A critique on strike ballots in South Africa

by

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Summary

The Labour Relations Amendment Act of 2018 (LRAA) came into force on 1 January 2019, bringing about an amendment to section 95(5)(q) of the Labour Relations Act (LRA). The amendment stated that the "ballot" must now include any system of voting by members of the trade union that is recorded and is in secret.

The Department of Labour has cautioned trade unions and employers' organisations to use the 180-day transitional period from the commencement of the LRAA to align their constitutions and provide for balloting, failing which punitive measures may be imposed by the Registrar, including the cancellation of registration, de-registration and the placement under administration of the guilty party.

There is, however, currently no express provision that permits that a strike or lock-out may be interdicted because a trade union or employers' organisation has failed to hold such a ballot. However, the amendment, if properly enforced, should bring about a greater form of responsibility and administration prior to strikes.

The key focus of this research is to review the pre-strike ballot alignment with the ILO's norms of freedom of association; to observe the impact of the pre-strike ballot on the constitutional right to strike; to review our case law on pre-strike ballots; to observe if the government is achieving its objectives regarding pre-strike balloting and/or determine if there are any positives objectives.

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List of Abbreviations

ANC	African National Congress
CC	Constitutional Court
CCMA	Commission for Conciliation Mediation and Arbitration
CODESA	Convention for a Democratic South Africa
COSATU	Congress of South African Trade Unions
EEA	Employment Equity Act, 1998
FFCM	Fact Finding and Conciliation Commission
ILO	International Labour Organisation
LAC	Labour Appeal Court
LC	Labour Court
LRA	Labour Relations Act, 1995
LRAA	Labour Relations Amendment Act, 2018
NEDLAC	National Economic Development and Labour Council
NEHAWU	National Education, Health and Allied Workers Union
NGO	Non-Government Organisation
NUMSA	National Union of Metal Workers of South Africa
SACP	South African Communist Party
SANDU	South African National Defence Union
TULCRA	Trade Union and Labour Consolidation Act, 1992
TUA	Trade Union Act, 2016
UN	United Nations

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A CRITIQUE ON STRIKE BALLOTS IN SOUTH AFRICA

CHAPTER 1: INTRODUCTION

"In each country the relations between management and labour are organised under the influence of strong political traditions, traditions connected with the role played by the organisations on both sides as political pressure groups promoting legislation, and as rule making agencies through the procedures of collective bargaining."

– Otto Kahn- Freund[1]

1. BACKGROUND

It is common knowledge that South Africa was liberated, among other things, through strikes and protest action in the form of boycotts and stayaways at the centre of the uprisings.[2] The labour movement has played a militant role in the struggle for liberation, hence industrial relations were polarised[3] and played a key role in the negotiations for the new democracy. These developments created a 360-degree shift from the old LRA[4] that criminalised strikes,[5] to the current dispensation of protected and unprotected strikes. Therefore, these developments yielded the pressure that abolished strike prohibition.[6] With the dawn of the new democracy and abolishment of apartheid, it was assumed that labour peace would follow, but that was not the case as South Africa is still grappling with labour instability.

Cheadle *et al.*[7] indicate that the Industrial Conciliation Act, which was the legislation recognising non-African unions' collective bargaining process and strikes, had

[1] Sir Otto Kahn-Freud was a scholar of labour law and comparative law. He was a Professor at the London School of Economics and University of Oxford. This writing is available in: O Kahn-Freud, 'On Uses and Misuses of Comparative Law', 37 MOD. L. REV. 1 (1974) 20.
[2] www.cosatu.org.za.
[3] Du Toit 'Industrial democracy in South Africa`s transition' 1997 Law, *Democracy and Development* 41.
[4] Labour Relations Act 28 of 1956.
[5] Mischke (1993) *JBL* 78; Rycroft (1989) *JCJ* 283-285- calling for decriminalization and review of criminal sanctions.
[6] Cheadle *et al.* (2017) 1.
[7] Cheadle *et al.* (2017) 3.

compliance provisions that provided for criminal sanctions in the event of non-compliance.[8] This was the era that could be characterised as the anti-strike era.

Myburgh[9] confirms that at that time, when the workers participated in any strike, the captains of industry resorted to dismissing them. He further argued that this enabled the captains of industry to have a powerful weapon to use against the workers. The old LRA[10] determined the legality of the strike through the process of balloting. For instance, the employer could halt an ongoing strike on the basis that it was not compliant with the procedural requirements of balloting.[11] The old LRA seemed to have restricted the workers' freedom to strike.

Hepple *et al.* indicate that the standards applied by different countries to strikes depend on the political and socio-economic conditions prevailing.[12] In the South African context the right to strike is a product of activism by various trade union movements in the struggle for liberation and of negotiations.

After the era of the old LRA, the right to strike was entrenched in the Constitution[13] and it was further enacted in the current Labour Relations Act (the LRA).[14] Van Niekerk *et al.*[15] argue that the right to strike is fundamental even though it is destructive to the economy, and that such destruction is necessary. The assertions made by Van Niekerk *et al.* stem from the decisions of the Constitutional Court *In re Certification of the Constitution*[16] and *NUMSA v Bader Bop*[17] cases wherein the court held that the right to strike is a fundamental right in the current jurisprudence.

It is crucial to note that the right to strike is an essential component of the process of collective bargaining.[18] In most cases the workers resort to strike action to raise their concerns to create equal bargaining power with the employer. However, in many cases there have been unrest, violence and death during strikes as evidenced in the

[8] Cheadle *et al.* (2017) 3.
[9] Myburgh (2004) ILJ 964.
[10] Section 65(2)(b) Labour Relations Act, No 28 of 1956; Mischke (1993) *JBL* 76.
[11] Rycroft in Hepple *et al.* (2016) 96.
[12] Hepple *et al.* (2016) 13.
[13] Section 23 of the Constitution.
[14] Section 64 of the Labour Relations Act of 1995.
[15] Van Niekerk *et al.* (2019) 449.
[16] *Ex parte Chairperson of the Constitutional Assembly*: In re Certification of the Constitution of the Republic of South Africa (1996) *ILJ* 821 (CC).
[17] *National Union of Metalworkers v Bader Bop (Pty) Ltd [2003] 103 (CC).*
[18] Myburgh (2004) *ILJ* 968.

Marikana disaster.[19] This is confirmed by the Department of Employment and Labour (Department)[20] to the extent that it led to the President of the country calling for social dialogue to deal with the conflict in labour relations. The Department`s annual report[21] stated that "this call was made in the State of the Nation Address in 2014 and this was followed by Labour Relations Indaba held 4 November 2014".

Godfrey *et al.* indicate that the aforesaid dialogue culminated in agreements in February 2017, one of which took the form of a draft Code of Good Practice on Collective Bargaining, Industrial Action and Picketing, while other agreements focused on the National Minimum Wage.[22] This research would investigate the Industrial Action element of these agreements that culminated in strike law reforms. Consequently, "the requirement that unions must conduct a ballot of its members is amended significantly".[23]

The fundamental reform came in the form of the Labour Relations Amendment Act 8 of 2018 (LRAA)[24] and its accompanying Guidelines.[25] However, the Guidelines are of concern to some,[26] and it has been argued that they resemble the old LRA, which prohibited the right to strike.[27] This statement will be explored in detail in Chapter 4 of this research.

As can be predicted, not all writers would agree that strike balloting resemble suppression of the right to strike. Botha has demonstrated this by proposing, among other things, that a "possible solution to lengthy, and/or violent strike, lies in the call to reintroduce strike ballots".[28] He further supports a compulsory strike ballots system or compulsory arbitration process as a solution to the strike law challenge. Other authors strongly condemn stricter regulations as the solution, and instead propose elimination

[19] Godfrey *et al.* (2018) *ILJ* 2162.
[20] Department of Labour Annual Report 2018/19 (9-10).
[21] fn 20.
[22] Godfrey *et al.* (2018) *ILJ* 2163.
[23] Godfrey *et al.* (2018) *ILJ* 2172.
[24] Section 19 of the LRAA 2018.
[25] Guidelines on Balloting for Strikes or Lockouts issued in terms of s 95(9) of the LRA.
[26] Godfrey *et al.* (2018) *ILJ* 2172.
[27] Hepple *et al.* (2016) 97.
[28] Botha (2015) De Jure 344.

of dysfunctional barriers to the right to strike.[29] Creighton *et al.*[30] identify the South African strike ballot system as a "light touch", an indication that it is a policy choice.

Fergus and Jacobs[31] reviewed the strike ballot system in *National Union of Metalworkers of SA v Mahle Behr SA (Pty) Ltd* (*Mahle Behr*). They identify anomalies in the *Mahle Behr* decision. It appears that the Department contributed to the anomalies.[32] The workers did not take kindly to this fact, especially as this affects the right to strike, as will be reviewed in more detail in Chapter 4 of this research.[33]

The International Labour Organisation (ILO) has no explicit provisions regarding the right to strike.[34] However, various Conventions will be explored in Chapter 2 of this research which confirms that there is indirect provision for the right to strike in the ILO. This unexpressed right to strike provided for by the ILO is not immune to challenges and controversy.[35] It seems, however, that the dust has settled and that not only the Conventions, but also the founding principles of the ILO Constitution and the Declaration of Philadelphia support the notion of the right to strike.

It is now trite that the LRA as set out is based on the principle of majoritarianism.[36] It is difficult to understand how workers would benefit from secret ballot provisions in their current form in South Africa as even their enforcement is in doubt.[37] This prompted a review of Rycroft's view that the failed 2012 Amendment Bill on strike ballots would have been in conformity with a 1994 statement by ILO.[38]

Although the Labour Appeal Court has recently protected the right to strike where the strike ballot was in dispute,[39] there are various schools of thought about the entire concept of strike balloting. The pre-strike balloting in its current form is far from being the solution for the strike law challenges, and this research will reflect on that.

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[29] Du Toit & Ronnie (2012) Acta Juridica 196.
[30] https://research.monash.edu/en/publications/strike-ballots-democracy-and-law
[31] Fergus and Jacobs (2020) *ILJ* 757.
[32] Notice from Buthelezi M- Department of Employment and Labour, 19 Sep 2019.
[33] www.cosatu.org.za.
[34] Kujinga and Van Eck (2018) *PER /PELJ* 1-34.
[35] Hepple *et al.* (2016) 40-43.
[36] Van Eck and Newaj (2020) *CCR* 331-351.
[37] https://www.labourguide.co.za/recent-articles/2637-strike-ballots-the-secret-s-out
[38] Rycroft (2015) 36 *Ind JL* 9-10. The author reflects that the strike ballot requirements that were removed in the 2012 Bill were no threat as they required majority of the workers who voted, not of the entire union membership.
[39] (2020) 41 *ILJ* 2093 (LAC).

2. RESEARCH QUESTIONS

This dissertation will consider the following research questions:

1.1 Are the South African legislative provisions regarding strike ballots in synchrony with the constitutional right to strike?
1.2 Will the requirements of pre-strike balloting contribute to trade union internal democracy?
1.3 What lessons can be gained from the international labour law?
1.4 What can South Africa learn from foreign jurisdiction, particularly the United Kingdom?

