle outlined by the ILO which determines that under a system of majoritarianism minority trade unions should be allowed to represent their members in individual cases.<sup>1127</sup>

### 3. The USA and ILO Conventions

As indicated above, the effect of the USA system is to exclude non-majority trade unions from workplace union activity in favour of the certified majority trade union. This system has attributes of a majoritarian system of collective bargaining. Even

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<sup>1124</sup> Brudney *CLLPJ* (2011) 777.

<sup>1125</sup> S 8(a)(5) of the NLRA. In *Flambeau Plastics* 151 NLRB 591 (1965) the Supreme Court held that to encourage employees to bypass the union is a violation in terms of s 8(a)(5) of the NLRA. The employer in this case did not involve the trade union and instead discussed collective bargaining issues in a handbook with employees.

<sup>1126</sup> S 8(b)(3) of the NLRA. In *Local 13, The Oakland Press* 233 NLRB 995 (1977) the Supreme Court held that the employer is under obligation, if requested, to furnish a trade union with relevant and useful information during negotiations.

<sup>1127</sup> *Digest of Decisions* (2006) para 969. See also Chapter 2 at 4.2 for the discussion of these requirements in the context of the relevance of thresholds or instruments that draw a distinction between majority and minority trade unions.

though the ILO declares that the prevailing conditions and circumstances of member states determines their collective bargaining systems, it consistently has maintained that where member states opt for the majoritarian system they must respect and protect a minority trade union's right to freedom of association.<sup>1128</sup>

Significantly, the ILO consistently has held that thresholds are relevant in the exercise of the right to engage in collective bargaining.<sup>1129</sup> The ability of minority trade unions to represent their members in individual cases is where thresholds of representivity and the majority status of a trade union determine the acquisition of trade union rights.

According to Charvonitz,<sup>1130</sup> freedom of association is at the heart of international labour law and the irony is that the USA voted for the adoption of Convention No 87 of 1948 yet did not ratify it. This state of affairs raises credibility issues for the USA as a major world player, in that it has difficulty in convincing other member states about the seriousness of its commitment to internationally recognised labour rights.<sup>1131</sup>

The position of the USA is clear regarding the ratification of ILO Conventions. In the first instance, the USA withdrew its membership of the ILO on 5 November 1975.<sup>1132</sup> Several reasons led to the decision to withdraw from the ILO after previously having withheld its financial support from the ILO in the attempt to influence its work.<sup>1133</sup>

When the USA rejoined the ILO in 1980, the President's Committee adopted an important ground rule on the ratification of the ILO conventions that:

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<sup>1128</sup> As above.

<sup>1129</sup> Chapter 2 at 4.2.

<sup>1130</sup> Charvonitz *AJIL* (2008) 91 states that it is ironical that Indonesia ratified Convention No 87 of 1948 due to the intervention of the International Monetary Fund and the USA, and yet the USA had not ratified it.

<sup>1131</sup> As above at 95.

<sup>1132</sup> Masters *ISSR* (1998) 17.

<sup>1133</sup> As above at 15-17. The reason relates to the 'cold war' with the Union of Soviet Socialist Republics (USSR). The USA was unhappy at with the appointment of a Soviet official to the position of Assistant Director General and the adoption of a resolution against the occupation of Arab territories in the 1970s. Added to this was its perception of the General Conference's non-adoption of Russia's violations as determined by the Committee of Experts on Application of Conventions and Recommendations (CEACR).

“there is no intention to change State law and practice by Federal action through ratification of ILO Conventions, and the examination will include possible conflicts between Federal and State law that would be caused by such ratification.”<sup>1134</sup>

The significance of this ground rule is demonstrated by the limits set by the President’s Committee on the tripartite community and the Tripartite Advisory Panel on International Standards (TAPILS).<sup>1135</sup> The latter body was established to review US labour laws and endorses ratification of ILO Conventions.<sup>1136</sup> An ILO Convention is not sent to the Senate for ratification unless it has gone through the rigorous inspection of TAPILS and consensus has been reached.<sup>1137</sup> The work of TAPILS is complicated by the position of business and labour with regard to ratification. The stance of business represented by the USCIB is that there should be no ratification of ILO conventions in the USA at all because:

“they have treaty status and would thus become the supreme law of the land, have the potential to grant rights not found in current national labor law and would also unconstitutionally usurp state sovereignty, particularly in the public sector.”<sup>1138</sup>

Labour’s position is that the fears of employers arise out of nothing but “creative judicial interpretation”<sup>1139</sup> and the need for a two thirds majority in the Senate as a requirement for ratification meant that an unwanted alteration of existing law was unlikely.<sup>1140</sup> The Federal Government’s position closely resembled that of business, which resulted in the cautious approach to ratification.<sup>1141</sup>

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<sup>1134</sup> See USCIB on ratification of ILO Conventions (2007) 3 available at [https://www.uscib.org/docs/US\\_Ratification\\_of\\_ILO\\_Core\\_Conventions.pdf](https://www.uscib.org/docs/US_Ratification_of_ILO_Core_Conventions.pdf) (accessed June 2015).

See also Schlossberg *CLLJ* (1989) 74-78. The author provides greater details of the workings and discussions of the positions of the social partners towards ratifying or not ratifying the Conventions of the ILO.

<sup>1135</sup> Schlossberg *CLLJ* (1989) 73.

<sup>1136</sup> As above. See also UCSIB on ratification of ILO Conventions (2015) 3 available at [https://www.uscib.org/docs/US\\_Ratification\\_of\\_ILO\\_Core\\_Conventions.pdf](https://www.uscib.org/docs/US_Ratification_of_ILO_Core_Conventions.pdf). TAPILS is chaired by the Solicitor of Labour and has legal advisors of the Departments of State and Commerce and the legal counsel of the AFB-CIO (labour) and USCIB (employers).

<sup>1137</sup> Schlossberg *CLLJ* (1989) 74.

<sup>1138</sup> As above the author mentions that the concerns of business were that any ratification will be perceived by the international community as an end to the US policy of non-ratification of ILO conventions. Ratification took place with caution.

<sup>1139</sup> As above.

<sup>1140</sup> As above.

<sup>1141</sup> As above.

The position of business was given expression by concerns as to the consequences of ratification of Convention 87 of 1948. According to Potter,<sup>1142</sup> the significant consequences in ratifying this Convention by the USA, at least in relation to minority trade unions, was that it would result in the exclusive bargaining representative being undermined by permitting employees effectively to ensure that minority trade unions are active in the labour relations sphere, at least to the extent permitted by the ILO. The other fears of business in relation to the ratification of Convention No 87 of 1948 include the replacement of the individual rights of employees with trade union privilege; broadening the definition of employee; limiting the NLRA in its regulation of the holding of trade union office; the limiting of the employer's free speech; altering restrictions on the right to strike; and altering the limitation on the participation of radical groups in trade union activity.<sup>1143</sup>

These consequences effectively hobbled any attempt by the USA to ratify the ILO's core conventions.<sup>1144</sup> This state of affairs is reflected in case law. An example is the USA Supreme Court case of *Hoffman Plastic Compounds, Inc. v NLRB*<sup>1145</sup> where the judgement had been challenged by the labour movement. It was held by the Supreme Court that an undocumented immigrant may be dismissed without back pay because of his status.<sup>1146</sup> The Supreme Court's reasoning was founded on the principle that enforcement of USA immigration law takes precedence over the international law principle of freedom of association in the NLRA.<sup>1147</sup> The CFA found that this principle was in conflict with international law and had a negative effect on the protection of freedom of association rights.<sup>1148</sup> It is this conflict

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<sup>1142</sup> Potter (1984) 15 and 42-44. See also UCSIB on ratification of ILO Conventions (2015) 5 available at [https://www.uscib.org/docs/US\\_Ratification\\_of\\_ILO\\_Core\\_Conventions.pdf](https://www.uscib.org/docs/US_Ratification_of_ILO_Core_Conventions.pdf) wherein the conclusions by Potter are summarized.

<sup>1143</sup> As above.

<sup>1144</sup> According to Gross (1999) 72 that the USA is yet to ratify these two core conventions does not mean that its obligation to comply with the principles of freedom of association is at an end. Compa (2010) 7 fn 8 the ILO mentions that standards are not the only source of international labor norms. There are others such as the United Nations declarations and covenants, UN resolutions on business and human rights, the Organisation for Economic Cooperation and Development's Guidelines for Multinational Enterprises, European human rights instruments and European Union directives on freedom of association.

<sup>1145</sup> 535 U.S. 137 (2002) 142-145. See also Gross and Compa (2009) 5.

<sup>1146</sup> As above.

<sup>1147</sup> As above.

<sup>1148</sup> Case 2227 Report No 348 (2002) para 88. Gross and Compa (2009) 5 note two CFA decisions that support the enjoyment of labour rights within clearly defined perimeters for persons that are not making national policy and that a ban on public worker collective bargaining is contrary to the right to organise and collective bargaining.

between the national law of the USA and the ILO's principles of freedom of association that causes the USA not to ratify the ILO Conventions No 87 of 1948 and No 97 of 1949.

Gross and Compa<sup>1149</sup> in their analysis of CFA decisions against US labour policy conclude that persons that are not involved in making national policy and work within clearly defined perimeters should be allowed to enjoy labour rights and that a ban on public worker collective bargaining is contrary to the ILO's rights in respect of being able to organise and collective bargaining.

## 4. Japan

### 4.1. Introduction

The system of collective bargaining in Japan is pluralist in nature. As has been mentioned in previous chapters, South Africa's system of collective bargaining is pluralist but strongly inclined towards majoritarianism.<sup>1150</sup> The pluralist character of the Japanese system makes it the primary reason for comparing it with the South African system. The first part evaluates to what extent Japan protects the right to freedom of association of minority trade unions.

A reason for the comparison is that in Japan as in South Africa the Constitution has similar legal force. A second reason is that both Constitutions make provision for a clear protection of the right to freedom of association. The third reason is that Japan is a member of the ILO and has ratified both Convention No 87 of 1948 and No 98 of 1949. The fourth reason is that Japanese labour law in the private sector and the public sector through separate pieces of legislation regulates collective bargaining. The paragraphs that follow offer an exposition of the regulation of trade union rights and the extent to which these are protected and promoted in Japan.

This part of the chapter examines Japan's constitutional provisions and their labour legislation. Thereafter, an exposition of the Japanese system of collective bargaining and its attitude towards minority trade unions and individual employees

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<sup>1149</sup> Compa and Gross *ILR* (2009) 5. See also Case 2227 Report No 348 (2002) para 88.

<sup>1150</sup> See Chapter 5 at 5 and Chapter 6 at 2.3 and 4.

is provided. This chapter offers an exposition of the regulation of trade union rights and the extent to which these are protected and promoted.

#### 4.2. The Constitution

The Constitution of Japan (the Constitution) is the supreme law of the country and it provides that “no law, ordinance, imperial prescript or other act of government, or part thereof, contrary to the provisions hereof, shall have legal force or validity”.<sup>1151</sup> The right to freedom of assembly, association and other forms of expression are guaranteed.<sup>1152</sup> Article 28 of the Constitution safeguards workers' rights to organise, to bargain and to act collectively. Wilson<sup>1153</sup> regards article 28 of the Constitution as an “eternal and inviolable” fundamental human right. Japan is committed to ensuring certain minimum welfare standards and it establishes a favourable environment within which trade unions can thrive irrespective of their size.

According to Smith and Ellis<sup>1154</sup> many labour rights in Japan emanate from the Constitution. Employees in the private sector are protected by the Constitution, but that is not true for public sector employees. Article 28 of the Constitution is of limited assistance to public service employees who possess only a theoretical entitlement to the basic rights of workers due to the restrictive provisions of the National Public Service Act (NPSA)<sup>1155</sup> and the Public Corporation and National Enterprise Labour Relations Law (PCNELRL).<sup>1156</sup>

Yamakawa<sup>1157</sup> affirms that the Constitution stipulates that Cabinet shall “administer the civil service in accordance with standards established by law”. The author adds that the relationship between government and its employees is considered to be a service relationship in terms of public law.<sup>1158</sup> Japan’s public service laws do not

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<sup>1151</sup> Article 98 of the Constitution of Japan, 1947.

<sup>1152</sup> Article 21 of the Constitution of Japan, 1947.

<sup>1153</sup> Wilson *LAICLJ* (1987) 593.

<sup>1154</sup> Smith and Ellis *IJCL* (2010) 12.

<sup>1155</sup> Law No 120 of 1947. See also Chapter 7 at 4.3 and 5 for the discussion of the public service law of Japan and the impact on ILO standards. According to Yamakawa *CLLPJ* (2013) 350 public employees in Japan are classified as national and local government employees, industrial and non-industrial.

<sup>1156</sup> Law No 257 of 1948.

<sup>1157</sup> Yamakawa *CLLPJ* (2013) 352.

<sup>1158</sup> As above.

afford public service employees the right to bargain collectively, but establish rules and regulations on working conditions for implementation by the National Personnel Agency.<sup>1159</sup> Employees in the public service are deprived of the right to strike.<sup>1160</sup> Yamakawa<sup>1161</sup> mentions that the Supreme Court concluded that the prohibition on strikes by public service employees did not violate article 28 of the Constitution.

In relation to the private sector Araki points out that “any legislative or administrative act that infringes upon these rights without reasonable justification” is held to be unconstitutional and thus void.<sup>1162</sup> The Japanese system provides that a collective workers’ dispute is justifiable only if it has collective bargaining as its objective.<sup>1163</sup> Where collective bargaining does not yield a collective agreement the Constitution protects, albeit with limitations, the trade union that engages in industrial action from criminal prosecution and breach of contract.<sup>1164</sup> Smith and Ellis mention that collective bargaining disputes are balanced against property rights. This right is also guaranteed in the Constitution.<sup>1165</sup> Despite the different legislative frameworks in respect of private and public sector labour rights, all of these rights arise from the provisions of the Constitution.<sup>1166</sup>

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<sup>1159</sup> As above.

<sup>1160</sup> Article 98 of the NPSA of 1947 provides that:

“(1) Officials must, in the performance of their duties, comply with laws and regulations and faithfully observe the orders of their superiors in the course of duties.

(2) Officials must not strike or engage in slowdown or other acts of dispute against the public represented by the government as their employer, or resort to slowdown which reduce the efficiency of government operations, nor must any person attempt, or conspire to effect, instigate or incite such illegal acts.

(3) Any official who resorts to a strike or other acts violating the provisions of the preceding paragraph may not, with the commencement of such acts, be asserted against the national government with the rights to appointment or employment possessed by officials under laws and regulations.”

<sup>1161</sup> Yamakawa *CLLPJ* (2013) 360.

<sup>1162</sup> Araki *JILPT* (2004) 4.

<sup>1163</sup> Smith and Ellis *IICLR* (2010) 13.

<sup>1164</sup> Nakakubo and Araki *JILPT* (2012) 2. See also Article 29 of the Constitution of Japan which guarantees the right to property.

<sup>1165</sup> Smith and Ellis *IICLR* (2010) 12-13.

<sup>1166</sup> Smith and Ellis *IICLR* (2010) 12.



### 4.3. Labour Legislation

The Labour Union Act (LUA)<sup>1167</sup> establishes the legal framework that regulates the right to form and to join a trade union and to engage in collective bargaining. The LUA provides that:

“[t]he purpose of this Act is to elevate the status of workers by promoting their being on equal standing with their employer in their bargaining with the employer; to defend the exercise by workers of voluntary organisation and association in labour unions so that they may carry out collective action, including the designation of representatives of their own choosing to negotiate working conditions and to promote the practice of collective bargaining, and procedures therefore, for the purpose of concluding collective agreements regulating relations between employers and workers.”<sup>1168</sup>

The LUA does not make specific reference to a trade union rights dispensation. Rohl<sup>1169</sup> submits that the goal of article 1 of the LUA is to be achieved by “protecting the exercise of autonomous self-organisation” by employees and by freedom of association so that the trade union can exercise collective action which includes the right to elect representative of their own choosing. Trade union rights in Japan therefore are seen as part and parcel of the right to engage in collective bargaining.

The LUA does not establish a set of defined trade union rights, but the framework itself provides such rights to trade unions during collective bargaining.<sup>1170</sup> The right to strike in the private sector is protected.<sup>1171</sup> However, 10 days’ notice is required for strikes in entities such as electric power generation and transmission, transportation and railways, medical care and public health and telecommunication services.<sup>1172</sup>

Article 108-5 of the NPSA stipulates the trade union rights for public service employees. The right to enter collective bargaining in the public sector is generally qualified by the explicit provision that it does not include the right to enter a

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<sup>1167</sup> Act 174 of 1949.

<sup>1168</sup> Article 1 of the LUA.

<sup>1169</sup> Rohl (2005) 559.

<sup>1170</sup> As above. See Bureau for Workers Activities paper presented at the International Workers Symposium (2009) 3 wherein it is suggested that it is absolutely reasonable for a labour organisation to be continually concerned about the threat of losing its bargaining power.

<sup>1171</sup> ITUC Report (2007) 3.

<sup>1172</sup> As above.

collective agreement.<sup>1173</sup> However, blue collar workers in the public service alone have the right to engage in collective bargaining and to conclude a collective agreement. White collar public servants do not have this right.<sup>1174</sup> Improvements in the conditions of employment of white collar workers and non-blue collar workers lie with the National Personnel Authority.<sup>1175</sup>

The International Trade Union Federation (ITUC)<sup>1176</sup> laments the fact that the NPSA imposes strict restrictions on public servants' trade union rights. ITUC criticises the prohibition on the right to strike for public servants and the fact that trade union representatives who incite strikes are susceptible to dismissal, and that fines or imprisonment of up to three years can be imposed on them. For public servants, collective bargaining is divorced from the right to strike.<sup>1177</sup>

Public service trade unions' right to freedom of association, the right to organise and the right to engage in collective bargaining are severely restricted.<sup>1178</sup> It is clear that private sector workers have greater protection regarding collective labour rights than employees in the public sector. As discussed below this situation impacts on the compliance with international law.

#### 4.4. Collective Bargaining and Trade Union Rights

##### 4.4.1. Introduction

The Japanese model of labour relations is premised on a corporate governance structure that promotes an alignment between the interests of management and

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<sup>1173</sup> Article 108-2 of the NPSA.

<sup>1174</sup> Hak-Soo (2006) 8. See also Yamakawa *CLLPJ* (2013) 353 where the author mentions, inasmuch as industrial employees may enter negotiations and conclude a collective agreement these are subject to the financial implications may not exceed the budget of government.

<sup>1175</sup> See s 3(1) of the NPSA 120 of 1947. The power of the Authority only goes as far as recommending the appropriate wages and improvements through the relevant Minister or head of organ of government to the Diet and the Cabinet. See also Chapter 7 at 4.2 on the discussion of article 28 of the Constitution of Japan and the public service employees' rights.

<sup>1176</sup> See ITUC Report (2007) 3 and 4. ITUC was acting on behalf of one of its affiliated trade unions called the Japanese Trade Union Confederation (JTUC-RENGO) with a membership of approximately 6,800,000.

<sup>1177</sup> Article 98 of the NPSA. See also Yamakawa *CLLPJ* (2013) 356 and 357 where the author mentions that the Industrial public employees could utilise the unfair labour practice dispute resolution procedures applicable to the private sector employees, because they generally are covered by the LUA.

<sup>1178</sup> See Chapter 7 at 4.4.

those of workers.<sup>1179</sup> Smith and Ellis<sup>1180</sup> mention that the consequences of the corporate governance structure of Japan are that collective bargaining takes place on a less adversarial basis and is less likely have the parties utilising the weapon to strike.

According to Araki,<sup>1181</sup> the ideas of the bargaining unit and the concept of exclusive representation do not exist in Japan. All trade unions have the same rights in the private sector. The challenges in relation to trade union rights relate to the public sector.

#### 4.4.2. Minority Trade Unions and the Duty of Neutrality

Article 6 of the LUA provides that:

“Representatives of a labor union or those to whom the authority has been delegated by the labor union shall have authority to negotiate with the employer or the employers' organisation on behalf of the labor union or the members of the labor union with respect to conclusion of collective agreements and other matters.”

The LUA does not draw a distinction insofar as recognition is concerned between the representatives of the majority trade union and those from the minority trade union. Should an employer discriminate against an employee based on trade union membership, it constitutes an unfair labour practice. This commitment forms the legal basis upon which a minority trade union may seek to compel an employer to bargain with them despite their being in a minority.<sup>1182</sup> Sugeno<sup>1183</sup> mentions that there are no legal complications when adjudicating disputes of unfair discrimination or where the obligation to be neutral is breached. The more difficult disputes are those where the majority union and the minority union are rivals and

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<sup>1179</sup> See Smith and Ellis *IICLR* (2010) 17.

<sup>1180</sup> As above.

<sup>1181</sup> Araki *CLLPJ* (2007) 261.

<sup>1182</sup> Sugeno and Morito *CLLPJ* (1987) 133 and 134. Articles 3 and 4 of the Labor Standards Act 49 of 1947 provide that “employers are not to discriminate with respect to wages, working hours or other working conditions by reason of nationality, creed, social status or gender.” See also Araki *JLR* (2015) 69 where the author explains that the current minority trade unions in Japan used to be majority trade unions and the sole union in the 1940s and 1950s when their strategy was described as radical and confrontational. However, they lost support and alternative trade unions were sought and these gained and commanded greater support. However, these radical now minority trade unions still exist.