3. SIGNIFICANCE OF THE STUDY

It is an open secret that labour unrest, in particular protracted strikes, affect the economy negatively.[40] It seems though that the solution does not rest in stricter restrictions, but in other considerations like a decent work agenda which needs to feature in strike law.[41]

This research is significant in the South African environment where there is long[42] and violent strikes.[43] The Department`s annual report reflects that the crisis persists.[44] The Department`s entities like the CCMA and NEDLAC can study this research as they are involved in policy making and dispute resolution. It was recently observed that the Minister was proposing a section 150 intervention to deal with the Sibanye Stillwater strike.[45]

The Department`s 2019/20 annual report contained no detail in terms of strike statistics, the attendance by trade unions during strike ballot consultations was shown to be of concern to the Department.[46] There are various authors who have pointed out that trade unions have rejected the amendments since 2012.[47] As far as the most recent amendment is concerned, the South African Federation of Trade Unions (SAFTU) referred to it as “new ways to restrict the workers’ constitutional right to

[40] Godfrey *et al.* (2018) *ILJ* 2162.
[41] Du Toit & Ronnie (2012) Acta Juridica 217.
[42] CCMA was recently called in to intervene in Sibanye-Stillwater
[43] Tenza 2021 *SA LJ* 181; Manamela and Budeli (2013) *CILSA* 322; Van Eck and Kujinga 2017 *PELJ* 1-26.
[44] Department of Employment and Labour Annual Report 2018/19 (9-10).
[45] Minister Nxesi engages stakeholders in the Sibanye Stillwater strike.
[46] Department of Employment and Labour 2019/20 annual report.
[47] Rycroft (2015) 36 *Ind JL* 7.

strike".[48] All other federations who are members of NEDLAC referred to the amendments as a "victory in defence of workers' rights to strike and collective bargaining".[49]

Therefore, this study will examine and recommend avenues to be explored in what some call "contested terrain"[50] and others questioning if "debating the bills: rigorous or scoring points?"[51] It cannot be assumed that all is well with the strike balloting system, especially as there are practices like "implicit limitations on strikes."[52]

4. RESEARCH METHODOLOGY

The study follows a desk-top and comparative approach to the pre-strike ballot legislative framework. The study reviews various sources including, national legislation, national case law, electronic sources, textbooks as well journal articles. International law and foreign law are reviewed with specific observation of UK law pertaining to pre-strike balloting and the freedom to strike.

The comparative study taken by this study attempts to be a "functional instead of institutional approach,"[53] to "be beyond terminology and traditional categories,"[54] and to be "beyond hard law towards soft law,"[55] tapping from Weiss who holds that:[56]

> "Similar effects achieved in one country by the judicial system might be achieved in another country by mechanisms of alternative dispute resolution or by administrative bodies."

5. OVERVIEW OF THE CHAPTERS

This research will be set in six chapters, as proposed:

[48] Godfrey *et al.* (2018) *ILJ* 2172.
[49] Godfrey *et al.* (2018) *ILJ* 2165.
[50] Fergus and Jacobs (2020) *ILJ* 757.
[51] Godfrey *et al.* (2018) *ILJ* 2165.
[52] Rycroft (2012) *Ind JL* 822.
[53] Weiss (2003) *Comp Labor Law & Pol`y J* 172.
[54] Weiss (2003) *Comp Labor Law & Pol`y J* 173.
[55] Weiss (2003) *Comp Labor Law & Pol`y J* 175.
[56] Weiss (2003) *Comp Labor Law & Pol`y J* 172- 177.

Chapter 1 introduces the research and briefly lays the foundation of the study. It provides for the significance of this study, the research methodology and the structure of the research.

Chapter 2 discusses the ILO principles that are related to the strike balloting. It also provides for the ILO's link with South Africa. The focus of the chapter is on the ILO's position on the pre-strike ballot.

Chapter 3 investigates the Constitutional Court`s orientation to the ILO and international law.

Chapter 4 critically examines relevant legislation, guidelines, case law and reviews authors' views regarding the strike balloting. This chapter aims to highlight the alarming provisions in the LRA and LRAA.

Chapter 5 examines and compares the strike ballot system in South Africa against that of the UK. This chapter highlights the points of similarity and difference with specific focus on strike balloting. It observes the UK context in an effort to learn from their practices. The two countries have a historical bond, they both have ratified Convention 98 of 1949 and both have a form of pre-strike ballot system.

Chapter 6 presents the conclusions and further includes the researcher's recommendations on how to advance pre-strike balloting and reforms necessary in South Africa.

CHAPTER 2: INTERNATIONAL LABOUR ORGANISATION'S (ILO) ROLE IN SOUTH AFRICA

1. Introduction

Pre-strike balloting is a global practice, and it is a phenomenon that the ILO is supporting. This chapter will assess the norms adopted by the ILO with regard to the pre-strike ballot in relation to the right to strike.

It is trite that international law is a source of law.[57] Treaties and Conventions are some of the basic sources of international law.[58] The ILO as a source of law deploys various forms of instruments such as Conventions and Recommendations.[59]

South Africa, being a member state, automatically accept to be subjected to the ILO's constitution, principles, declarations and decisions of Committees like Experts and Freedom of Association as obliged by the ILO Constitution.[60] This chapter will reflect on various Conventions and Recommendations - it will not cover every aspect but will focus on the strike ballot norms.

The research will put emphasis on the Freedom of Association and Protection of the Right to Organise Convention, 1948 (No. 87) and Right to Organise and Collective Bargaining Convention, 1949 (No. 98). The research will also review the Reports of the Committee of Experts on the Application of Conventions and Recommendations on strike balloting.

[57] NMU Substantive labour law module (2019) 11.
[58] Dugard (2015) 24.
[59] ILO 2022 Committee of Experts Report https://www.ilo.org/global/standards/lang--en/index.htm.
[60] Clause 2(a) of the ILO Declaration on Fundamental Principles and Rights at Work of 1998; ILO Digest on Freedom of Association (5th edition) para 15.

2. Background of the ILO

The ILO was founded in 1919 as part of the Treaty of Versailles that ended World War 1, with the belief that universal and lasting peace could be achieved through social justice.[61] The ILO`s Constitution[62] "recognises the principle of freedom of association," and provides for an "obligation[63] to member states regarding Conventions and Recommendations." The Constitution of the ILO provides authority to the "Annual reports on ratified Conventions"[64] and to the adopted "Declaration of Philadelphia"[65] that contains the Charter of aims and objectives of the ILO in the organisation's constitution.

The ILO seems to be the only tripartite agency that had survived since 1919, and since the United Nations' (UN) formation in 1946.[66] The organisation still carries the historical mandate to set labour standards, develop policies and to promote decent work for all, thereby reflecting the views of social partners and aiming to promote rights at work with a focus on social dialogue.[67]

3. Role of the ILO in South African Labour Law

Although not everybody would agree, the victory over apartheid in South Africa was surely not a one-man show, some credit can be given to the ILO.[68] The 1995 Labour Relations Bill was oriented to give effect to the ILO Conventions 87, 98, Discrimination (Employment and Occupation) Convention, 158 (No. 111), and the findings of the ILO`s Fact Finding and Conciliation Commission (FFCM).[69]

The task team that mandated the Draft Bill was assisted by the ILO and its experts, and this foundation was then handed over to the National Economic Development and Labour Council (NEDLAC), Public Service Bargaining Council and Education Labour

[61] https://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm.
[62] Preamble of ILO- still reflect ideas that were relevant then and still relevant today in labour relations.
[63] Artcile 19 of the Constitution of the ILO.
[64] Article 22 of the Constitution of the ILO.
[65] Preamble, article 1 and 35 of the Constitution of the ILO; re-affirmed in the Preamble Collective Bargaining Convention, 1981.
[66] https://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm.
[67] https://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm.
[68] https://www.ilo.org/global/about-the-ilo/history/lang--en/index.htm.
[69] Explanatory Memorandum on the 1995 Labour Relations Bill.

Relations Council.[70] NEDLAC[71] is a South African vehicle that operates in the similar fashion as the ILO to the extent of mentioning the social dialogue that seem to be the main aim or objective of the ILO.

South Africa has ratified the relevant Conventions of the ILO: Convention 87 that deals with Freedom of Association and the Protection of the Right to Organise, and Convention 98 concerning the Application of the Principles of the Right to Organise and to Bargain Collectively.[72]

The last part of the preamble of the Employment Equity Act[73] (EEA) observed Convention 111.[74] The 'broad' purpose of the Basic Conditions of Employment Act (BCEA) links the obligations of the Republic as member state of the International Labour Organisation.[75]

The Labour Relations Act (LRA) provides that the legislation applies some standards of foreign jurisprudence stipulated in the ILO as part of our law. [76] Furthermore, the LRA provides that any person applying the Act must interpret its provisions in compliance with the public international law obligations of the Republic.[77]

Judge Waglay suggests that during the formulation stage of the LRA, strike law was to be aligned to the Conventions 87 and Convention 98.[78] The LRA[79] reflects the Freedom of Association and Collective Bargaining of the ILO without direct expression.

The National Minimum Wage Act[80] is one recent development in South Africa whereby the ILO principles of decent work norms can be observed. Bodies like the Commission for Conciliation Mediation and Arbitration (CCMA) have a long-established partnership with the ILO on various issues including innovation[81] and principles of social justice.[82]

[70] Explanatory Memorandum on the 1995 Labour Relations Bill.
[71] https://nedlac.org.za.
[72] du Toit in Waas (2014) 478.
[73] Employment Equity Act- Preamble.
[74] https://www.ilo.org/wcmsp5/groups/public/---ed_norm.
[75] Basic Conditions of Employment- Long purpose of the Act.
[76] LRA- in the long purpose.
[77] S 3(a) of the LRA.
[78] Van Eck *et al* (2020) 28.
[79] Chapters 2 and 3 of the LRA.
[80] Act 9 of 2018.
[81] CCMA 2020/2021 Annual Report.
[82] CCMA- purpose.

Our legal framework has traces of the ILO norms[83] and international law plays a major role in the development of South African labour law.[84] This impact of the ILO dates back to the apartheid era, for example COSATU's complaint to the ILO about the attitude of the South African government towards workers.[85]

4. The ILO Norms on the Right to Strike and Strike Balloting

Gernigon, Odero and Guido seems to emphasise that neither in the Conventions, nor in its Recommendations, is there a right to strike standard, but the Committee of Experts nevertheless frequently state that the right to strike is a fundamental right.[86]

Van Niekerk and Smit examine a lot of issues related to the freedom of association[87] in relation to the right to organise and collective bargaining convention[88], submitting that ILO Conventions require that the authorities must refrain from impeding trade union activities. These trade union activities are inclusive of industrial action.

Article 3(1) of Convention 87 of 1948 provides:[89]

> "the workers` and employers` organizations shall have the right to draw up their constitution's rules, to elect their representative in full freedom, to organize their administration and activities and to formulate their programmes."

Article 8(2) protects the entire Convention 87 against state laws that have the potential to intervene with the operation of the Convention. Article 10 propagates for furthering and defending the interest of the workers.

Article 3 and 4 of Convention 98 of 1949 provides, respectively:[90]

> "Machinery appropriate to national conditions shall be established, where necessary, for the purpose of ensuring respect for the right to organise as defined in the preceding Articles."

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[83] Gernigon *et al.* (2000) preface.
[84] Gernigon *et al.* (2000) 60.
[85] Report of the Fact -Finding and Conciliation Commission on Freedom of Association (1992) 1-4.
[86] Gernigon *et al.* (2000).
[87] Van Niekerk *et al.* 396- Right to Freedom of Association is the corner stone of the collective bargaining. A precondition for the rights to strike and to bargain.
[88] Van Niekerk *et al.* 403 & 449. Right to strike is the means through which employees can protect their social and economic interest.
[89] CO87- Freedom of Association and Protection of the Right to Organise Convention, 1948 (No87) https://www.ilo.org/wcmsp5/groups/public/---ed_norm).
[90] CO98- Right to Organise and Collective Bargaining Convention, 1949 (No 98) https://www.ilo.org/wcmsp5/groups/public/---ed_norm).