<sup>1183</sup> Sugeno (1985) 5.

do not agree to a condition of an agreement.<sup>1184</sup> According to Araki, minority trade unions can lodge disputes against large unions who treat them unfairly in order to weaken their influence and power in the company.<sup>1185</sup>

The recognition of minority trade unions for collective bargaining purposes may lead to multiple agreements with the employer. However, Summers<sup>1186</sup> suggests that this negative result can be mitigated by employers through the strategy of postponing the agreement with the minority trade union to ensure that all the terms agreed upon are agreed to by the majority trade union. This is the basis in Summers' reasoning that leads him to believe that the Japanese system is a species of majoritarianism.<sup>1187</sup>

It is argued that their system should rather be described as a pluralist model with an element of majoritarianism. The Japanese system stands in total contrast to that of the USA which excludes minority trade unions and all other trade unions that are unable to prove their majority status at a given time.

Smith and Ellis mention that Japanese labour law does not make provision for exclusivity.<sup>1188</sup> This means that unlike in the USA multiple trade unions may represent workers within a single workplace.<sup>1189</sup> A minority trade union in an enterprise has the right to collective bargaining, as has the majority trade union.<sup>1190</sup> Wilson states that any two or more employees can demand recognition by the

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<sup>1184</sup> As above.

<sup>1185</sup> Araki *JLR* (2015) 69.

<sup>1186</sup> Summers *CLLPJ* (1998) 51.

<sup>1187</sup> As above. The observation by Summers in his examination of Japan and other countries is that the "practical result commonly is that the collective agreement of a dominant union in fact determines the terms and conditions of all employees in the category." See Nakakubo *JILP* (2012) 13, who together with other scholars holds the view that reforms in the Japanese system should insist upon strengthening the power of majority trade unions and should emulate the USA system of having a duty of fair representation.

<sup>1188</sup> Wilson and Ellis *IICLR* (2010) 11.

<sup>1189</sup> As above.

<sup>1190</sup> Summers *CLLPJ* (1998) 51. See also Morito *JILPT* (2006) 3 where the author confirms that even a union with two or three members "is guaranteed the right to negotiate with the employer." See Hanami and Komiya (2011) 43. According to Hanami and Komiya, after the Second World War, there was no resistance against unions by employers and it was easy for unions to organise within the workplace as there was no reason why they should be concerned with the industry at large when their jobs were secured until retirement in the enterprise. This was said to be coupled with the oppressive conditions that did not allow for industry unionism and the workers not needing to consider moving to other enterprises. It is submitted that the general propensity of collective bargaining in Japan being at the level of the enterprise and not sectoral level, the recognition of minority unions and pluralism in collective bargaining is to be understood predominantly within the context of the enterprise.

employer for collective bargaining purposes.<sup>1191</sup> A plurality of unions can co-exist in the workplace and trade unions have the right to collectively bargain with the employer.<sup>1192</sup> Collective bargaining with minority unions is buttressed by the employer's duty to negotiate in good faith with all unions.<sup>1193</sup>

Araki explains that as a general rule a collective agreement applies only to the members of the trade union that has signed the agreement.<sup>1194</sup> This, he admits, causes difficulties for the employer in promoting uniform treatment of employees.<sup>1195</sup> In a pluralist system of collective bargaining, such as in Japan, it is a natural consequence that there would be multiple collective agreements. Various options are available: the employer may negotiate the same working conditions with all trade unions or the collective agreement will apply to all in terms of Article 17 of the LUA.<sup>1196</sup> Article 17 of the LUA provides that:

“When three-fourths or more of the workers of the same kind regularly employed in a particular factory or workplace come under application of a particular collective agreement, the agreement concerned shall also apply to the remaining workers of the same kind employed in the factory concerned or workplace.”

Morito explains that the parties to a collective bargaining process may modify a working condition “even disadvantageously to the union members”.<sup>1197</sup> The author mentions that the principle is that working conditions in a collective agreement provide content to the union members' contracts of employment even if it is to their detriment.<sup>1198</sup> This possibility occurs where the employer concludes an agreement with the majority trade union and in good faith enters into negotiations with other non-majority unions on similar terms.

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<sup>1191</sup> Wilson *LLA/CLJ* (1987) 594.

<sup>1192</sup> Morito *JILPT* (2006) 3. Under the Japanese collective bargaining system majority status is not a requirement for acquisition of the right to engage in collective bargaining and to acquire trade union rights. However, under the USA system collective bargaining and the acquisition of trade union rights is enjoyed exclusively by the certified majority trade union. See also *Nissan Jidoshya v Cent. Lab. Rel Comm'n*, 39 Minshu 730 (S.Ct., April 23, 1985)

<sup>1193</sup> As above. See also Araki *CCLLPJ* (2007) 444. The collective agreements entered into are said to have a binding effect.

<sup>1194</sup> Araki (2002) 57.

<sup>1195</sup> As above.

<sup>1196</sup> As above. See also Summers (1998) 51 who likens the Japanese system of collective bargaining as having traits of majoritarianism wherein the employer waits until the collective agreement is signed with the majority trade union first before insisting on bargaining with other trade unions to agree on substantially the same terms as agreed with the majority trade union.

<sup>1197</sup> Morito (2006) 4.

<sup>1198</sup> As above.

Japanese case law has developed a unique “duty of neutrality” to be maintained towards all unions.<sup>1199</sup> Under the duty of neutrality employers “must not treat one union more favourably than the others based on the union’s general character, tendencies, or policies and the like”.<sup>1200</sup>

#### 4.4.3. Trade Union Rights

There is no specific dispensation of trade union rights in Japanese labour law. Trade union rights are enjoyed as a consequence of a trade union’s existence and recognition for collective bargaining purposes without reference to thresholds of representivity. However, there are instances where specific trade union rights are indirectly alluded to as part of the law which prohibits certain employer actions. Article 7(iii) of the LUA provides that:

“the employer shall not control or interfere with the formation or management of a labour union by workers...and...not preclude the employer from permitting workers to confer or negotiate with the employer during working hours without loss of time or wage, and this shall not apply to the employer’s contributions for public welfare funds or welfare and other funds which are actually used for payments to prevent or relieve economic adversity or misfortunes, nor to the giving of office of minimum space.”

The first identifiable trade union right in the provision relates to trade union work during working hours without loss of time or wages and resembles the right to time off for trade union representatives.<sup>1201</sup> The second pertains to the employer granting office space for trade union activity without the loss of wages, which resembles the right to facilities for trade union representatives.<sup>1202</sup> Although there is an obligation on the employer not to discriminate between majority and minority trade unions, the employer is permitted to provide a bigger office to a majority trade union and smaller one to a minority trade union.<sup>1203</sup> This rule seems to be an exception to the duty of neutrality.

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<sup>1199</sup> *Nissan Motor Co.* Supreme Court (April 23, 1985) 39 Minshu 730. See also Araki (2002) 198.

<sup>1200</sup> Araki (2002) 198.

<sup>1201</sup> See Chapter 5 at 5.5.

<sup>1202</sup> See Chapter 3 at 3.4.

<sup>1203</sup> Araki (2002) 198.

## 5. Japan and ILO Conventions

According to Hanami<sup>1204</sup> the Constitution is silent regarding the adoption of international standards and ILO Conventions. However, article 98 of the Constitution provides for the faithful observance of “treaties and established laws of nations” and as a member of the ILO Japan should observe the ILO’s international standards.<sup>1205</sup> This also means that Japan, like all member states, should adapt national laws to comply with ratified conventions.

Hanami<sup>1206</sup> mentions that Japan’s ratification of Conventions No 87 of 1948 and 98 of 1949 was not easy, a number of aspects demonstrate the difficulty. He mentions that prior to ratification the public service law dispensation prohibited managers, supervisors, prison officers, coastguards and firemen from joining a trade union.<sup>1207</sup> These laws were contrary to ILO standards and became the subject of complaints to the ILO.<sup>1208</sup>

The Japanese government, prior ratification of Convention No 87 of 1948, proposed to end the “check-off system” for the payment of union dues. There was an outcry from trade unions and political parties that were aligned to government.<sup>1209</sup> After lengthy debate and soul-searching Japan ratified Conventions No 98 of 1949 and No 87 of 1948 in 1953 and 1965 respectively.<sup>1210</sup>

The ratification of the mentioned conventions did not pose a challenge in respect of Japan’s private sector. However, the ILO viewed the restrictive public sector laws in a negative light. As has been mentioned, the provisions of the NPSA and the PCNELRL place severe limitations on collective bargaining and industrial action in the public sector.<sup>1211</sup> This state of affairs has not been left unabated by public sector trade unions by filing complaints to the ILO pursuing these rights for

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<sup>1204</sup> Hanami *ILR* (1981) 765. The author mentions that Japan ratified 22 conventions after the Second World War, including Conventions No 87 of 1948 and No 98 of 1949.

<sup>1205</sup> As above.

<sup>1206</sup> Hanami *ILR* (1981) 773.

<sup>1207</sup> As above.

<sup>1208</sup> Cases No 2177 and 2183 in 367<sup>th</sup> Report of CFA (2013) 205-216.

<sup>1209</sup> Hanami *ILR* (1981) 773.

<sup>1210</sup> ITUC Report (2007) 3.

<sup>1211</sup> See Chapter 7 at 4.3.

fire fighters who were placed in the same category of personnel with limited labour rights.<sup>1212</sup> In 2013, this matter still remains unresolved with the ILO having recommended that Japan enter into frank and meaningful consultations to complete reform of the public services systems.

Also observed, the public sector trade union membership is limited to employees. According to Hanami,<sup>1213</sup> opening membership only to employees means that an employer may refuse to bargain with a trade union leader who loses employee status by reason of dismissal.<sup>1214</sup> This possibility has resulted in cases being referred to the ILO where the argument was advanced that the PCNELRL violates Convention No 87 of 1948 which guarantees to workers the rights to freedom of association and to organise.<sup>1215</sup>

## 6. Germany

### 6.1 Introduction

Germany is a constitutional, parliamentary democracy and is headed by the Chancellor who is elected by the Federal Parliament.<sup>1216</sup> The judicial branch is made up of federal and state courts, with the Constitutional Court being the highest court over constitutional matters.<sup>1217</sup> The German labour relations representation system is a dual one, with employees on the one hand being active in supervisory boards and on the other being members of works councils and involved in collective bargaining.<sup>1218</sup>

This dualism is evident in that it has on the one hand tenets that are characteristic of an adversarial system and on the other hand it has tenets of co-operation

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<sup>1212</sup> Challenges for Public Sector in Japan available at <https://psiasiapacificsectoralnetwork.files.wordpress.com/2015/08/ze> (accessed on 1 April 2018)

1 and 6.

<sup>1213</sup> Hanami *ILR* (1981) 772.

<sup>1214</sup> As above.

<sup>1215</sup> According to Hanami *ILR* (1981) at 773 both the NPSA of 1947 and the LPSL of 1950 excluded from trade union membership non-employees. See also Jung (2001) available at [www.oit.org](http://www.oit.org) (accessed on 13 April 2018) where the author mentions that Germany is also a federal state with 16 self-governing states and there is separation of powers between the legislature, the Executive and judiciary.

<sup>1216</sup> Secretariat Research Office (2015) 6.

<sup>1217</sup> As above.

<sup>1218</sup> Botha *PELJ* (2015) 1815.



between employers and labour. Summers<sup>1219</sup> submits that this state of affairs within the German system is demonstrated by the fact that in the one instance negotiations may be entered into from different positions between parties and where there is an impasse a strike becomes an instrument to force one party to accede. On the other hand, the work councils regulated in terms of the law serve as institutions of co-operation between parties.

The German system as described above, resembles to an extent the South African system of labour relations which has traits of an adversarial nature in its collective bargaining regime on the one hand and traits of co-operation in the form of workplace forums on the other. This is the first reason for selecting Germany for comparative purposes.

The second reason is that the LRA of 1995 drew heavily on the German and wider European experience in bringing about a system in South Africa that would foster employee participation in decision making in the workplace.<sup>1220</sup>

Thirdly, the workplace forums in South Africa and the works councils in Germany operate concurrently with collective bargaining even though they operate at different levels. The other area of commonality is that in both South Africa and in Germany collective bargaining takes place both at plant or enterprise level and at sectoral level.<sup>1221</sup>

The sources of labour law in Germany are the Basic Law of Germany of 1949 which is the German Constitution, the Works Constitution Act of 1998 and the Act on Collective Agreements of 1974. The relevant provisions of these pieces of legislation will be discussed in order to ventilate the labour relations framework pertaining the rights of trade unions with reference to the role if any played by minority trade unions.

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<sup>1219</sup> Summers *CLLJ* (1995) 475.

<sup>1220</sup> See Manamela *SA Merc LJ* (2002) 729.

<sup>1221</sup> See Fuerstenberg (1998) 169.

## 6.2 The Constitution

The right to freedom of assembly for all citizens<sup>1222</sup> and the right to freedom of association<sup>1223</sup> are provided for separately in the German Constitution.<sup>1224</sup> Section 9 of the German Constitution provides that:

“(1) All Germans shall have the right to form corporations and other associations.  
(2) ...  
(3) The right to form associations to safeguard and improve working and economic conditions shall be guaranteed to every individual and to every occupation or profession. Agreements that restrict or seek to impair this right shall be null and void.”

This constitutional provision confirms the right of employees to form and join trade unions of their choice without any previous authorization.<sup>1225</sup> The rights to freedom of assembly and association shall be forfeited if abused in terms of Article 18 of the German Constitution.<sup>1226</sup>

Significantly, section 33(5) of the German Constitution of 1949 qualifies worker rights further by providing that the public service law shall be regulated “with due regard to the traditional principles of the professional civil service.” The Federal Constitutional Court held that although the right to freedom of association protected the right to strike and to enter into collective agreements, this did not include the “absolute right to use key positions and blockage power to pursue an organisation’s own interests at all costs.”<sup>1227</sup>

Besides those working in the private sector, Germany has two categories of workers in the public service, namely, civil servants and public servants.<sup>1228</sup>

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<sup>1222</sup> Art 8 of the German Constitution of 1949.

<sup>1223</sup> Art 9 of the German Constitution of 1949.

<sup>1224</sup> German Constitution of 23 May 1949 available at <http://www.refworld.org/docid/4e64d9a02.html> (accessed on 3 March 2018).

<sup>1225</sup> Bureau of Democracy Report (2011) 22.

<sup>1226</sup> According to the Bureau of Democracy Report (2010) it is the right-wing organisations that are prohibited from holding public meetings. Permits are required for “open-air public rallies and marches,” and authorities may deny these “when public safety concerns arise or when the applicant is a prohibited organisation.”

<sup>1227</sup> *B v R 1571/15* Judgment of the First Senate of 11 July 2017 para 131.

<sup>1228</sup> Wolf *Ius Publicum* (2011) 1.

According to Weihermann<sup>1229</sup> the current German law, does not permit workers in the public service to strike for the improvement in their conditions of work, which includes wages. The rationale for the apparent acquiescence on the part of civil servants includes the fact that they enjoy special benefits of having the most secured employment in Germany and are paid salaries on terms set by national pay regulations.<sup>1230</sup> Public servants on the other hand are the blue-collar workers and salaried employees with the remaining group being those employed in the state-owned enterprises.<sup>1231</sup> Weihermann<sup>1232</sup> mentions that the Federal Administrative Court was the last to deal with this matter and held that the German case law banning strikes is contrary to European law.

The German Constitution does not specifically make specific provision for the right to engage in collective bargaining. However, this right is grounded on the right to freedom of association in terms of section 9(3) of the German Constitution and further regulated by German labour legislation. The Federal Constitutional Court in *B v R*<sup>1233</sup> held that the right to freedom of association:

“protects all activities which are typical for labour associations, in particular the conclusion of collective agreements, their continued existence and application, as well as measures taken in labour disputes.”

### 6.3 Legislation

#### 6.3.1 The Collective Agreement Act of 1969

The Collective Agreement Act of 1969 (CAA of 1969) regulates collective agreements. The provisions pertinent to the legal questions raised have been duly amended and the CAA of 1969 will not effectively serve as definitive authority for the position of minority trade unions within the context of both individual and

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<sup>1229</sup> Weihermann article (2018) available at <https://www.lexology.com/library/detail.aspx?g=31a429c7-2443-4238-8d11...> (accessed on 7 May April 2018).

<sup>1230</sup> According to Wolf (2011) the principle of alimentation that applies to civil service is that that in return for the civil servants not striking and their loyalty for the duration of their work as such, they are paid well and are in secure jobs amongst benefits.

<sup>1231</sup> Wolf *Ius Publicum* (2011) 1-6. According to the author this includes professionals, officials, judges, soldiers and other specific public legal relations officers are amongst this group.

<sup>1232</sup> Weihermann article (2018) available at <https://www.lexology.com/library/detail.aspx?g=31a429c7-2443-4238-8d11...> (accessed on 7 May April 2018).

<sup>1233</sup> *B v R* 1571/15 Judgment of the First Senate of 11 July 2017 para 131.

collective representation. According to Marquardt<sup>1234</sup> there are two types of collective agreements under the German system. The first is between trade unions and employers and the second is between employers and work councils.<sup>1235</sup>

Article 3(1) of the CAA of 1969 provides that “[m]embers of the parties to a collective agreement and the employer who is himself a party thereto shall be bound by the collective agreement.” According to Marquardt<sup>1236</sup> for the duration of the collective agreement there is a duty to keep peace for both parties concerning the items which are regulated in the collective agreement.

Marquardt<sup>1237</sup> mentions that if a smaller union has concluded a collective agreement, the majority union may apply to court that this agreement be void due to the fact that when there is a collective agreement with the majority union, the latter should take precedence. The CAA of 1969 was amended by the Collective Bargaining Unity Act of 2015. The extent to which the collective bargaining regime has been amended is discussed below.<sup>1238</sup>

The CAA of 1969 regulates the collective agreements entered by parties whilst the Works Constitution Act of 2001 regulates works councils. The promulgation of the Collective Bargaining Unity of 2015 has far reaching implication on representation in collective bargaining and will require to be explored.

### 6.3.2 The Works Constitution Act of 2001

Organisational rights as contextualised by the South African model of collective bargaining do not form part of the German system of labour relations. What resembles the rights enjoyed by the trade unions in Germany in pursuit of the rights to freedom of association, to organise and to engage in collective bargaining, including employee participation can be identified from the provisions of the WCA of 2001.

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<sup>1234</sup> Marquardt Paper (2006) 1.

<sup>1235</sup> As above.

<sup>1236</sup> Marquardt Paper (2006) 5.

<sup>1237</sup> Marquardt (2006) 6.

<sup>1238</sup> See Chapter 7 at para 6.2.

In the context of the WCA of 2001, the rights are not exercisable by the trade union *per se*, but rather by members of the works council who have been placed there by the trade union. The rights provided for in the WCA are as follows:

- the right of access to personal files,<sup>1239</sup>
- right to make complaints for discrimination, unfair treatment or disadvantageous treatment,<sup>1240</sup>
- right to propose issues,<sup>1241</sup>

The other rights are timely information,<sup>1242</sup> the right to access, the right to be heard and the right to co-determination.<sup>1243</sup> These rights clearly bolster the ability of the trade union representatives in works council in performing their functions. The power of the works council is quite strong as it can veto a decision from being made without the prior approval of the works council.

Within the German system of labour relations, the trade union exercises the rights that enable it to perform its functions in relation to the collective bargaining process as a separate but process complementary to employee participation through works councils. In the event of disputes section 74(2) of the WCA provides that industrial shall be unlawful. In the same breath the provision stipulates that this does not apply to the trade unions. Where there is a dispute the process that can be follows entails, conciliation, arbitration, grievance. The available option for the works council in dispute with the employer is to refer the matter to the conciliation committee which has power to issue an award.<sup>1244</sup> which can be set in terms of section 78 of the WCA of 2001. The parties may also have an arbitration body set which shall not be precluded by the award of the conciliation committee.<sup>1245</sup>

The right to access is granted to trade unions to exercise their powers and duties as provided by the WCA of 2001. However, from the provisions of the WCA as mentioned the individual cases of members such as grievance and disciplinary proceedings, these are taken up by the works council rather than by the trade

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<sup>1239</sup> S 83 of the WCA of 2001.

<sup>1240</sup> S 84 of the WCA of 2001.

<sup>1241</sup> S 86(a) of the WCA of 2001.

<sup>1242</sup> S 2 of the WCA of 2001.

<sup>1243</sup> S 87 of the WCA of 2001.

<sup>1244</sup> S 76 of the WCA of 2001.

<sup>1245</sup> S 76(8) of the WCA of 2001.

union. The trade union as alluded to is involved with collective bargaining as part of its main activity.

The German system of co-determination is regarded as “first and most highly developed model” that ensures that employees participate in the business of the employer.<sup>1246</sup> Section 5 and 99 of the Works Constitution Act of 2001 (WCA of 2001) provide that it applies to the private sector, whilst the federal law and the public sector committees regulate the establishment of works councils. The works councils are established at the discretion of employees as long as the establishment has 5 or more permanent employees older than 18 years.<sup>1247</sup>

The WCA of 2001 not only has an effect in both the collective and the individual spheres. Section 2 of the WCA of 2001 provides that:

“(1) The employer and the works council shall work together in a spirit of mutual trust having regard to the applicable collective agreements and in co-operation with the trade unions and employers’ associations represented in the establishment for the good of the employees and of the establishment.

(2) In order to permit the trade unions represented in the establishment to exercise the powers and duties established by this Act, their agents shall, after notification of the employer or his representative, be granted access to the establishment, in so far as this does not run counter to essential operational requirements, mandatory safety rules or the protection of trade secrets.

(3) This Act shall not affect the functions of trade unions and employers’ associations and more particularly the representation of their members’ interests.”