> "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."

The Committee on Freedom of Association recognises the right to strike as the core of the right of freedom of association.[91] The source of the right to strike from the ILO seems to be stemming from interpretation of the Conventions. The existence of the right to strike has been a contested phenomenon for some time, but international employer organisation has since accepted its existence.[92] Van Niekerk seems to support this as he indicates that the Conference took for granted that the right exists.[93]

Gernigon *et al.*[94] indicate that the conditions for exercising the right to strike should not be unreasonable so as to comply with the intention of Article 3 of Convention 87. The Committee of Experts seem to accede that they cannot determine for member states on how their legislation should prescribe when and how to strike.[95]

Rycroft suggests that the ILO has as early as in 1994 pronounced on the pre-strike balloting that:[96]

> "If a member State deems it appropriate to establish in its legislation provisions which require a vote by workers before a strike can be held, it should ensure that account is taken only of the votes cast, and that the required quorum and majority are fixed at a reasonable level."

The International Labour Conference declared the following in 2012:[97]

> "The Committee requests the Government to continue to take steps to ensure that the exercise of the right to strike in practice is not restricted by unduly challenging and complicated strike ballot procedures and to continue providing statistics on the number of protected action ballots authorized out of a total number of applications, as well as to any important or excessive delays resulting from this procedure."

[91] Gernigon *et al.* (2000) 11.
[92] Hepple *et al.* (2016) 40-43 & 13 referred to the right as freedom to strike that depend on countries political, socio-economic conditions prevailing.
[93] Van Niekerk (2019) 450.
[94] Gernigon *et al.* (2000) 25-27.
[95] Gernigon *et al.* (2000) 29.
[96] Rycroft (2015) 36 *Ind JL* 10.
[97] Report III (Part 1A) Report of the Committee of Experts on the Application of Conventions and Recommendations 60.

Gernigon *et al.* provides that practices like secret strike balloting should not be used as a tool to prohibit workers from striking.[98] Freedom of Association Committee (Digest)[99] provide that the prerequisites for strikes should be reasonable and not used to limit the right to strike. The ILO is equally opposed to certain stringent requirements in the pre-strike balloting, for example absolute majority.[100] The ILO requires "only simple majority of the votes cast in secret ballot."[101] The ILO has also raised concerns about "the high threshold requirements for strike ballots."[102]

The Freedom of Association Committee accepts that the obligation to observe a certain quorum in meetings to take decisions on strikes by secret ballot may be acceptable.[103] The Committee on Freedom of Association had dealt with a complaint against the Substantive Labour Code of Colombia and the court's decision that ruled a strike to be illegal for not complying with strike ballot guidelines.[104] The Committee reiterated that provisions of law regarding strike ballots should be reasonable, with strike ballots not to substantially limit trade unions, declaring:[105]

> "in general terms, that it has considered that no violation of the principles of freedom of association is involved where the legislation contains certain rules intended to promote democratic principles within trade union organizations or to ensure that the electoral procedure is conducted in a normal manner and with due respect for the rights of members in order to avoid any dispute as to the election results."

The Committee of Experts report published recently in 2022, did not raise more concerns but placed more emphasis on the August 2018 tripartite agreement that being "the obligation to observe a certain quorum and to take strike decisions by secret ballot may be considered acceptable".[106]

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[98] Gernigon *et al.* (2000) 56.
[99] ILO Digest on Freedom of Association (5th edition) para 547-548.
[100] ILO Digest on Freedom of Association (5th edition) para 555-557.
[101] Report III (Part 1A) Report of 2012 of the Committee of Experts on the Application of Conventions and Recommendations 148.
[102] International Labour Conference of 2016 -Conference Committee on Application of Standards 16 Part II/31.
[103] ILO Digest on Freedom of Association (5th edition) para 559; Report III (Part 1A) Report of the Committee of Experts of 2016 on the Application of Conventions and Recommendations 87, 143.
[104] 393rd Report of Freedom of Association (2021) para 247- 248.
[105] 393rd Report of Freedom of Association (2021) para 248.
[106] ILO Conference of year 2022 Committee of Experts Report 169. The Compilation of decisions of the Committee of Freedom of Association 6th edition (2018) 151.

Therefore, the ILO has not changed its stance to support the right to strike and ILO remains in favour of strike ballot mechanisms as long as they do not infringe on the right to strike.

5. The ILO Enforcement Measures

The enforcement measure of the ILO is mainly twofold,[107] consisting of the Regular Supervisory System and Special Procedures. Neither of these mechanisms operate like a judicial tribunal, and therefore do not issue a decision like an award or an order of court.

Under the Regular Supervisory System, the Committee of Experts operate under the following general criterion:

> "- to place on record the Committee's appreciation of the positive action taken by governments in response to its comments; and
>
> - to provide an example to other governments and social partners which have to address similar issues."

The Special Procedures are basically operating on representation endorsed by article 24 and 25 of the ILO Constitution, which provides the right to make representation against a non-complying party.

The Special Procedures allow for a complaint endorsed in terms of articles 26 to 30 of the ILO Constitution, which provides for the right to submit a complaint against a party that is not complying or is perhaps engaging in ill-practice.

The Committee of Freedom of Association (CFA) examines complaints against freedom of association and has an umbilical cord to Conventions 87 and 98. This governing body would receive complaints against member states, establish facts and draft reports on findings.

All the above measures have a common denominator, being the responsible structure that makes recommendations about non-compliance, and the structure that encourages compliance through dialogue and drafting a report. Although the report is

[107] Regular supervisory system and special procedures: Applying and promoting International Labour Standards (ilo.org)

common in all organisations, these reports seem to have an additional function, to 'name and shame' and congratulate others.

6. Is South Africa Complying with ILO Norms Regarding Strike Balloting?

According to the ILO, as evidenced above with the contribution of Gernigon *et al.*, there are no hard and fast rules or ILO standard on strike balloting. The ILO structures dealing with such matters are the Freedom of Association and Experts Committees. South Africa is not reflected as a culprit and has not been called on to comply or to correct its legislation.

The Freedom of Association Committee, as seen above, does not prohibit or condemn strike ballots or secret strike ballots. The Committee is, however, very clear that any measure must not be used to be a mechanism to impede workers from striking. Therefore, it can be assumed that South Africa is complying with the Freedom of Association Committee obligations as a member state and the Expert Committee is in constant interaction with various organisations involved with labour laws in South Africa. The research observed various states that were reported for non-compliance recently in the Committees reports, but South African was not among the non-compliant states.

Fergus and Jacobs suggest that comparatively worldwide, the strike ballot phenomenon exist, and that other jurisdictions have more stringent requirements than those imposed by the LRAA.[108] The authors indicate:[109]

> "The International Labour Organisation (ILO) accepts pre-strike ballots as a legitimate regulatory requirement, provided that the requirements for ballots do not render 'the exercise of the right to strike … very difficult, or even impossible in practice."

Cheadle[110] reflect on two international schools of thought on the strike ballot regarding strike ballot compliance. One is that non-compliance renders the strike unlawful while the other holds that whether there is full compliance or no compliance with balloting, the lawfulness of the strike is not affected.

[108] Fergus and Jacobs (2020) *ILJ* 766.
[109] Fergus and Jacobs (2020) *ILJ* 766.
[110] Cheadle *et al.* (2017) 70.

Cheadle[111] answers the question above in some measure by quoting Rycroft's views that the LRA expressly excluded the ballot requirement as a subject for legality or procedural requirement of the strike. Therefore, it can be concluded that South African labour laws are compliant with ILO norms as non-compliance with ballot requirements does not render the strike unlawful or un-procedural.

7. Conclusion

It can be concluded, as reflected above, that the ILO is not an international labour court where decisions of our apex court can be reviewed, but neither is the ILO an international "talk show", but rather a global organisation with a mandate towards international labour relations.

Firstly, the key committees, that of Experts and Freedom of Association are playing a meaningful role both in monitoring global compliance, providing guidance and that of being a complaint platform.[112] The committees can meaningfully intervene as can be seen with the role played by ILO Committees in the establishment of post-1994 labour relations.

It can be observed in various ILO reports, for example Report III (Part 1A) Report of the Committee of Experts of 2016, that parties are taken to task. These reports of various committees are treated as case law. Although the research did not reflect on individual member states called on by the ILO to review their respective legislation and regulations, the ILO reports does have that detail available.

Secondly, the ILO does support the pre-strike balloting system and various ILO reports have issued generic guidelines thereon, for example where they prescribed simple majority. The research argues that the South African regulations comply with ILO guidelines in as far as avoiding impeding the right to strike.

In chapter 3 of this research, it will be reflected that the Constitution has endorsed various ILO values namely social justice, human rights, and other principles.

[111] Cheadle *et al.* (2017) 72.
[112] Regular supervisory system and special procedures: Applying and promoting International Labour Standards (ilo.org).

CHAPTER 3: THE CONSTITUTION AND INTERNATIONAL LAW

1. Introduction

In Chapter 2 of this research, it has been shown that the International Labour Organisation (ILO) has a strong influence and impact on South African labour law. It was also reflected that the pre-1994 regime through apartheid created a South Africa that was divided with the foundation that rested in values that were characterised by injustices of all forms.

The pre-1994 regime could formulate legislation and social policies that were unfair and cruel as the Republic was a parliamentary sovereignty.[113] Therefore, the law that was passed in parliament became law whether inhuman or discriminatory. It was indicated in chapter two that the ILO played a role in the fight against the old regime, hence at some stage even COSATU approached the ILO to intervene.

When South Africa became a democracy and South Africa re-joined the ILO,[114] it was expected that, to change the structure of the old regime the type of regime would have to be changed, hence South Africa became a constitutional democracy and the Constitution became the supreme law.[115] Therefore, all laws, policies and practices that were not in line with the values, the spirit and purport of the Constitution are unconstitutional.

The Constitution adopted similar values to that of the ILO, such as democratic values, social justice, and fundamental human rights.[116] Furthermore, South Africa was

[113] BP-380-South-Africas-Parliamentary-System-May-2015.pdf (cplo.org.za).
[114] Waglay B in Van Eck *et al* (2020) 28.
[115] Pre-amble of the Constitution of the Republic.
[116] Section 2 Supremacy of the Constitution.

founded on values that can be seen all over in the ILO, for example, human dignity, equality, and human rights, to mention just a few.

Cheadle *et al.*[117] gives an overview on the historical context of the right to strike and provide what is termed justification for the right to harm the economy. The justification is the significance of this right to balance bargaining power, giving autonomy to unions and the whole culture of human rights as endorsed by the ILO in the spirit of human dignity. They further explain how international law recognised the right to strike as an inherent right to freedom of association.[118]

This chapter would reflect on the umbilical cord of the Constitution with the ILO and further reflect on its impact in our jurisprudence, especially considering some Constitutional Court decisions. Therefore, although the effect of the constitutional order is an integral part of South African jurisprudence, this chapter would focus only on the international law. The research in this chapter is showing that when the research critiques the strike ballot, it does so cognizant of the reality that the Constitution bounds the country into international law obligations.

2. The Constitution and International Law

2.1 Social Justice and Human Rights

As indicated above, the Constitution mandates the legislature to establish a society that is based on democratic values, social justice, and human rights. The Constitution of the ILO[119] stipulates that the ILO's mission is social justice, international human rights, and labour rights. It further suggests that universal and lasting peace can only be achieved if it is based on social justice. Therefore, social justice and human rights are the values found in both Constitutions (South Africa and ILO). Some of the examples of social justice includes, but are not limited to, a living wage, decent work, and the right to strike.