Reference to members interests’ in section 2(3) should be to both the interests of the employees at both the collective interest level and the individual level. Employees have a right to be involved in the grievance process make complaints and he may seek assistance from a member of the works council.<sup>1248</sup> When the grievance is lodged, the works council shall hear the grievance and have the employer remedying it where it is justified.<sup>1249</sup>

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<sup>1246</sup> See Botha *PELJ* (2015) 1815.

<sup>1247</sup> S 60 of the WCA of 2001.

<sup>1248</sup> S 84 of the WCA of 2001.

<sup>1249</sup> S 85 of the WCA of 2001.

In the case of disciplinary proceedings of employees, the works council plays a role insofar as applying the principle of co-determination thereto. Section 102 provides that:

“(1) The works council shall be consulted before every dismissal. The employer shall indicate to the works council the reasons for dismissal. Any notice of dismissal that is given without consulting the works council shall be null and void.”

This provision makes it a right for the works council to be heard before a decision of dismissal is made by the employer. Non-compliance with the formal prerequisites in dismissal matters should deem such resultant dismissal as invalid. This it is submitted should not mean that the employer is unable to dismiss an employee where it is justified in doing so. The essence and significance of the works councils is also realised with the context of collective interests. According to Coe<sup>1250</sup> labour unions find themselves in a stronger position in that:

“[I]abor representatives are included in the decision-making process alongside shareholders. Workers form “works councils” on the floor level, which then choose labor representatives to put forth their interests at a managerial level. The representation of workers’ interests goes all the way up the chain of command. Such a system is beneficial for employees, and it can also be argued to be beneficial for employers, as it provides a venue for avoiding confrontation or strikes.”

The WCA of 2001 fosters employee participation in decision-making in the workplace rather than conflict in both the individual employee matters and those that concern a collective of employees. It is noted significantly that the WCA of 2001 is not meant to deal with matters that fall within collective bargaining. In this regard section 77(3) of the WCA of 2001 identifies these matters as “remuneration and other conditions of employment that have been fixed or are normally fixed by collective agreement.”<sup>1251</sup>

Botha<sup>1252</sup> laments the opportunity posed by the German works council model by contrasting it to the choice of employee participation that was opted by South Africa. The managerial prerogative of the employer which entitles the employer to

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<sup>1250</sup> Coe (2014) available at [aicgs.org](http://aicgs.org) (accessed on 13 May 2018)

<sup>1251</sup> According to Marquardt (2006) 5 these matters are wages, that is, additional allowances, benefits, bonuses, leave, professional training, rules of employment contracts such as terms of notice.

<sup>1252</sup> Botha *PELJ* (2015) 1816.

make strategic and operational decisions is left intact by opting for collective bargaining as the avenue preferred for employee participation in workplace decision making. According to Botha<sup>1253</sup> collective bargaining does not empower trade unions on behalf of employees on decision-making with regard to the “direction, plans and policies of the business.” Due to the fact that the running of the business is not covered by collective bargaining these are left wholly to management and the opportunity that manifests in the German system of co-determination is lost.

### 6.3.3 The Collective Bargaining Unity Act of 2015

Prior to the promulgation of the Collective Bargaining Unity Act of 2015 (CBAU of 2015), the regulation of collective bargaining and the influence of trade unions was regulated in terms of the collective bargaining unity principle of the *Tarifeinheit* which refers to the principle of “one collective agreement for one business.”<sup>1254</sup> Zimmerman<sup>1255</sup> explains that it will only be the collective agreement of the majority trade union that will apply in the business. However, the Federal Labour Court abolished this principle in 2010 allowed various collective agreements to be entered because this principle was seen to be amongst other things an infringement of the right to freedom of association and led to strikes and conflict in the workplace.<sup>1256</sup>

The legislature made an about turn on the abolishment of the *Tarifeinheit*, hence the referred to promulgation and ratification of the CBAU of 2015. This legislation is most significant for purposes of this thesis amongst the labour laws of Germany. The reason is that it mirrors Germany ratified the German collective bargaining system and the role played by minority trade unions insofar as the exercise of the right to freedom of association and the extent to which it is lawfully permissible. According to Vogel<sup>1257</sup> the principle encapsulated in the Act is that:

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<sup>1253</sup> As above.

<sup>1254</sup> Zimmerman (2015) available at <https://www.linkedin.com/pulse/restriction-right-strike-act-collective-bargaining-unity-zimmermann/> (accessed on 13 April 2018).

<sup>1255</sup> As above.

<sup>1256</sup> As above.

<sup>1257</sup> Vogel (2017) available at <https://www.eurofound.europa.eu/observatories/eurwork/articles/germany-collective-bargaining-law-declared-largely-constitutional> (accessed on 13 April 2018)



“Only the most specific and relevant agreement could cover an establishment’s employees at any one time. This practice meant that, in companies with overlapping collective agreements, only the agreement concluded by the majority trade union applied.”

According to Zimmerman<sup>1258</sup> this law was passed in order to curb or prevent the increase in strikes due to the abolishment of the principle of collective bargaining unity. The employer in terms of the Act still has to grant them a right to express their views,<sup>1259</sup> including the possibility to enter a collective agreement with the same employer. Birgit<sup>1260</sup> mentions that nothing prevents the minority trade union from co-signing the majority trade union collective agreement. If their right to air their views is infringed upon, they may approach the courts to seek redress. This is a case of possible conflict between the two collective agreements entered by the majority trade union and the minority trade union. According to Birgit<sup>1261</sup> this possible conflict is avoided by the Act providing that “in the case of competing collective agreements, membership figures at establishment level are crucial in defining the validity of a collective agreement.” This, the author describes as a “numerical understanding of representativeness.”<sup>1262</sup>

It is submitted that the premise of this piece of legislation makes the German system of collective bargaining pro-majoritarian. However, the system allows for the voice of the minority trade union to be heard. The right to freedom of association for minority trade unions does not only relate to the right to represent members in individual cases such as disciplinary and grievance proceedings, but extends to collective bargaining processes to the extent of a possible collective agreement with the minority trade union. As provided in the CBUA of 2015, the collective agreement that takes precedence in terms of the principle of collective bargaining will be the one entered with the majority trade union.

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<sup>1258</sup> Zimmerman (2015) available at <https://www.linkedin.com/pulse/restriction-right-strike-act-collective-bargaining-unity-zimmermann/> (accessed on 13 April 2018).

<sup>1259</sup> As above.

<sup>1260</sup> Birgit (2015) available at [www.eurofound.europa](http://www.eurofound.europa) (accessed on 14 May 2018).

<sup>1261</sup> As above.

<sup>1262</sup> As above.

## 7. Germany and ILO Conventions

Germany ratified Convention No 87 of 1948 20 March 1957 and Convention No 98 of 1949 on 08 June 1956.<sup>1263</sup> According to Schnorr<sup>1264</sup> the constitutional guarantee of freedom of association and autonomy of labour and management is reinforced by supplementary provisions of substantive labour law. Section 75(1) of the WCA imposes a duty on employers and works councils to ensure that there is no discrimination against workers on account of their union activities or affiliation.<sup>1265</sup>

Having appreciated the role of the works councils in relation to the grievance and disciplinary proceedings against employees the active role of the works council in these individual cases is worthy of note. The exercise of the right of individuals to freedom of association and more especially with their trade unions does not seem to be a major challenge under the German system.

The identifiable instance where an affront on the right to freedom of association has been in relation to the prohibition of organisations whose activities are illegal and opposed to the democratic order. Such organisations whose freedom of association have been and still are limited in Germany are the neo-Nazi party and the communist party which were banned and declared illegal in 1950.<sup>1266</sup> Such authority was a threat to the trade union movement as through German law trade unions could be banned or dissolved on this basis. The CEACR addressed the concern and through their intervention the amendment to the law in question was made.<sup>1267</sup> The amendment had the effect that any prohibition order or restrictive measure imposed on workers' and employers' organisations would take effect only if the legality thereof is confirmed by the Administrative Court.<sup>1268</sup>

According to the Bureau of Democracy there is yet to be a report that has reflected upon any significant infringement on trade union rights that could lead to the conclusion of an affront on the right to freedom of association and to the right to

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<sup>1263</sup> See Ratifications for Germany available at <https://www.ilo.org/dyn/normlex> (accessed on 28 April 2018).

<sup>1264</sup> Schnorr *ILR* (1974) 545.

<sup>1265</sup> Schnorr *ILR* (1974) 544.

<sup>1266</sup> As above.

<sup>1267</sup> Schnorr *ILR* (1974) 546.

<sup>1268</sup> As above.

engage in collective bargaining.<sup>1269</sup> However, the one area of concern in the collective bargaining arena are the rights of civil servants to engage in collective bargaining. In addressing this challenge when it was referred to it on behalf of teachers, the CEACR recommended that measures be taken by the German government in accordance with their legal system that would permit teachers with civil service status to bargain collectively.<sup>1270</sup>

## 8. Conclusion

Research has illustrated that the labour law frameworks of the USA, Japan and Germany have a number of similarities and differences regarding collective bargaining and the rights of trade unions. Commencing with the examination of the similarities, this study concludes as follows. First, all countries are members of the ILO.<sup>1271</sup> Second, each country has a supreme Constitution.<sup>1272</sup> Third, each has a set of labour laws and has adopted a particular model of collective bargaining<sup>1273</sup> The German model has an additional dimension of employee participation. Four, all countries have different dispensations for the private sector and the public sector.

Despite these similarities, there are a number of significant differences. First, the Japanese Constitution contains specific rights which apply directly to the right to freedom of association and trade unions.<sup>1274</sup> In the USA constitutional rights apply to trade unions only indirectly.<sup>1275</sup> Second, the USA has adopted a model which recognises majority trade unions as the exclusive bargaining agent of employees.<sup>1276</sup> The German model of collective bargaining and co-determination does not draw a distinction between the majority trade union and the minority trade union, except insofar as the precedence taken by the collective agreement with the majority trade union during collective bargaining. The trade union rights are enjoyed under the German system through participation in the works council for individual matters of employees in the workplace. However, in matters of collective

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<sup>1269</sup> Bureau of Democracy 2010 Reports (2011) 30.

<sup>1270</sup> Report No 302 Germany (1996) para 111.

<sup>1271</sup> See Chapter 7 at 3 and 4.1.

<sup>1272</sup> See Chapter 7 at 2.2.

<sup>1273</sup> See Chapter 7 at 4.2 and 4.3.

<sup>1274</sup> As above.

<sup>1275</sup> See Chapter 7 at 2.2.

<sup>1276</sup> See Chapter 7 at 3.1.

bargaining, these are handled by trade unions and employers. It is in the event of an impasse that the trade union may go on strike.

Minority trade unions in the USA do not have the right to represent members in both collective bargaining and in individual matters.<sup>1277</sup> They are completely excluded due to system of exclusive representation applicable in the USA. In Japan, the minority trade unions in the private sector have the right to freedom of association and to engage in collective bargaining on behalf of their members, irrespective of their numbers. This situation not only accommodates minority trade unions in relation to the exercise of the right to freedom of association, but also extends the right to engage in collective bargaining to all trade unions. The German system has representivity of the trade union being relevant when there is conflict between two collective agreements, that is, one entered between the majority union and an employer and one between the minority trade union and the employer. The ILO cautions against pluralist systems of collective bargaining such as Japan's, which may foster a proliferation of trade unions. Even though the ILO does not oppose pluralistic systems it does not support "absolute proportional representation."<sup>1278</sup>

The system of collective bargaining in the USA favours majority trade unions.<sup>1279</sup> All trade union rights pertaining to representation in both individual disputes and collective bargaining are exclusively enjoyed by the majority trade union and minority trade unions are excluded.<sup>1280</sup> This system of exclusive representation effectively does not attach any significance to the rights to freedom of association and to organise by minority trade unions.

The ILO adopts the view that despite the compatibility of a majoritarian system with the right to freedom of association, member states are required to recognise the right of minority trade unions to exist and at least to represent their members in individual disputes concerning grievances and discipline.<sup>1281</sup> The USA model does not meet this criterion as it does not recognise the right of minority trade unions to represent members in individual cases and in collective bargaining processes.

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<sup>1277</sup> See Chapter 7 at 2.3.

<sup>1278</sup> As above at para 1097.

<sup>1279</sup> See Chapter 7 at 3.1.

<sup>1280</sup> See Chapter 7 at 2.3.

<sup>1281</sup> *Digest of Decisions* (2006) para 974.

South Africa with a constitutional dispensation that recognises minority interests and the right to freedom of association cannot follow this approach as it is at odds with the principles of the South African Constitution, 1996.

The German experience also yields some outcomes. The dual system of Germany's labour relations would be the greatest contributor to its relative labour peace and relatively orderly collective bargaining in that the collective bargaining process supplemented by the works councils complement each other. This, it can be submitted is based on the protection of the rights employees at both the individual and collective levels, with the works council responsible for individual matters whilst the collective matters subject to collective bargaining are handled by the trade unions.

South Africa's model is pluralist with a strong inclination towards majoritarianism.<sup>1282</sup> However the South African Constitution, 1996 protects and promotes the rights of minorities. The point of view that minority trade unions have a right to exist in a society that recognises the right to freedom of association is consistent with the South African Constitution, 1996. Despite this space provided by the constitutional framework that is pro-minority interests, South Africa has not taken advantage of the employee participation scheme proffered by the workplace forum. Instead it has sought as submitted in chapter 1 to pursue its quest for a say in the business of the employer through collective bargaining which is adversarial in nature. The collective bargaining framework is the context within which improvements in the protection and promotion of labour rights can be sought.

South Africa's system, with the suggested changes, is better suited to our collective labour law landscape than the systems of the countries covered in this comparative study. The positive elements in the South African system are listed: an outline of organisational rights coupled with the right to strike to boost collective bargaining, the right to freedom of association which is protected; the recognition that all trade unions are entitled to represent their members in individual disputes.

Chapter 8, the conclusion, expresses the writer's opinions in respect of the lessons that can be learned from this comparative study.

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<sup>1282</sup> See Chapter 6 at 2.3 and 2.4.

## Chapter 8 General Conclusion

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### 1. Introduction

The rights to freedom of association, to organise and to engage in collective bargaining are constitutional rights<sup>1283</sup> and are subject to limitation only in terms of section 36 of the Constitution, 1996.<sup>1284</sup> However, the LRA of 1995 permits majority trade unions and employers, as well as bargaining councils, to set thresholds of representivity for the acquisition of organisational rights.<sup>1285</sup>

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<sup>1283</sup> See Chapter 2 at 6.2, 6.3 and 6.4 on the detailed discussion of the three constitutional rights.

<sup>1284</sup> See Chapter 3 at 8.

<sup>1285</sup> See Chapter 6 at 2 and 3.

The primary aim of the study is to offer an exposition of South Africa's organisational rights dispensation and to determine whether the impact of thresholds of representivity on the right to freedom of association of minority trade unions complies with the international norms and conforms to the Constitution, 1996. It was significant that an exposition of the labour law dispensation be provided and that it be contrasted with the constitutional principles as instruments to measure such compliance and conformity.

On the international framework, an exposition on the content and principles relating to the interpretation and application of the Conventions No 87 of 1948 and No 98 of 1949 on the rights to freedom of association, to organise and to engage in collective bargaining was made.<sup>1286</sup> Central and significant in the international framework is the fact that the ILO does not prefer one system of collective bargaining over another.<sup>1287</sup> However, the ILO does clearly point out what will and what will not be regarded as incompatible with the right to freedom of association where a member state has opted for a particular system.

On the constitutional framework, the thesis provided the content of the constitutional labour rights and also significantly the model of democracy espoused by the Constitution, 1996. It has been argued that the constitutional framework applies to all society and institutions and should include the workplace. The common thread in the Constitution, 1996 is that although the majority must be the driving force in decision-making of institutions and the workplace, minority interests still require to be considered and given a voice. Further, the Constitution, 1996 recognises the diversity of South African society and its history by ensuring that the Constitutional Court will have the power to determine when to limit the power commanded by majority entities. This is the context of the constitutional framework that has to be taken into consideration whenever constitutional rights and related principles are at stake. The thresholds of representivity for the acquisition of organisational rights have a limiting effect on the right to freedom of association. The justifiability and extent to which this right is limited is determinable by reference to the constitutional framework.<sup>1288</sup>

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<sup>1286</sup> See Chapter 2 at 3.3., 3.4.

<sup>1287</sup> See Chapter 2 at 4.3.

<sup>1288</sup> See Chapter 5 and 6 for the discussion and analysis of the impact that threshold provisions of the LRA of 1995 have on the organisational rights of minority trade unions.

The comparative analysis of the USA system of exclusive representation, Japan's extremely pluralist model and the German model of co-determination from which South Africa modelled its employee participation provide an international practice dimension for South Africa.<sup>1289</sup> This comparative analysis also reflects upon the weaknesses and strengths of the majoritarian, pluralist systems and workplace co-determination system for South Africa to take lessons from.

This sequence of interrogation serves as a foundation towards answering the main research question of whether the threshold provisions of the LRA of 1995 comply with international norms and conform to South Africa's model of democracy as established by the Constitution, 1996. The answers to these questions provide direction in the consideration of a need for amendments to the relevant and current provisions of the LRA of 1995. Notwithstanding the fact that all of the chapters of the thesis have a conclusion, this general conclusion sums up the findings and conclusions of all the chapters. Finally, the recommendations address the findings on the incompatibility of threshold provisions in respect of the right to freedom of association within the South African context.

## 2. Key Findings

### 2.1. ILO Norms

Chapter 2 outlined the ILO's position regarding the rights of minority trade unions within both a majoritarian and pluralist system of collective bargaining. The ILO has adopted a neutral stance on collective bargaining models followed by members states.<sup>1290</sup> Under both majoritarianism and pluralism the ILO has provided content to instances to be regarded as incompatible with the right to freedom of association principles.<sup>1291</sup> In this regard, the ILO has firstly, provided that the ideal to have a collective voice of workers and to pursue it through majoritarianism should still recognise the right to freedom of association of minority

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<sup>1289</sup> See also Chapter 7 at 2.4 and 3 for the examination of the impact that the exclusive representation system has on trade union rights of minority trade unions.

<sup>1290</sup> See Chapter 2 at 4.2, 4.3 and 5.

<sup>1291</sup> As above.



trade unions insofar as representing their members in individual cases is concerned and for diversity to remain possible.<sup>1292</sup>

Secondly, the ILO cautions that when pluralism is implemented it must not lead to the fragmentation of trade unions and their bargaining power. The belief is that strength is seated in unity among workers, and that pluralism that leads to a proliferation of trade unions should be prevented.<sup>1293</sup> Insofar as pluralism is concerned, the concept must not be seen as one and the same concept as proliferation.

Thirdly, the ILO regards thresholds of representivity as acceptable in the sphere of collective bargaining as long as clear requirements are established in order to prevent bias and abuse.<sup>1294</sup> The ILO has adopted the approach that in any country where a majoritarian model has been implemented and where thresholds of representivity apply minority trade unions that do not meet the set threshold at least should have the right to represent their members in grievance and disciplinary proceedings.<sup>1295</sup>

Finally, there is a current academic debate whether ILO norms should be viewed as “hard” or “soft” law. This thesis adopts the approach that the cases of the CFA and the Committee of Experts on the Application of Conventions and Recommendation (CEACR) should not be deemed to be mere soft law. South Africa, in terms of section 39 of the Constitution, 1996 indirectly supports the view that the hard law approach should be followed in respect of cases of the supervisory bodies. This understanding is supported by the peremptory nature of the provision that South Africa is under an obligation to consider international law in its interpretation of legislation. The Constitutional Court confirmed in both *NUMSA v Bader Bop*<sup>1296</sup> and *AMCU v Chamber of Mines*,<sup>1297</sup> that the case law of the CFA and CEACR should be accepted as authority in South Africa. The

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<sup>1292</sup> Chapter 2 at 3.5.

<sup>1293</sup> Chapter 2 at 4.3.

<sup>1294</sup> Chapter 2 at 4.2.

<sup>1295</sup> *Digest of Decisions* (2006) para 974. This right of minority trade unions to represent members in the disciplinary or grievance process is the least that the ILO says should be allowed in a majoritarian system of collective bargaining.

<sup>1296</sup> [2003] 2 BCLR (CC) para 34.

<sup>1297</sup> (2017) 38 ILJ 831 (CC) para 52.

provisions of the LRA of 1995 therefore should not deny the right of minority trade unions as already recognised by the ILO supervisory bodies.<sup>1298</sup>

## 2.2. Constitutional Democracy Model and Minority Interests

Chapter 3 outlined the model of democracy as advanced by the Constitution, 1996 and how it represents an endeavour to move South Africa away from the vestiges of its inequitable past and to promote diversity and protecting and recognising the vulnerable.<sup>1299</sup> This chapter reached the following findings and conclusions.

First, in *Democratic Alliance v Masondo NO and another*<sup>1300</sup> the Constitutional Court held that South Africa's form of democracy unambiguously constitutes a pluralist variation on majoritarianism. This model of democracy promotes and protects minority interest groups, even though it recognises the right of the majority to rule.<sup>1301</sup>

Secondly, political parties with a 1% vote are able to secure a seat in parliament and to participate proportionally in the organs of government and not to face high thresholds that prevent their participation. The premise and content of constitutional democracy not only impacts on political democracy but all institutions of society, of which the workplace is a part. Therefore, there is a need to fully recognise minority interests and to make sure that diversity remains possible as reflective of the diversity of South African society.<sup>1302</sup> The context provided by South Africa's apartheid past and its constitutional democracy being born out of negotiations with minority political entities being included is significant. In *Masondo*<sup>1303</sup> the Constitutional Court endorsed the principle of pluralism and the inclusion of minority political parties when decisions on the future of the country are made.