It must be observed that the ILO has isolated a programme of Decent Work Agenda,[120] to advance economic and working conditions that would benefit tripartite parties in the

[117] Cheadle *et al.* chapter 1.
[118] Cheadle *et al.* chapter 1.
[119] https://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm .
[120] https://www.ilo.org/global/about-the-ilo/mission-and-objectives/lang--en/index.htm .

ILO. It seems trite that in a capitalist or free market society, business' interest is to maximise profit accumulation for the ruling class, while the interest of the workers is the accumulation of better wages. This seems to suggest that there is no way that decent work could be provided as a "handout". The following paragraph will illustrate why the Decent Work Agenda cannot be divorced from the right to strike, hence a phenomenon like strike balloting would always be 'suspect' to the right to strike.

Hepple *et al.*[121] argues that the right to strike has changed from being a weapon in collective bargaining to an individual human right, and that has affected how the right to strike is defined and guaranteed. Hepple *et al.* further indicates that this human right can be exercised collectively. His remarks that the individual right of workers is simply a right to participate in the decision whether to strike and to participate in the strike itself[122] could be an indication of the policy direction taken by South Africa.

2.2 Freedom of Association

The Constitution guarantees the right for every worker to form and join trade unions and, further, to participate in the union agenda and strike.[123] The Constitution further guarantees the right to freedom of association directly.[124] This right to strike is also now known to be implied in Articles 3; 8 and 10 of the ILO Convention 87. This establishes a direct link between the ILO Convention and the Constitution. The ILO further, through Convention 98, provides for the Right to Organise and Collective Bargaining Convention, and this is catered for in the Constitution as a trade union's right to collective bargaining.[125]

The ILO Conventions are entrenched directly into the Constitution so that the ILO values, as international law, can find direct application in the supreme law of the country. This direct link is not the only form of direct application, as it will be reflected in the paragraph to follow that it is also evident in the interpretation of South African law.

[121] Hepple *et al.* (2016) 13.
[122] Hepple *et al.* (2016) 16.
[123] Section 23(2) (a-c) of the Constitution.
[124] Section 18 of the Constitution of the Republic.
[125] Section 23(5) of the Constitution.

Novitz[126] reviewed the Marikana events and found that the incident raised "profound concerns relating to freedom of association and the right to strike". The author further suggests that South Africa is perhaps distanced from the international arena, and it must return to receive shared experiences of other governments. Although the attack by Novitz on South Africa is focused on dispute resolution and the research is not required to confirm whether South Africa has at some stage vanished from the international arena, the Marikana event remains an unfortunate incident.

2.3 Interpretation

The Constitution provides that when interpreting the Bill of Rights, a court, tribunal, or forum must consider international law and may consider foreign law. Consideration of international law is peremptory. Therefore, this means that when courts are required to interpret law, courts must consider the position and the tone of international law in the decision-making process. Therefore, international law in South Africa is not an after-fact. It would be assumed that where the national legislation or policy is in conflict or a provision does not exist, the international law would prevail. The courts can use their inherent power[127] in the interests of justice to rely directly on international law for any matter before the court of law.

The Constitution further assists in the sphere of international law by providing that when interpreting any legislation, every court must prefer any reasonable interpretation that is consistent with international law.[128] This can be understood, for example, to indicate that if strike ballot provisions in the LRA is inconsistent with international law, the court must prefer the provisions of the ILO standard.

2.4 International Agreements Affect South Africa

The Constitution grants powers of negotiating and signing of international agreements to the national executive and such agreements become binding when the National Assembly and Provincial Legislatures have approved same, except those agreements

[126] Novitz in Hepple *et al.* (2016) 30-50.
[127] Section 173 – Supreme court inherent power.
[128] Section 233 of the Constitution of the Republic.

that does not need such parliamentary processes like ratification and accession.[129] The Constitution[130] also has a provision for enactment of international agreements.

2.5 Customary International law's effect in South Africa

The Constitution reflect that international customary law is binding in South Africa unless it is inconsistent with the Constitution or an Act of parliament.[131] This seems to reflect that the international law has equal status to that of the South African law, unless it does not support our values, or the internal law is invalid. This would further mean where our law is invalid, international law triumphs or a tribunal would apply international law.

3. Constitutional Court and International law

Some labour law authors[132] and scholars suggest that the South African courts rely on both binding and non-binding Conventions, like the pronouncement of the Expert Committees and the contents of ILO Recommendations. This basically will include undertakings and decisions agreed upon in ILO conferences and where tripartite partners meet.

The Constitutional Court in *S v Makwanyane*[133] has confirmed that the Constitutional order[134] has resulted in both binding and non-binding international agreements to be considered as part of our law. Further, the court confirmed that international agreements and customary international law is part of our legal framework as tools of interpretation.

NUMSA v Bader Bop[135] confirms interpretation mechanisms to include international law with a source of law being the Conventions (No 87 & 98), and Recommendations. The court mentioned the two key Committees' role (Experts & Freedom of Association), and further indicated that they are important sources of jurisprudence in developing our law.

[129] Section 231 (1-3) of the Constitution.
[130] Section 231 (4) of the Constitution.
[131] Section 232 of the Constitution.
[132] Kujinga and Van Eck (2018) PER /PELJ 1-34.
[133] *S v Makwanyane* 1995(3) SA 391 (CC) para 35.
[134] Constitution - chapter 14.
[135] *National Union of Metal Workers of South Africa & other v Bader Bop (Pty) Ltd & Other* [2003] 2 BLLR 103 (CC) para 26-30.

The above court decisions are confirming the Constitution that:[136]

> "When interpreting any legislation, 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".

The Constitutional Court decisions are significant in captivating labour law as a human right as purposed by the Constitution.[137] This becomes significant for example in the future development of labour legislation as the research is observing the strike balloting amendments. The law developed whether by lower courts or legislature is predetermined to follow the doctrine set by the constitutional values.

The other significance is that the lower courts are bound by the decisions of the Constitutional Court. Therefore, to have the highest court in the land compliant with the international laws means rule of law prevails.

4. The Significance of the Constitution on the International law

Our constitutional order indicates, for example, that the drafters of legislation must research the position of international law when drafting a bill or legislation. This is an indication that international law must, without a doubt, be applied in the interpretation or application of our law. There are certain international law provisions that binds South Africa automatically as it will be reflected below.

The Constitution indicate that:[138]

> "An international agreement of a technical, administrative or executive nature, or an agreement which does not require either ratification or accession, entered into by the national executive, binds the Republic without approval by the National Assembly and the National Council of Provinces, but must be tabled in the Assembly and the Council within a reasonable time".

The Constitution further indicate that "customary international law is law in the Republic unless it is inconsistent with the Constitution or an Act of Parliament".[139] The Constitution is furthermore emphasising that international law must be considered in

[136] Section 231(3) of the Constitution.
[137] Section 23 of the Constitution.
[138] Section 231(3) of the Constitution.
[139] Section 232 of the Constitution.

the process of interpreting South African laws.[140] Therefore, the international law plays a significant role in South Africa.

5. The Supremacy of the Constitution

The Constitution stipulate:

> "This Constitution is the supreme law of the Republic; law or conduct inconsistent with it is invalid, and the obligations imposed by it must be fulfilled".[141]

> "This Bill of Rights is a cornerstone of democracy in South Africa. It enshrines the rights of all people in our country and affirms the democratic values of human dignity, equality and freedom."[142]

The provisions can be understood to mean that in South Africa any guideline, regulation and legislation is subject to the supreme law. It is trite that no right in the Bill of Rights is absolute, as rights are subject to the limitations clause[143] and other provisions as stipulated in the Constitution. There is a stringent process to amend the Constitution.[144] Therefore, all the rights of the workers remain intact so if the constitutional order prevails in South Africa.

6. Conclusion

Firstly, the reflected provisions of the Constitution seem to make the international law order peremptory in our law. Therefore, litigants and the tribunal interpreting, for example, guidelines of strike balloting must consider the position of the ILO regarding strike ballots.

Secondly, it seems trite that where our law, for example, is anti- right to strike, international law would be applied directly in the interpretation process by our courts or tribunals. Our constitutional order is currently resolute, and it is aligned with international norms. It is against that background that international law has received an equal status to that of our law when international law is consistent with our

[140] Section 39(1)(b) of the Constitution.
[141] Section 2 & 1 (c) of the Constitution.
[142] Section 7 of the Constitution.
[143] Section 36 of the Constitution.
[144] Section 74 of the Constitution.

constitutional mandate. It is also against that background that our courts are considering international law as a primary source of law.

Thirdly, since South Africa follows the rule of law, the decisions of the Constitutional Court ought to be followed. This might seem insignificant, but it serves to remind all those involved in policy making and the labour law practitioners that the right to strike is a fundamental constitutional right. The significance is reflected in chapter 4 and 6 of this research whereby it is shown that either the executive or judiciary seems to overlook the fact that South Africa is a constitutional democracy.

The research submits that in a typical constitutional order like South Africa, the right to strike cannot be removed by legislative amendments. The right to strike can only be removed through vigorous constitutional amendment. Therefore, the strike balloting review that is valid cannot simply not survive because of the South Africa dark history. South Africa has systems including judiciary that would protect the right to strike.

CHAPTER 4: THE LEGAL FRAMEWORK ON STRIKE BALLOTING

1. Introduction

In South Africa it is common that there are two types of labour disputes, the dispute of right and the dispute of interest.[145] The dispute of right is normally resolved through litigation and the dispute of interest is what is commonly known as 'power struggle'.[146] The 'power struggle' in the employment relationship is characterised by the employer`s dominance over 'means of production,' and the employee`s power lies in their ability to hold back labour through strike action.

The above 'power struggle' in the employment relationship is controlled by a legal framework for example legislation, regulations, guidelines, and other mechanisms. The legislature is the sphere of the government tasked with the formulation of these mechanisms informed by government policy choices.

The policy choices that the government makes are sometimes good and sometimes less so. It is against that background that this chapter of the research would critically evaluate the legal frame of strike balloting.

It is imperative to understand that the policy choices that the legislature would make are informed by a certain context, for example: South Africa is a constitutional democracy with the Constitution as the supreme law[147] and this was achieved through negotiated settlement.

[145] Van Niekerk *et al.* 449 & 472. The author acknowledges as a shorthand, although the distinction can confuse.
[146] Cheadle *et al.* (2017) 44. The only weapon open when demand for high wages is not given.
[147] Section 2 of the Constitution- law or conduct inconsistent with it is invalid.

Amongst the outcomes of the negotiation, the settlement mentioned above yielded the LRA meant to change the laws governing labour relations by, for example, regulating the right to strike in conformity to the Constitution.[148] Therefore, it becomes somehow inevitable that what is founded in the spirit of negotiation would be characterised by compromise from the role players.

The research reviews the impact of the above-mentioned settlements on the policy direction and whether the strike balloting in its current form needs to be reviewed or not. Alternatively, the research attempts to comprehend the agenda of the legislature in drafting the pre-strike balloting laws as it seems somewhat ambiguous.

2. The Definition of the Strike and Balloting

The LRA defines a strike as:

> "the partial or complete concerted refusal to work, or the retardation or obstruction of work, by persons who are or have been employed by the same employer or by different employers, for the purpose of remedying a grievance or resolving a dispute in respect of any matter of mutual interest between employer and employee, and every reference to "work" in this definition includes overtime work, whether it is voluntary or compulsory".[149]

Hepple *et al.*[150] indicates that the classic definition of a strike contains two essential elements: concerted action and withdrawal of labour. They further suggest that an individual's withdrawal of labour does not amount to a strike.