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<sup>1298</sup> This is the international norm that is consistent with the decisions of the ILO committees to point out that minority trade unions must be allowed to exist and to represent members in grievance proceedings. The Constitutional Court in *Bader Bop* at para 34 and *AMCU* at para 52. See also at Chapter 6 at 2.4.

<sup>1299</sup> See Chapter 2 at 5.4 where the rationale for the need to protect vulnerable elements in society is examined in detail.

<sup>1300</sup> 2003 2 SA 413 (CC) 426 para 42. This case is discussed in Chapter 3 at 4.5 and serves to provide an exposition of the content of constitutional democracy.

<sup>1301</sup> As above.

<sup>1302</sup> See Chapter 3 at 3.

<sup>1303</sup> 2003 (2) SA 413 (CC) para 42. See Chapter 3 at 4.5 for the discussion of model of democracy espoused by the Constitution, 1996.

Fourthly, the right to freedom of association is protected and promoted by the Constitution, 1996 to act as a bulwark against domination and monopolising the political space by political majorities. It is this same monopoly principle that the principles of constitutional democracy and pluralism seeks to infuse into the workplace to ensure that unrepresentative trade unions enjoy freedom of association and challenge the hegemony of majority trade unions.

Finally, the rights to freedom of association, to organise and to engage in collective agreements are labour rights that are protected by the Constitution, 1996. The Constitution, 1996, does not provide for the limitation of the right to freedom of association with reference to numbers. However, section 18 of the LRA of 1995 effectively endorses thresholds which in practical terms limit the right to freedom of association.<sup>1304</sup>

### 2.3. The Ministerial Task Team Setting the Foundation

Chapter 4 covered South Africa's historical developments and the following findings were made. First, the Industrial Court developed a duty to bargain in good faith, however, it did not endorse a clear right to strike.

Secondly, the decisions of the Industrial Court were not consistent insofar as the acquisition of organisational rights is concerned. However, key in its decisions was the recognition of the right to freedom of association with reference to the acquisition of organisational rights for effective collective bargaining.

Thirdly, the need for reforming labour law in South Africa led to the establishment of the Ministerial Task Team. The Ministerial Task Team in support of collective bargaining recommended organisational rights and the right to strike be introduced into the labour relations framework. Various options regarding the acquisition of organisational rights were explored. However, the Ministerial Task Team decided that trade unions should be accorded organisational rights based on their representivity. The Ministerial Task Team introduced a hierarchical structure in the

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<sup>1304</sup> See Chapter 6 at 2.2. and 2.3. See also Van Eck *ILJ* (2017) 1509 for a detailed discussion on the Constitutional Court judgement of *AMCU* and its effect on the definition of the workplace and minority trade unions' right to strike.

enjoyment of organisational rights. The majority trade union was to acquire all organisational rights, the sufficiently representative trade unions some and minority trade unions none.

Finally, the work of the Ministerial Task Team effectively resulted in the production of draft labour legislation that effectively subjects the enjoyment of the right to freedom of association to the determination by parties to collective bargaining or the bargaining council through collective agreement. In so doing, the organisational rights dispensation is structured such that parties to collective bargaining are empowered in terms of section 18 or 20 of the LRA of 1995 to enter collective agreement that keep rivals out of the workplace.

#### 2.4. Definition of “Workplace” and Statutory Organisational Rights

Chapter 5 analysed two significant aspects, namely the definition of the workplace and the statutory organisational rights dispensation of the LRA of 1995. The key findings were as follows.

First, the definition of the workplace in terms of the LRA of 1995 in relation to the public sector is dependent on the purpose it serves.<sup>1305</sup> This means that the purpose is dependent on whether it relates to collective bargaining or to some other purpose. In order to alleviate the challenges faced by unrepresentative trade unions and to have them gain organisational rights in pursuit of their right to freedom of association it was mooted that the collective bargaining purpose should exclude the acquisition of organisational rights and should have these falling under the category “other purposes.” In this way, the setting of low thresholds and ease of access to these by unrepresentative thresholds where they meet the low threshold will be possible.

Secondly, in line with this definition as applicable in the public sector, it was also mooted that the private sector should also follow the same route and define the workplace by reference to the purpose it serves in the same manner. In this regard, the private sector would be for purpose of collective bargaining refer to the

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<sup>1305</sup> See Chapter 5 at 2.

operations of the employer, whilst for other purposes that include the acquisition of organisational rights, the workplace will refer to the individual places of work.<sup>1306</sup>

Thirdly, inasmuch as organisational rights coupled with the right to strike were introduced to bolster collective bargaining, policy makers have not provided unrepresentative trade unions with a mechanism to acquire organisational rights. The Constitutional Court in *Bader Bop* was able to resolve this vacuum, albeit section 200 of the LRA of 1995 already arguably provided for same right to represent members without reference to threshold requirements. It is the finding of the thesis that organisational rights serve both the right to represent members in collective bargaining and the right to represent them in individual disputes.<sup>1307</sup> There is also recognition that the right of minority trade unions to exist makes diversity possible and majority trade unions are put on their toes lest they literally drop the ball on interests of workers.

Fourthly, the significance of the interpretation of “workplace” by the Constitutional Court in *AMCU* is worthy of mention as it drew starkly on the distinction to treat collective bargaining on substantive issues on improvement in conditions of employment of workers and the acquisition of organisational rights. Where the issue relates to the former, the right to strike is limited. However, where the issue concerns organisational rights, the right to strike is not limited. This is arguably in line with the mooted emphasis on purpose to define the workplace.

## 2.5. Unrepresentative Trade Unions and Organisational Rights

Chapter 6 explored the acquisition of organisational rights by minority trade unions through collective bargaining and the following findings were made. First, it is accepted that South Africa follows a pluralist system of collective bargaining that is strongly inclined towards majoritarianism.

Secondly, within this system the majority trade union and the employer or a bargaining council may conclude a section 18 agreement that sets thresholds.<sup>1308</sup>

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<sup>1306</sup> See Chapter 5 at 3.

<sup>1307</sup> See Chapter 6 at 2 and 3. Even though statutory organisational rights are located in the collective bargaining Chapter of the LRA of 1995, these rights may be acquired by other means, as discussed in Chapter 6 in relation to the right to freedom of association.

<sup>1308</sup> See Chapter 6 at 2.

These thresholds have the effect of excluding non-majority trade unions from the acquisition of organisational rights, impacting on the right to exist and to represent members in individual disputes and serving to make diversity in the workplace possible. In this regard, the Constitutional Court, in both *Bader Bop*<sup>1309</sup> and *AMCU*<sup>1310</sup> effectively held that a minority trade union's right to freedom of association may not be limited to the extent that it denies it the right to exist and to represent its members in grievance and disciplinary proceedings. This it held is in line with international norms.

Fourth, section 20 of the LRA of 1995 provides that "nothing" in the Act precludes a minority trade union from concluding a collective agreement that regulates organisational rights. This provision is available to both representative and unrepresentative trade unions to negotiate for the regulation of organisational rights in the way they see fit. Unlike section 18 of the LRA of 1995 which allows for the setting of thresholds in relation to only three organisational rights, section 20 can seek to set thresholds for all organisational rights and unrepresentative may acquire those that they require. In a positive development, the Labour Appeal Court in *SA Correctional Services Workers Union v Police and Prisons Civil Rights Union*<sup>1311</sup> held that section 20 can override section 18 and that it is permissible to conclude two collective agreements pertaining to organisational rights.

## 2.6. The Comparative Analysis

Chapter 7 outlined the collective bargaining systems of the United States of America (USA), Japan and Germany. In relation to the USA the following key findings were made. First, the USA's labour relations model which excludes minority trade unions from being recognised as bargaining agents resembles a strict majoritarian system of collective bargaining.

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<sup>1309</sup> (2003) 2 BLLR 103 (CC) paras 40 and 41. See also Chapter 5 at 5.4 where the Bader Bop CC is discussed in detail in terms of how it protects and promotes the right to freedom of association while recognising the status of a majority trade union with regard to the acquisition of organisational rights including collective bargaining rights.

<sup>1310</sup> (2017) 38 ILJ 831 (CC) at paras 52-54. See also Chapter 6 at 2.4, where the Constitutional Court case is discussed in more detail reflecting a similar attitude towards minority trade union as in *Bader Bop*.

<sup>1311</sup> (2017) 38 ILJ 2009 (LAC) paras 42-45.

Secondly, this system of exclusive representation excludes minority trade unions from exercising organisational rights and their right to freedom of association. This exclusion makes it extremely difficult for a start-up trade union to establish itself.

Thirdly, the reason the USA has not ratified Convention No 87 of 1948 is that the Convention awards recognition to minority trade unions which national legislation does not provide for.<sup>1312</sup>

In relation to Japan the following findings were made. First, Japan recognises both minority and majority trade unions in the enterprise for purposes of collective bargaining.<sup>1313</sup>

Secondly, the Japanese labour relations system is an example of extreme pluralism and could lead to the undesired phenomenon of the proliferation of trade unions.

Thirdly, the ILO frowns upon splintered systems such as Japan's. The ILO confirms that "excessive representational fragmentation" has the effect of limiting workers' collective efforts.<sup>1314</sup>

In relation to Germany the following findings were made. Firstly, the labour relations system is premised on two systems. On the one hand, the system entails co-operation between the employer and the employees on matters pertaining to management of the workplace, including representation of members in disciplinary hearings. On the other, it entails adversarial relations between the trade unions and the employer on matters pertaining to negotiations for improvement of conditions of employment, such as wages.

Secondly, in the case of disciplinary and individual proceedings the works council provides representation. The effect hereof in individual cases of employees in the workplace such as grievances and disciplinary proceedings, thresholds of

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<sup>1312</sup> See Chapter 7 at 3. The USA cases referred to the ILO have led to recommending the US Congress to bring their laws in line with the principles of freedom of association

<sup>1313</sup> Wilson *LLA/CLJ* (1987) 594. See also Araki (2002) 57 where the author mentions that agreements apply only to the parties that have entered into them.

<sup>1314</sup> *Digest of Decisions* (2006) para 1097.

representivity to determine the acquisition of organisational rights by trade unions is irrelevant.

Thirdly, the German system does not preclude having two systems operating side by side. On the one hand the system can accommodate day to day management issues in the hands of a works council. On the other hand, collective bargaining takes place about substantive issues of collective bargaining such as wage negotiations.

### 3. Conclusions: Answering the Research Questions

#### 3.1. Does South Africa's Labour Legislation Comply with International Norms?

The first question of the study is whether the setting of thresholds provided for in the LRA of 1995 pertaining to organisational rights conforms to international norms.<sup>1315</sup> The ILO adopted a neutral stance regarding the choice of collective bargaining systems by member states, however it emphasised that majoritarian systems are not incompatible with freedom of association. The ILO added a significant qualification, that all member states that implement a majoritarian system at the very least should allow space for minority trade unions to exist and their rights to represent members in grievances should be respected. The difficulty is how then will these minority trade unions represent members in individual cases if the right to elect is an organisational right they cannot exercise?

The starting point should be that section 14 of the LRA of 1995, which regulates the election of trade union representatives, grants this right only to majority trade unions. As is argued in chapter 5 this provision is in clear contravention of the approach by the CFA and the CEACR. A collective agreement to this effect would reflect that sufficiently representative and minority trade unions may be excluded from exercising the right to elect persons to represent their members in grievance and disciplinary proceedings. This is a misaligned with international norms.

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<sup>1315</sup> See Chapter 1 at 3.



Secondly, section 18 of the LRA of 1995 makes provision for the setting of thresholds. Such agreements may result in excluding minority trade unions from exercising organisational rights such as the right to represent their members in grievance proceedings.<sup>1316</sup> The current wording of sections 18 and 20 of the LRA of 1995 has resulted in conflicting court decisions in South Africa, some of which are in conflict with case law of the CFA and the CEACR.<sup>1317</sup> Chapter 6 argues that the wording of these sections should be amended to ensure compliance with the decisions of the ILO's expert committees. The thesis therefore concludes that the threshold provisions of the LRA of 1995 are contrary to international norms. A case in point is that the incorrect interpretation of international norms led to the incorrect decision in *Police and Prisons Civil Rights Union v Ledwaba NO and others*.<sup>1318</sup> It is a positive development that the decision was subsequently overturned by the Labour Appeal Court in *South African Correctional Services Workers Union v Police and Prisons Civil Rights Union*.<sup>1319</sup>

### 3.2. Does Labour Legislation Conform to the Constitutional Model of Democracy?

The second main question of the study is whether South Africa's labour legislation conforms to the constitutional model of democracy.<sup>1320</sup> As was explained the LRA of 1995 is strongly inclined towards majoritarianism.<sup>1321</sup>

Section 14 of the LRA of 1995 not only precludes minority and sufficiently representative trade unions from acquiring the statutory right to appoint representatives, but section 18 permits majority trade unions and employers to conclude threshold agreements which potentially severely limit the rights of minority trade unions to exist and to be in a position to represent their members in individual cases and to effectively exercise their right to freedom of association.

As indicated in chapter 3, the Constitution, 1996 adopts a democratic model which makes provision for the existence of minority political parties. Further this context

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<sup>1316</sup> See Chapter 2 at 3.2 and Chapter 6 at 2.

<sup>1317</sup> See Chapter 3 at 4 and Chapter 6 at 2.

<sup>1318</sup> [2013] 11 BLLR 1137 (LC)

<sup>1319</sup> 38 *ILJ* 2009 (LAC).

<sup>1320</sup> See Chapter 1 at 3.

<sup>1321</sup> Brassey et al (2006) A3:23-24. See also Chapter 6 at 2.3.

and the context provided by the Constitutional Court minority interests where they are unjustifiably threatened and limited would not be permitted. The Constitutional Court in both *Democratic Alliance v Masondo NO and another*<sup>1322</sup> and *S v Makwanyane*<sup>1323</sup> endorsed democracy in the context of South Africa's constitutional dispensation. This context is critical in providing the appropriate context for the exercise of democracy in the workplace as aspired by the LRA of 1995.

From the above it is clear that there is a disjuncture between the model of democracy as espoused by the Constitution, 1996 and South Africa's model of workplace democracy. It is suggested that the structure for the granting of organisational rights, sections 18 and 20 pertaining to threshold agreements and the definition of workplace, be amended to rectify the non-alignment with the model of democracy espoused by the Constitution, 1996.

#### 4. Recommendations

##### 4.1. Introduction

As a member of the ILO, and having adopted a modern Constitution, 1996, South Africa is obliged to adhere to international norms and fundamental principles. Central to this study is the protection and the right to freedom of association. South African labour legislation recognises this right and therefore it is necessary to fine tune national laws so that they adhere to both these international standards as obligated by the Constitution, 1996. This thesis recommends that three aspects of the LRA of 1995 should be adapted. Even though the focus of the thesis falls on threshold agreements, the recommendations are broader and address other aspects relating to the regulation of organisational rights.

The first recommendation concerns amendments to sections 18 and 20 requirements on threshold agreements. The second deals with the need to have thresholds for the acquisition of organisational rights set at low levels and in

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<sup>1322</sup> 2003 (2) SA 413 (CC).

<sup>1323</sup> See the discussion of the Constitutional Court cases of *Democratic Alliance v Masondo NO and another* 2003 (2) SA 413 (CC) and *S v Makwanyane* 1995 (3) SA 391 (CC) on multi-party and constitutional democracy in Chapter 3 at 4.4 and 4.5 democracy.

compliance with the criteria set by the ILO. Finally, the thesis recommends that the definition of workplace should be adapted in line with the premise on organisational rights acquisition as distinguishable from collective bargaining on substantive issues related to improvement in conditions of employment.

#### 4.2. Organisational Rights for Registered Trade Unions

Majority trade unions acquire all organisational rights, namely access to the workplace, trade union subscriptions, leave for trade union representatives, the election of trade union representatives and disclosure of information. From this situation, it is clear that minority and sufficiently representative trade unions are not entitled to elect trade union representatives or at least to have them recognised. If unrecognised the election of such a trade union representative would be insignificant.

A trade union must be in a position to exercise the right to elect representatives before members can be represented in grievance and disciplinary proceedings. Without this organisational right being accorded to minority trade unions the right to represent members in individual disputes in pursuit, *inter alia*, of the right to freedom of association is not possible. The organisational rights are clearly interrelated and one right depends on the other. It is for that reason that it becomes significant that the right to elect representatives be accompanied by the right to access the premises where the employee is appearing, the right to union leave in order not to prejudice the representative and the right to the disclosure of information to use during the appearance and thus represent the member effectively. These organisational rights are not only useful in the context of collective bargaining alone, but also in the context of representing members in individual disputes.

Even though minority trade unions may not have the right to engage in collective bargaining, they should have the right to acquire organisational rights that will enable them to exist and to enjoy the right to freedom of association.<sup>1324</sup> The right to elect trade union representatives is a pre-requisite for the exercise of the right to represent members in individual disputes. The thesis recommends that a

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<sup>1324</sup> See Chapter 2 at 3.1 and Chapter 5 at 5.4.

relatively low threshold be introduced for the election of trade union representatives, as well as all the associated organisational rights. This change would be in line with both international standards and the constitutional framework.<sup>1325</sup> Clearly the idea of a hierarchy of organisational rights is not the desired route, as all organisational rights are interrelated and only the purpose determines which right is required more than the other at any point in time. Are these organisational rights to be used to advance the right to freedom of association or are they to advance the right to collective bargaining?<sup>1326</sup>

#### 4.3. Thresholds of Representivity Provisions in the LRA of 1995

It is recommended that amendments be made in respect of sections 18 and 20 with the intention to ensure the following:

- (1) to cover all organisational rights rather than three as is the case currently with section 18 of the LRA of 1995;
- (2) section 18 to be available to an unrepresentative trade union to enter into agreement with an employer to exercise organisational rights;
- (3) where there is a threshold agreement, to have it premised on a low threshold;
- (4) to protect and promote the right to freedom of association of trade unions;
- (5) to permit unrepresentative trade unions that at least meet a low threshold to represent their members in individual disciplinary and grievances proceedings.

In this regard the amendments are to reflect the following:

- Section 18 must be changed to provide for the establishment of a low threshold agreed to by parties and that is precise, pre-established and objective.
- Section 18 is to cover all organisational rights as they are interrelated and to premise them on serving both the collective bargaining purpose as well as the right to freedom of association.
- Section 20 to be removed as the section 18 changes accommodate for the accommodation of all organisational rights instead of three, namely, right to access, to stop order facilities and the right to leave for trade union representatives.

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<sup>1325</sup> See Chapter 3 at 5.3.

<sup>1326</sup> See Chapter 5 at 2 and 3.

#### 4.4. Redefining the Concept of “Workplace”

The current definition of “workplace” as per section 213 of the LRA of 1995 in the context of the public service reflects upon two types of purposes. The purposive approach in defining the workplace can also be appropriate for the private sector definition. In the public sector, the definition of the workplace is nuanced in as far as it makes provision for two descriptions, one for the purpose of collective bargaining and the other for all other purposes. In the context of the collective bargaining purpose, the workplace would entail the State as employer and in the private sector would entail the total aggregate of individual workplaces of the employer. In the context of the other purposes which are mooted to include organisational rights the workplace would entail in relation to the public service the individual national and provincial departments. The low threshold for acquisition of organisational rights will in this way apply to these individual national and provincial departments. In the context of the private sector, the workplace in respect of the acquisition of organisational rights relation will entail the individual operations of the employer. Glaringly in the private sector the element of independence is removed make the definition of workplace in the private sector consistent with the one in the public service.

The new recommended section 213 definition of “workplace” is as follows:

- “(a) in relation to the public service-
- (i) for the purpose of collective bargaining and related disputes, the registered scope of the Public Service Co-ordinating Bargaining Council or a bargaining council in a sector in the public service, the national or provincial department as the case may be; or
  - (ii) for dispute resolution and any other purpose, including the acquisition of one or more organisational rights, an office or the place where the employees work in the national department, provincial administration, provincial department or organisational component contemplated in section 7(2) of the Public Service Act, 1994 (promulgated by Proclamation No. 103 of 1994), or any other part of the public service that the Minister for Public

Service and Administration, after consultation with the Public Service Coordinating Bargaining Council, demarcates as a workplace;<sup>1327</sup>

(b) in the private sector –

(i) and all other instances, if an employer carries on or conducts two or more operations, all the operations taken together that, constitutes the workplace for that operation for purposes of collective bargaining and related disputes. If an employer conducts a single operation the workplace refers to that individual operation for purposes of collective bargaining.

(ii) for dispute resolution and any other purpose including the acquisition of one or more organisational rights, the individual place where employees work in connection with an operation, constitutes a workplace.”<sup>1328</sup>

The implementation of these recommendations may address the shortcomings of the LRA of 1995 which pertain to organisational rights acquisition and the impact of threshold agreements on the right to freedom of association of minority trade unions in particular. It is further submitted that the suggested changes should be considered and debated through forums of social dialogue, in which international norms and constitutional values serve as the guiding light during deliberations.

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<sup>1327</sup> See Chapter 5 at 2 and 5 where an examination of the definition found it lacking in not providing explicitly for the inclusion of the acquisition of organisational rights as included in all other instances and clearly making their acquisition distinguishable from the collective bargaining purpose.

<sup>1328</sup> As above.

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<b>Other Resource Tools from the Internet</b>
1 <a href="http://www.academicjournals.org/AJBM">www.academicjournals.org/AJBM</a>
<a href="http://www.anc.org.za">www.anc.org.za</a>
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