The LRA defines a ballot as including any system of voting by members that is recorded and in secret.[151] Tenza defines it as the tool used by unions to test the level of support for the proposed strike.[152]

[148] Long Purpose of the LRA.
[149] Section 213 of the LRA
[150] Hepple *et al* 13.
[151] Section 95(9) of the LRA; S19 of the LRAA; Guidelines 11 on strike balloting.
[152] Tenza (2019) Obiter 269.

3.The Constitution and Legislative Framework

3.1 The Constitution and the Right to Strike

The current legal framework regarding the right to strike stems directly from the Constitution.[153] The Bill of Rights provides that "every worker has the right to participate in the activities and programmes of the trade union, and to strike."[154] Darcy du Toit confirms that this right is granted to a worker, not a trade union, and therefore employees can call a strike as long the strike complies with the relevant strike requirements.[155]

The trade unions and employers have the right to engage in collective bargaining.[156] The same provision states that "National Legislation" may be enacted to regulate collective bargaining. Collective bargaining is always linked to the right to strike for practical purposes. When the negotiations fail, the power struggle is the means through which an impasse is resolved.

Section 23 of the Constitution illustrates the interdependence of the right to strike and collective bargaining. The provision seems to formalise the common belief that freedom of association and collective bargaining would not be able to protect the interest of the workers without the right to strike. Therefore, it is not a coincidence that the provision caters for both processes but amplifies the need to balance the 'power dynamics` of labour relations mentioned in the introductory chapter of this research.

3.2 The Right to Strike and Strike Balloting Provisions in the LRA

Every trade union has the right to determine its own constitution and rules.[157] The trade union members have the right to participate in the trade union's lawful activities, but this right is subject to the union`s constitution.[158] These two provisions highlight

[153] Bill of Rights in the Constitution - atmosphere created by the Rights to Demonstrate, Freedom of Association, Political Rights and Labour Relations.
[154] Section 23 (2) (b) & (c) of the Constitution- Labour Relations Right to Strike. Hepple in 'The Freedom to Strike and its Rationale' 17- says the SA individualistic approach is an indication that this right to strike is directly derived from Freedom of Association or the Right to Collective Bargaining.
[155] Du Toit in Waas (2014) 479.
[156] Section 23 (5)- of the Constitution is the Collective Bargaining Right & LRA enacted to give effect to this provision of the Constitution.
[157] Section 8 (a)(i) of the LRA
[158] Section 4 (3)(a)- LRA – Freedom of Association

the significance of the strike ballot provision in the constitution of the union, especially where there are different schools of thought.

The LRA provides for the right to strike and sets all requirements for a protected strike.[159] The key procedural and substantive aspects of the strike law provision is contained in this part of the LRA.[160] Another key component of the strike law is the limitations on the right to strike.[161] These limitations are like safety valves for instances where the right to strike is prohibited. It is important to highlight for purposes of this research that the provisions regarding strike balloting are not located in these provisions relating to the limitation clauses in the LRA.

In terms of the LRA there are provisions that deal with compliance and non-compliance with strike requirements.[162] In essence, the provisions provide for benefits of the protected strike to workers and the options available to employers to deal with the unprotected strike. In terms of the LRA the pre-strike balloting is not a requirement for a protected strike, as provided:[163]

> "The failure by a registered trade union or a registered employers' organisation to comply with a provision in its constitution requiring it to conduct a ballot of those of its members in respect of whom it intends to call a strike or lock-out may not give rise to, or constitute a ground for, any litigation that will affect the legality of, and the protection conferred by this section on, the strike or lock-out".

The South African policy makers, as it can be observed above, have chosen to support a policy direction whereby the right to strike cannot be prohibited for non-compliance with the strike balloting procedure. The strike balloting provisions would be explored further in the following paragraphs.

Except for the provision in the above paragraph, the strike balloting provisions are encountered in the LRA as the requirements for the registration of the trade union.[164] The legislative framework for strike balloting provides that:[165]

[159] Section 64 of LRA.
[160] Chapter 4 of the LRA would have been the engine if strike law was a car.
[161] Section 65 of LRA- Limitations to the right to strike.
[162] Sections 67 & 68 of the LRA- basically defines what constitutes protected and unprotected strikes, further illustrate benefits of protected strike and recourse to the unprotected strike.
[163] Section 67(7) of the LRA.
[164] Section 95 of the LRA.
[165] Section 95(5) (o)(p) &(q) of the LRA.

> "The constitution of any trade union or employers' organisation that intends to register must-
>
> - establish the circumstances and manner in which a ballot must be conducted;
> - provide that the trade union or employers' organisation, before calling a strike or lock-out, must conduct a ballot of those of its members in respect of whom it intends to call the strike or lock-out;
> - provide that members of the trade union or employers' organisation may not be disciplined or have their membership terminated for failure or refusal to participate in a strike or lock-out if-
>   - no ballot was held about the strike or lock-out; or
>   - a ballot was held but a majority of the members who voted did not vote in favour of the strike or lock-out."

The controversial issue of concern to be explored is 'why strike balloting is not a provision in the strike requirements of the Act'. In the alternative, the concern is 'why is the strike ballot provision part of the registration provisions of the union'. There is literature below that would reflect that the legislature did not err but has chosen this policy direction as there are other countries with a similar framework.

3.3 The Labour Relations Amendment Act 2018 (LRAA) and the Guidelines

The amendments[166] stipulated that a union constitution that does not comply with section 95(5) of the LRA, must conduct a secret ballot of members before engaging in a strike.[167] The highlight or controversy is the peremptory nature of the phrase 'must conduct a secret ballot'. The amendment mandates the Registrar of the Department of Employment and Labour with the responsibility of implementation, and that then gives rise to the 'Guidelines' below.

The Guidelines[168] are stipulated as follows:

> "Section 19(1) of the Labour Relations Amendment Act, 2018 requires the Registrar of Labour Relations, within 180 days of the Act coming into effect, to
>
> - consult with the national office bearers of trade unions and employers' organisations which have constitutions that do not provide for the conducting of a secret ballot before calling a strike or lockout;
>
> - issue a directive to those trade unions and employers' organisations as to the period within which their constitutions must be amended to ensure compliance with the requirement for conducting a secret ballot.

[166] LRAA of 2018- Effective 1 January 2019- to provide for the Minister to extend meaning of ballot to include any voting by members that is recorded in secret.
[167] Section 95(9) of the LRA.
[168] Minister of Labour issued the guidelines in terms of S95(9)- signed 12 December 2018.

> In terms of section 19(2) of the Labour Relations Amendment Act, 2018, until such time as a trade union or employers' organisation complies with the directive to change its constitution, it must conduct a secret ballot of its members before calling a strike or lockout, as the case may be."

It must be, however, noted that these controversial Guidelines were declared "ultra vires and set aside."[169]

4.The South African Jurisprudence on the Pre-Strike Ballot

Although the research has taken note of pre-democracy decisions regarding the strike ballot, it will examine only the post-democracy case law in relation to the strike balloting. The Labour Court decisions reflects a need for a social dialogue regarding the meaning of the constitutional right to strike. Furthermore, a reflection is needed of the 'fears' that the "strike ballot can be abused and be manipulated"[170] by the trade unions in the continuous debate regarding pre-strike ballots as a pre-requisite for procedural strike.

4.1 The Labour`s Court Interpretation of Strike Balloting

In the *National Union of Metalworkers of SA v Mahle Behr SA (Pty) Ltd*[171] the Labour Court was called upon to interpret the new provisions of the strike ballot. The case was heard together with the *National Union of Metalworkers of SA v Foskor (Pty) Ltd*. It was common cause that the constitution of the National Union of Metal Workers of South Africa (NUMSA) did not contain a pre-strike ballot provision and neither did the union embark on strike balloting for the strike. The employers requested the court to interdict the strike. The court held that the action by the union was an infringement of section 19 of the LRAA, and therefore interdicted the strike. The court rejected the view of NUMSA that they were required to comply with section 19 of the LRAA only after the Registrar has complied with the task of consultations and issuing of directives.

In *Air Chefs (SOC) Ltd v National Union of Metalworkers of SA & others*[172] the court had to deal with an urgent application to interdict a strike. The applicant claimed that the basis for their claim is that the matter was governed by a collective agreement and,

[169] (2021) 42 *ILJ*.
[170] Rycroft (2015) 36 *Ind JL* 7.
[171] (2019) 40 *ILJ* 1814 (LC)
[172] (2020 41 ILJ 428 (LC) para 21- 23.

in the alternative, NUMSA has failed to comply with the secret pre-strike balloting requirements. The court agreed with the applicant and held that section 19 of the LRAA requirements is peremptory, and further that these requirements protect the employee's choice to either strike or not strike. The court directly followed the *Mahler Behr* decision that peremptory requirements will merely suspend the strike. The court seemed to be saying to NUMSA "go and comply with secret pre-strike balloting, then you can continue with your strike". However, there was not going to be a strike in any event as the court further agreed with the applicant that the matter was subject to a collective agreement.

In *Johannesburg Metropolitan Bus Services (SOC) Ltd v Democratic Municipal & Allied Workers Union & another*[173] the court was also called on to interdict the strike. The applicant claimed that the issues that were the subject of dispute formed part of a previous settlement and, further, that the union did not comply with strike balloting transitional requirements. The court disagreed with the applicant`s contention that the demands were part of a previous settlement except regarding one issue. The court held, interestingly, that the failure of the union cannot render the strike unprotected, but nonetheless that the union cannot strike without embarking on balloting first. The court also raised a concern, which is also a question raised by the research, that "section 19 of the LRAA transitional provisions is not part of chapter iv of the LRA."

4.2 Labour Appeal Court`s Interpretation of the Strike Balloting

In *National Union of Metalworkers of SA v Mahle Behr SA (Pty) Ltd*[174] (*Mahle Behr*) the court was called upon to deal with the appeal of NUMSA. The Labour Appeal Court upheld the appeal, thereby agreeing with NUMSA that section 19 of the LRAA mandated the Registrar with two tasks, the first being consultations and the second being the issuing of directives. Therefore, the failure of the Registrar to comply with its own mandate meant that NUMSA was not obliged to comply with the secret pre-strike balloting. The Labour Appeal Court held that the Labour Court decision, interdicting the NUMSA strike, was unjustifiable in limiting the right to strike.

[173] [2019] 12 BLLR 1335 (LC) para 2-4 & 21.
[174] (2020) 41 ILJ 2093 (LAC).

4.4 Are the judgements in synchrony with the constitutional right to strike?

If one compares the Labour Court judgements, one can say that the judgements were not contradicting each other. Labour Court position was that non-compliance with pre-strike balloting can be interdicted. The Labour Court is further indicating that when the union is interdicted for non-compliance with pre-strike balloting, the union is only delayed, and therefore the workers' right to strike is not taken away. This is misaligned with the constitutional right to strike.

The Labour Appeal Court is fundamentally disagreeing with the above, emphasising that the right to strike, as pronounced by the highest court in the country and the ILO's stance, is fundamental. The Labour Appeal Court is further indicating that the right to strike cannot be blocked by mere administrative requirements imposed by the Department of Employment and Labour.

Because South Africa follows the doctrine of precedent, it is normal that the decision of the lower court could be reviewed or changed by courts above it. The research is therefore submitting that, so far, the judgements are in synchrony. The error that the Labour Court has made thus far has been corrected by the Labour Appeal Court *Mahle Behr* decision.

5. The Pre-Strike Balloting Use and Misuse as a Strike Requirement

It has been reflected already that the phenomenon of pre-strike balloting is not new in the South Africa.[175] Therefore, the historical role it played will affect the current strike ballot dialogue.

Professor Kahn-Freud and current scholars, like Professor Weiss, reflect on the use and misuse of comparative law.[176] The research review this concept of use and misuse to draw attention to the fact that failure of an intervention like pre-strike balloting could be a consequence of various aspects. The strike ballot dialogue should therefore be based on whether it is fit for purpose or not.

[175] Chapter 1 of the research- Old LRA. Rycroft in Hepple *et al.* (2016) 96- reflect that the pre-1995 LRA a ballot was a requirement that ensured legality of the strike, for example failure to conduct ballot or defect or irregularity could be used to stall a strike or to dismiss workers for striking in an un-procedural strike.
[176] Kahn-Freund, 1974 Vol 37 (1). A view that comparative law scholars should far enough (go deep) and understand the entire context.

Fergus and Jacobs[177] highlight how charged and controversial the historical South African strike balloting was. The authors focussed on the Labour Court's interpretation of section 19 of the LRAA, and they rejected it. The authors, in attacking the court`s decision, proposed:[178]

> "an alternative reading of the transitional provisions, which is better aligned with the purposes of the LRA (and its amendments) and the constitutional right at stake".

Fergus and Jacobs further indicate that "balloting should not render exercise of the strike difficult or impossible." The authors attack the fact that trade unions should conduct pre-strike ballots even though their members did not call for it, indicating:[179]

> "In our view, these anomalies and impracticalities of requiring a secret ballot prior to a strike**,** as well as the lack of specificity or clarity around the requisite threshold — which is pivotal to rendering a ballot meaningful — mean that the requirement clearly limits the right to strike."

Fergus and Jacobs link the challenges related to strikes to our societal challenges e.g., strike violence, poverty, unemployment, and inequality.[180] The authors[181] further confirm that the LRA does not require a ballot prior to a strike and, interestingly, they describe the South African situation surrounding strike balloting as ambiguous. In explaining the ambiguity, they reflect that with the old LRA the ballot preceding a strike was a requirement, however the current ballot is relevant for the relationship between the trade union and its union members. The research submit that these are lessons that are good for the pre-strike ballot as the requirement for the procedural strike.

Cheadle *et al.,*[182] in support of the strike ballot as a requirement, reviews the Labour Relations Amendment Bill of 2017. The authors seem unimpressed with the fact that the Bill is not introducing the strike ballot as a requirement.[183] This is further indication that the strike ballot would not make a difference and that the strike ballot has the potential to create tension as unrealistic demands can be used to garner support. Furthermore, the author is of the opinion that with the current prevailing situation in

[177] Fergus and Jacobs (2020) *ILJ* 757.
[178] Fergus and Jacobs (2020) *ILJ* 757.
[179] Fergus and Jacobs (2020) *ILJ* 772.
[180] Cheadle *et al.* chapter 2. The authors explanation of Socio-economic dimension of strike is basically suggesting that the LRA or law alone is not the solution.
[181] Cheadle *et al.* (2017) 70.
[182] Cheadle *et al.* (2017) 72.
[183] Cheadle *et al.* (2017) 72.

South Africa, any methods can be used by the union or strikers to pressurise employees to vote in favour of the strike.

Hepple *et al.*[184] reflect on the significance of socio-political impact on the policy direction. The strike balloting in the pre- 1994 or old LRA era were used to determine the legality of the strike - for example, non-compliance with the balloting procedure could be used to block the strike by the employers.[185] This history and the context will always be a permanent reflection. It cannot, however, be said that the strike ballot will still be used in future to achieve these historical purposes.

Corazza and Fergus[186] reflected on strike balloting, observing the failure of parliament when the LRA Amendment Bill was tabled in 2012. It seems though that the authors are of the view that strike balloting can be used as a strike requirement if not incorrectly misplaced.

6.The Purpose of the Pre-Strike Ballot in South Africa

There is a view that the strike balloting is just a dormant requirement.[187] There is a further view that the strike balloting requirements is an interference in union affairs.[188] There is also a view that strike balloting is necessary for internal union democracy and to curb violent strikes,[189] and long strikes.[190] These views will be explored in detail below, starting with the purpose in terms of the LRA.

The LRA is silent on the purpose of the pre-strike balloting. LRAA provides the following for the amendments:[191]

> "…to extend the meaning of ballot to include any voting by members that is recorded in secret; to provide for the independence of the registrar and the deputy registrar; to provide for an advisory arbitration panel; to provide for an advisory arbitration award; to provide for transitional provisions; and to provide for matters connected therewith."

[184] Hepple *et al.* (2016) 13.
[185] Hepple *et al.* (2016) 96. Reflecting on the Labour Relations Act 28 of 1956.
[186] Corazza and Fergus, chapter 4 in Hepple *et al.* (2016) 71;84-86.
[187] Creighton *et al.* (2000) 64. 'Light- touch' explanation.
[188] Creighton *et al.* (2000) 62.
[189] Tenza (2019) Obiter 264 & 67.
[190] Tenza (2019) Obiter 280.
[191] Act No 8 of 2018.

Creighton *et al.* defines the character of the South African ballot, indicating:[192]

> "South Africa is the grouping of countries that adopted the most 'light-touch' form of pre-strike ballot requirement."

The description of a 'light-touch' seems to suggest that the pre-strike ballot has no meaningful purpose as it suggests that the regulations provide no enforcement measures, although burdensome in terms of union administration.

Cheadle *et al.*[193] indicates:

> "LRA does not need ballot prior to the strike, however ballots remain relevant between relationship of union and members and warns that compelling a ballot to unions would create more violence."

This line of thought seems to suggest that the purpose of the pre-strike ballot is as a tool for union members to vote for the strike and as a tool for union officials to garner power. The authors submit that the original plan of the LRA regarding strike balloting was to protect the union members against the union's poor governance.[194] This view is in support of other scholars who describe the legislature's policy direction in what is referred to as "light touch."[195]

Van Niekerk *et al.*[196] suggest that the system of registration of unions was made simple to ensure there are democratic processes, financial accountability, independence, and non-discrimination in the trade unions. This view supports the view by Fergus that strike balloting was implemented to protect members against union governance.

Creighton *et al.*[197] seems to suggest that the compulsory pre-strike ballots requirements were viewed as interference in the union affairs and being against the spirit of freedom of association. They explain a similar situation in the South Africa as having existed between 1924 and 1995, that being the era before the constitutional democracy or the LRA in its current form.

Rycroft[198] seems to support the internal trade union democracy, indicating that:

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[192] Creighton *et al.* (2000) 64.
[193] Cheadle *et al.* (2017) 70-72.
[194] Fergus and Jacobs (2020) *ILJ* 778.
[195] Creighton *et al.* (2020) 64.
[196] Van Niekerk *et al.* 421.
[197] Creighton *et al.* (2020) 62, 69-70.
[198] Rycroft in Hepple *et al.* (2016) 97.

> "LRA does not require a strike ballot, but that does not mean LRA does not anticipate that a strike ballot may still be used to test support for a strike."

This seems to suggest that a pre-strike ballot could be a tool used to test the interest of the workers in a strike. This can be a threat to the smooth dialogue in the negotiation rooms. Rycroft[199] deals with the role of the trade union in the strikes and confirms that the pre-strike ballot has no bearing on the legality of the strike. The non-compliance with a strike ballot can only be enforced by the union members.[200] The author refers to the 2012 amendments to the LRA that intended to insert cooling-off after conciliation and strike balloting in the strike procedural requirements, and that the amendment was scrapped.[201]

Botha supported the strike balloting system, indicating that balloting would give union members the voice, submitting that:[202]

> "introduction would increase the legitimacy of the process of calling strike and force trade unions to listen to the wishes of their members. In other words, if a strike is called without complying with the ballot requirement, it will be unprotected because a procedural requirement was not adhered to by the trade union."

Cheadle *et al.*[203] gives credence to the 2010 Amendment Bill on the LRA that intended to re-introduce the strike ballot requirement before the strike. The author reviewed the Memorandum of objects that accompanied the Bill and found that the purpose of the amendments was focused on preventing the strikes. However, pre-strike balloting was removed from the final product as COSATU was against it, calling it the worst policy since apartheid.

Godfrey *et al*[204] specifically did an analysis of the Bill but could not give the exact purpose of the pre-strike ballot, but they did reflect on the three areas of collective bargaining that were reviewed: extension of agreements; picketing and the right to strike. Further, regarding the right to strike amendments they gave background on the

[199] Rycroft in Hepple *et al.* (2016) 96.
[200] Rycroft in Hepple *et al.* (2016)97-98. The author takes this point further to suggest that members can approach the Labour Court.
[201] Rycroft in Hepple *et al.* (2016) 98.
[202] Botha 2016 (79) THRHR 383-384.
[203] Cheadle *et al.* (2017) 72. The author interestingly reflects on views by Rycroft that these amendments meant nothing or were a no threat as LRA was clear that failure of balloting does not temper with the strike as known now from S67(7) LRA.
[204] Godfrey *et al.* (2018) ILJ 2168.

"upsurge of the un-protected strike accompanied by violence". Godfrey *et al.*[205] seems to suggest that even during post-apartheid South Africa the policy makers, in seeking solutions to violent strikes, re-visited strike balloting. The author's submission is that the legislature thought that unions voting in secret could be a game changer as workers opposed to the strike can vote freely. This view seems to suggest that the policy makers trusted that workers would vote against the strike to curb violent strikes.

Tenza, in supporting strike balloting as a requirement for a procedural strike, indicating:[206]

> "If a ballot is made a requirement for a protected strike, the process of casting votes will give the union leadership the opportunity to advise its members on how to conduct themselves during a strike (at the time of the ballot and afterwards) – an opportunity that the union must exercise faithfully, honestly and with care and diligence, considering that it could be held accountable for the actions of its members during the strike or picket".

It seems somehow that Tenza's assessments are premised from the view that "violence is minimal where there is consensus for the strike".[207]

7. Conclusion

The current LRA focuses on the constitution of the union and possibly the responsibility of the enforcement is in the hands of the union members.[208] This view is in line with Fergus who held that strike balloting was originally meant for the union's purpose. If this assumption is correct it seems to echo the sentiments that strike balloting could never have been designed by the legislature as a procedural requirement of the strike. If these sentiments are true, then the research supports the view that the Labour Court decisions on strike balloting were wrong. The Labour Appeal Court *Mahle Behr* decision is supported by the research as the correct interpretation that our jurisprudence should follow.

The research has found it difficult to align itself with the views by Novitz that the challenges of South Africa regarding freedom of association and the right to strike are

[205] 2018 *ILJ* 39 2172.
[206] Tenza (2019) Obiter 273.
[207] Tenza (2019) Obiter 273.
[208] Rycroft in Hepple *et al.* (2016) 97.

as alarming as the author postulated. The research rather identifies with views that the socio-economic challenges in South Africa are a source of strike related challenges.

The pre-strike ballot is problematic, but the research disagrees with the views that the pre-strike ballot will further erode the right to strike.[209] The pre-strike ballot in its current form would not harm the right to strike, but it seems to be creating an undue burden on the trade union. The research submits that this undue burden is misaligned with Article 3(1) of Convention 87 of 1948 in that it interferes with union affairs.

The research supports Rycroft's views that the strike ballot was meant to test whether a strike has the necessary support. The research submits that the pre-strike ballot is arguably in a dilemma and/or a mystery.

The research agrees with both Rycroft and Cheadle's views that if the LRA has a provision[210] that states the strike ballot does not affect the right to strike, then there is no threat to the right to strike. Simply because there was historical abuse, it does not mean that strike balloting cannot be explored as a solution in today`s challenges.

The research agrees with Cheadle that the outcomes of the voting in strike balloting can be predetermined. Therefore, the research submits that whether in secret or not, the strike is in the hands of the union officials.

In Barnard's article[211] the author describes 'trade unions as suppliers of goods and services' and, although not relevant to this research, the research agrees with various aspects of that literature. The trade union movement has played a significant role in the demise of apartheid, and that energy is now needed in the dialogue to positively develop South Africa. A strong social dialogue involving all spheres of our society, including academics, is needed. An open dialogue is needed on the type of leadership needed for the challenges facing the entire society as it has been apparently evident that laws and rules alone are not enough.

[209] Corazza and Fergus in Hepple *et al.* (2016) 90. The authors predicted that pre-strike ballot would erode the right to strike should it be implemented in South Africa.
[210] Section 67(7) LRA.
[211] Barnard 2018 SA Merc LJ 216.

CHAPTER 5: COMPARATIVE ANALYSIS

1. Introduction

This chapter examines the pre-strike ballot system in the United Kingdom (UK) and compares it with South Africa. The author has chosen this jurisdiction because South Africa was a British Colony, hence UK has a significant influence on South African jurisprudence.[212] Secondly, the UK is the founding member of the International Labour Organisation (ILO)[213] and both countries have ratified Convention 98 of 1949.[214] Thirdly, the UK like South Africa has a pre-strike ballot system legislation and practice and, since the research critiques strike balloting, it will help to explore other routes available and to compare it to a country where labour relations begun.[215]

The research concentrates on the macro comparison of specific areas without the detail but does provide some nature and context of the two jurisdictions. The areas of focus are the legislative framework specifically related to the strike balloting, the historical background, terminology related to strikes, and jurisprudence regarding the secret pre-strike ballot phenomenon as it is applied in the UK. The comparison would attempt to understand and learn the policy direction of South Africa through the UK.

[212] It is common knowledge that South Africa was a British Colony; therefore, UK common law would have a strong influence. See also South Africa 1652- 1806 Home Page | South African History Online (sahistory.org.za).
[213] United Kingdom - ILO Cooperation (PARDEV) .
[214] Ratification by countries- https://www.ilo.org/global/standards/lang--en/index.htm
[215] Hepple and Fredman (1992) 17. The authors give praise to Great Britain calling it 'workshop` of the world & the first country to legalise trade unions. It seems somehow that the authors were sarcastic as in a page following the great history or praise, they immediately identify labour relations in UK as chaotic.

2. Historical Development

In the UK the mandatory pre-strike ballot requirements had been debated around 1956, but these requirements were rejected in the entire period prior 1984.[216] In the same period Labour Government produced a white paper proposing pre-strike ballots, but that was never tabled in parliament until a new government took over and the new government introduced new law.[217] The focus on the new legislation empowered government to apply for the court to order pre-strike ballots in events of emergencies or livelihood endangerment. Creighton indicates that the pre-strike ballot was dormant until Thatcher (Conservative Government) introduced the Green Paper 'Democracy in the Trade Union' with its focus being pre-strike ballots.[218]

The Green Paper gave rise to the Trade Union Act of 1984, wherein the pre-strike ballot became the pre-requisite, and non-compliance could result in interdicts and workers in trouble for participating in an unlawful strike.[219] Cameron (Conservative Government) in 2016 introduced some changes like new quorum, and majority requirements.[220] Ford and Novitz summarises the changes as more controls and restrictions on trade union activities like industrial action.[221]

It seems somehow that the pre-strike balloting in both countries is associated with the challenges related to the strikes and socio-economic dynamics.

3. Terminology or Concepts

In the UK the strike is defined in the legislation as "any concerted stoppage of work".[222] The UK has what they refer to as 'official strike' and 'unofficial strike',[223] the difference being whether the strike is endorsed by the union or not.

Both jurisdictions' legislation refers to the secret ballot and the concept seems to be used to describe what type of ballot is preferred.[224] The 'trade union' in the UK is

[216] Creighton *et al.* (2020) 75-76. Author reflecting on Conservative Party pamphlet 'A Giant`s Strength' & 1968 Report of Donovan Royal Commission.
[217] Creighton *et al.* (2020) 77. Industrial Relations Act 1971.
[218] Creighton *et al.* (2020) 77.
[219] Creighton *et al.* (2020) 79.
[220] Creighton *et al.* (2020) 80. See more detail in paragraph 5.
[221] Ford and Novitz 277. A common theme of placing more controls on trade unions—restricting union-supported industrial action and picketing
[222] Section 246- Trade Union and Labour Relations (Consolidated) Act 1992 (UK) (herein TULRCA).
[223] Hepple and Fredman (1992) 259. Referred to as 'Official or Unofficial action'
[224] Section 115-116 Trade Union and Labour Relations Act 1992 (UK).

relatively defined[225] in the manner that South Africa defines the trade union to be, but the UK has further included what they term 'independent trade union'. In the UK there is no link between the Trade Union Congress and the Labour Party, but just regular liaison.[226] In South Africa, unlike UK, there are tripartite alliances like ANC-COSATU-SACP.

4. The Parliamentary Sovereignty in UK

In the UK they have a constitutional monarch, with parliamentary sovereignty[227] or supremacy.[228] This means that the law that is passed by parliament is final and binding. In the UK there is no positive right to strike, but a 'freedom to strike'.[229]

Unlike UK, South Africa is a constitutional democracy - the Constitution is the supreme law and the right to strike is endorsed by the Constitution.[230]

5. Statutory Framework

In the UK the Trade Union and Labour Relations Consolidated Act 1992 (TULRCA) offers protection to the procedural strike.[231] The purpose of TULRCA is:

> "to consolidate the enactments relating to collective labour relations, that is to say, to trade unions, employers' associations, industrial relations and industrial action".

In UK the pre-strike ballot requirements are endorsed in the TULRCA.[232] The TULRCA requirements for strike ballot provides:[233]

> "(1) An act done by a trade union to induce a person to take part, or continue to take part, in industrial action is not protected unless the industrial action has the support of a ballot.
> (2) Industrial action shall be regarded as having the support of a ballot only if—

[225] Sections 1 trade union & 5 defining independent trade union- TULRCA 1992 (UK).
[226] Hepple and Fredman (1992) 24.
[227] Hepple and Fredman (1992) 22. The authors refer to this as an important feature of their constitution that is not written down in a document, but found in Acts of Parliament, judgements and constitutional conventions that are not legally binding.
[228] https://about-britain.com/institution/constitution.htm
[229] Hepple and Fredman (1992) 256-257.
[230] Constitution of the Republic- sections 2; 23
[231] Section 219 of TULRCA of 1992 (UK)- Protection from certain tort liabilities in UK Industrial Action.
[232] Section 226-35 of TULRCA 1992 (UK)- Requirement of ballot before strike action by trade union. Industrial action is not protected without the support of the ballot. There are provisions detailing the administration for example the separate workplace balloting, the voting paper requirements, conducting of the voting in secret, information sharing and calling of the industrial action.
[233] Section 226 (1-2) of TULRCA 1992 (UK).

> (a) the union has held a ballot in respect of the action in relation to which the requirements of sections 227 to 232 were satisfied,
> (b) the majority voting in that ballot answered "Yes" to the question applicable in accordance with section 229(2) to industrial action of the kind to which the act of inducement relates, and
> (c) the requirements of section 233 (calling of industrial action with support of ballot) are satisfied".

Trade Union Reform and Employment Rights Act 1993 (TURERA) amended TULRCA adding the requirement that employees who are away be enabled to vote through postal ballot.[234] The employees on board on ships and employees outside UK should be provided with voting paper to be able to cast their vote whilst they were outside UK.

The Cameron government introduced amendments to the TULRCA through Trade Union Act 2016 (TUA) that added more restrictions to the right to strike.[235] TAU amended TULRCA inserting a provision for the turnout during balloting that:[236]

> "In section 226 of the 1992 Act (requirement of ballot before action by trade union), in subsection (2)(a), after sub-paragraph (ii) insert—
> (ii) in which at least 50% of those who were entitled to vote in the ballot did so".

TAU amended various aspects of the TULRCA seeking to secure an electronic method of balloting and major changes in the voting paper to provide:[237]

> "(2B) The voting paper must include a summary of the matter or matters in issue in the trade dispute to which the proposed industrial action relates.
> (2C) Where the voting paper contains a question about taking part in industrial action short of a strike, the type or types of industrial action must be specified (either in the question itself or elsewhere on the voting paper).
> (2D) The voting paper must indicate the period or periods within which the industrial action or, as the case may be, each type of industrial action is expected to take place."

It seems though that the direction taken by amendments was not the one proposed by the ILO in chapter 3 of this research. It must be remembered that the ILO supported the strike balloting requirements that do not impede on the right to strike.

In the UK, trade union members have a right to take their trade union to court for non-compliance with the legislation ballot provisions.[238] Therefore, in the UK there is direct

[234] Section 17 of Trade Union Reform and Employment Rights Act 1993 amending section 230 of TULRCA (UK)
[235] Trade Union Act 2016 (UK) amending 1992 Act- 50% turnout requirement; 40% requirement in public services & the electronic balloting review and piloting. Basically, these were amendments to TULRCA of 1992 (UK).
[236] Section 2 Trade Union Act 2016 (UK).
[237] Section 4- 5 Trade Union Act 2016 (UK). This was a major amendment to section 229 of TULRCA.
[238] Section 62 TULRCA of 1992 (UK).

enforcement measures provided for in the legislation. It is suggested that members who were induced to vote or were likely to be induced to take part in the strike, was likely to use this provision even if such a member did vote.[239]

The enforcement measures are used by the employers to challenge or interdict the strike or, as Creighton identifies, use this interference as an injunction against proposed strikes.[240] Creighton seems to suggest that the actual strike action could not even take place because of technical qualities that are not complied with.

In the UK there is a right to complain against dismissal for participating in official industrial action.[241] Hepple and Fredman[242] indicate that even the statutory right to complain is conditional and determined by whether the strike is 'official' or 'unofficial.' The official strike is the strike authorised or mandated by the union with the unofficial being the opposite. The right to complain is reserved for the official strikes, however, there is no right to claim unfair dismissal for unofficial strike action.

In South Africa the ballot requirements are linked with registration of the union with the Department of Employment and Labour, and non-compliance does not render the strike unprotected.[243]

6. The Purpose of the Pre-Strike Ballot

Hepple and Fredman[244] indicate that the purpose of the pre-strike ballot in the UK as a "tactical weapon in the hands of the employers to affect the industrial action". An example is the fact that a trade union which fails to comply with the balloting requirements loses its immunity in respect of the torts of inducing breach of or interference with a contract of employment or commercial contract.[245]

However, the UK had a somewhat clearer purpose, whether overt or covert, whereas with South Africa it is difficult to identify the purpose. Cheadle reflects that the "intention in the explanation memorandum[246] states that the recent amendment reflects on 'new

[239] Hepple and Fredman (1992) 272.
[240] Creighton *et al.* 66.
[241] Section 237 TULRCA of 1992 (UK)- Loss of unfair dismissal protection.
[242] Hepple and Fredman (1992) 259.
[243] Section 67 (7) of the LRA- noncompliance with strike ballot does not affect legality or protection of the strike.
[244] Hepple and Fredman (1992) 268-269.
[245] Hepple and Fredman (1992) 272.
[246] Cheadle *et al.* (2017) 70-72.

technologies of balloting' and as well as ensuring governance and secrecy." It seems however, according to the author, that this was not reflected directly in the Bill in 2017.

7. Jurisprudence

In *Royal Mail Group Ltd v Communication Workers Union* (Royal Mail), UK had had to deal with the strike balloting regarding the trade union instruction to members.[247] The employer contended that the trade union instruction to members to intercept ballot papers at work, instead of waiting for them to be posted to their homes, amounted to interference. The employer contended that the trade union action amounted to interference and therefore non-compliance with section 232 of the Act of 1992. In the *Royal Mail* matter showed that a mere technicality in strike balloting can render the strike illegal even though the majority of union members voted in favour of the strike.

Hepple and Fredman[248] made observations in *British Railways Board v Union of Railwayworkers*[249] that technicalities can affect strike ballot outcomes. According to the authors in the *British Railways Board* matter, the ballot was held, and the large majority voted in favour of the strike. The employers then applied to court because some members of the union were not granted the opportunity to vote. According to the authors the courts did not agree with the employers, but the delay caused damage to the strike.

In chapter 2 and 4 of this research it was reflected that the right to strike is a fundamental right. The courts have recently confirmed that the right to strike remain fundamental, and that the strike ballot requirements cannot tamper with this right.[250]

8. Conclusion

The UK has a well-developed strike ballot jurisprudence. It can be observed that the use of interdicts against defective strike ballot process is a tool used by the employers to attempt to either curb or delay the industrial action. It is the view held by the research that such technicalities used by employers to take away the workers' collective

[247] *Royal Mail Group Ltd v Communications Workers Union [2020] UK*. The court of appeal considered various other cases that agreed with its views including that of court a quo.
[248] Hepple and Fredman (1992) 269.
[249] *British Railways Board v. National Union of Railwayworkers [1989] IRLR 348 UK.*
[250] See paragraph of chapter 4- LAC decision in *Mahle Behr*.

bargaining rights are unfair and, further, to observe that the UK strike ballot requirements are restrictive to the workers' freedom to strike.

The UK legislative framework in terms TULRCA, TURERA and TUA, the mandate is to protect business interest and the economic stability of the country. It seems though that is realised through the limitation on the right to strike as envisaged by ILO Convention 98.

In the UK non-compliance has consequences that include civil liability against the union. South Africa has no such regulations as civil liability to unions for strike balloting.[251] The research submits that these consequences for non-compliance in the UK can be adopted in South Africa. Although in the UK they seem to be against the spirit of the freedom of association, in South Africa since there is a constitutional right to strike, this will operate as a vanguard.

It is the view of this research that the UK strike ballot requirements in their current form are not what the ILO proposed regarding strike balloting. It can therefore be concluded that although the UK has ratified Convention 98 of 1949, the UK is not fully compliant with the intentions of this Convention 98.[252] This however must be understood in context of the UK freedom to strike.

There are some lessons to be learned by South Africa from the UK strike ballot model. The South African model of pre-strike ballot is distinct to the UK, however selected areas of the UK model might work in South Africa. For example, if the strike ballot is the requirement for the procedural strike, consequences for non-compliance could be by means of civil liability, this can be effective to curb violent strikes. Currently in South Africa it be observed as seen the Marikana tragedy that in even court interdict can be ineffective, therefore civil liability is the option as it will affect finances on the trade union. Therefore, civil liability in a constitutional democracy model can work as an accountability tool.

[251] As provided in paragraph 3 of this chapter-Strike ballot requirement not to impede the right to strike.
[252] CO98- Right to Organize and Collective Bargaining Convention of 1949.

CHAPTER 6: CONCLUSION AND RECOMMENDATION

1. Introduction

The research has reflected that the pre-strike ballot in South Africa is in the context of a constitutional right to strike. As reflected in previous chapters the old LRA had a provision for strike balloting, in the LRA it is imbedded in chapter vi of the LRA. The recent amendments to the LRA on pre-strike ballot provision added a secret ballot and the guidelines that have since been declared invalid. It can be argued that the pre-strike ballot amendments have created not only concerns, but also confusion. The confusion is reflected in the Labour Court *Mahle Behr* decision where the court interdicted the strike for non-compliance with the pre-strike ballot. A recent salary increase impasse has confirmed that the pre-strike ballot is even confusing the labour lawyers and practitioners.[253]

2. International Labour Organisation (ILO)

The ILO as the organisation that facilitate global labour relations has put forth various conventions and principles to guide member states when dealing with employment relations. The ILO places the right to strike as the core of collective bargaining. Furthermore, the ILO supports the notion of pre-strike balloting that is in line with the right to strike as the guidelines stipulate that the secret pre-strike ballot must not make it impossible to exercise the right to strike. The ILO, however, does not prescribe to the member states how to conduct the secret pre-strike ballot. Perhaps the ILO need

[253] General Secretary of UNTU in communique: REF: UN.CL.GEN.393.CVV/mh- https://www.untu.co.za. See also www.dfa.co.za/news/transnet-sticks-to-guns-as-strike-threatens-to-cripple-sa-ec…. This is a recent incident that reflect that the labour law parties are not all well vest with South African context of pre-strike balloting.

to re-examine its position on enforcement measures. The current practice of name and shame seems futile.

3. The South African Position

The purpose of this research was to critique the strike ballots in South Africa. This was done by examining some of the amendments of the LRA about the strike balloting, case law and inputs of various labour scholars. The research has shown that the guidelines that have since been declared invalid have created confusion. The research has shown that South Africa is a constitutional democracy and there is a constitutional right to strike.[254]

The decision by the Labour Court in *Mahle Behr* could have potentially had enormous effects on the South African right to strike had it not been overruled. The research agrees with Fergus and Jacobs that the *Mahle Behr* decision and amendment (transitional provisions) caused a disjuncture with the original purpose of the LRA on strike ballot provisions. The authors correctly predicted "a higher court providing clarification"[255] which is what the Labour Appeal Court *Mahle Behr* decision has done to confirm the right to strike.

Creighton[256] seems to suggest that South Africa belong to a group of countries that have chosen a light-touch form of pre-strike ballot requirements. In the South African context this is arguably due to the history and role played by the trade union movement in the struggle against apartheid.

Consequently, from the above, what is referred to as 'light-touch' is a compromised government policy. The crux of the matter is that the pre-strike ballot in its current form is not a solution to South African challenges related to the strikes. Neither is the strike balloting in the current form a solution to union internal democracy. The research submits that the pre-strike ballot is not dysfunctional, but it does have elements of being burdensome regarding the administration involved. The research further submits that the burden given to the unions has elements of interfering with the unions' administration of its own affairs.

[254] Section 23 of the Constitution.
[255] Fergus and Jacobs (2020) *ILJ* 778.
[256] Creighton *et al.* (2020) 64. Reflecting on work of many others like Benjamin & Cooper 2016. This light-touch approach is defined as 'toothless regulations' or have burden rules without consequence management.

The research agrees with the view that "balloting members before a strike is to prevent industrial action that has little or no support".[257] This is however supported with caution as it is trite that strikers are sometimes frustrated by the mere no work no pay rule even though there is minimal production or no production.

4. The Evaluation of Comparative Law - UK and South Africa

The legislative framework in the UK makes no provision for the protection of the right to strike[258] in any form as they have freedom to strike. In South Africa, there is a constitutional right to strike. In the UK they have parliamentary sovereignty, and the environment is favourable to business, hence laws passed would be biased towards business, perhaps for the greater interest of the society. In South Africa there is constitutional democracy, and the current government is in a tripartite alliance with the trade union federation.

The UK model of the pre-strike ballot has been shown to not be in the spirit of the ILO norms, but that does not mean their system is not functional. Commentators[259] seem to easily identify the real policy goal of the UK regarding pre-strike ballots, which is to reduce trade union power, whereas in South Africa, the motivation is somehow difficult to identify. It must be noted that transplanting what is working in UK does not mean it will yield the same result in South Africa.[260] However, it does not mean that what works in UK will not work in South Africa.

5. Recommendations

The research recommends a robust dialogue on the purpose and the character of the pre-strike balloting. The UK model of civil liability need to be considered in cases of total disregard of the strike balloting and for the violent strikes. The call for civil liability could be aligned with views that a procedural strike can lose its status.[261] Although other scholars who are opposed to this proposal of procedural strike losing its status,

[257] Tenza (2019) Obiter 273.
[258] Waas (2014) 556.The author quotes Lord Justice Kay's whose comments were that right to strike has been a slogan or legal metaphor.
[259] Waas (2014) 565.
[260] Kahn-Freud O (1974) *MOD. L. REV*. 5. Transferring part of a living organism and transferring part of a mechanism are comparable in purpose, but in nothing else.
[261] Rycroft (2012) 826. Author suggesting that protected strike to lose its status and strikers sued.

there are those who are not on the opposition, but "doubt that it will pass the constitutional master".[262]

A restructuring of the LRA is to be considered, whereby section 95 (5)(q) or the entire section about pre-strike ballots could be removed and placed in chapter iv of the LRA.[263] In support of this recommendation to alleviate fears that were created by the old LRA, it is submitted that both the Constitution and LRA has strong mechanisms protecting the right to strike. Therefore, the constitutional democracy itself would not allow pre-strike ballot to be abused. This was demonstrated by the Constitutional Court defence to the workers' rights.

In an event the social partners do not support the proposal above of the pre-strike ballot as a prerequisite, then internal union enforcement measure need to be considered. The LRA[264] could be amended, currently non-compliance with pre-strike ballot requirement is not a ground for litigation. The legislation can have an addition that- however union members can lodge a complaint with the Department of Employment and Labour or that the "protection conferred by this section on, the strike"[265] is reviewable in an event that the majority of the union members petition the Department of Employment and Labour.

Another alternative available for consideration by the policy makers is the complete removal of the pre-strike ballot from the LRA as there is minimal purpose achieved. The vast administration that the current pre-strike ballot has allocated to the unions borders on interference with section 8 of the LRA. In terms of section 8, a trade union have the right to determine its own constitution, rules, and administration of its own affairs. It is therefore recommended that if complete removal is not possible, that some adjustments be considered to avoid interfering in union affairs. Perhaps the overloaded CCMA might coordinate or assist in the voting process as suggested by others.[266]

Dynamic leadership is needed from all parties, while corruption, populism and greediness need to be ventilated. It is submitted that at the core of the dialogue, the

[262] Van Eck and Kujinga (2017) *PELJ* 6.
[263] Section 64 of the Labour Relations Act.
[264] Section 67(7) of the Labour Relations Act.
[265] Section 67(7) of the Labour Relations Act. The addition would mean protection is lost in an event majority of union members challenge or complain about non-compliance.
[266] Tenza (2019) Obiter 269.

energy of the union leaders must be debated. Energy can be described as the agenda and contribution of the trade union leaders. A back-to-basics approach in terms of good faith negotiation seems to be lacking, social partners need robust engagements on the good faith principles. South Africa needs the same energy the trade union leaders had in the demolishing of apartheid to be revived in the building of the economy. The free-market agents and masters of the economy need to internalise values of decent work agenda. This part of the dialogue is crucial as there is ample research and evidence that reflect that the laws alone cannot resolve a societal national crisis.

It is time that everyone comprehends that the Constitution directs that the courts when interpreting any legislation, must prefer explanation that is consistent with international law. The international law respects the right to strike and supports the strike balloting, therefore if there are prospects that the strike balloting might be the solution, a realistic dialogue must ensue.

The recommendations attempt to give the pre-strike ballot a meaningful purpose with some credence that is related to the strike challenges the South African government is trying to curb.

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